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THE EFFECT OF THE SUCCESSFUL ASSERTION OF THE STATE SECRETS PRIVILEGE IN A CIVIL LAWSUIT IN WHICH THE GOVERNMENT IS NOT A PARTY: WHEN, IF EVER, SHOULD THE DEFENDANT SHOULDER THE BURDEN OF THE GOVERNMENT'S SUCCESSFUL PRIVILEGE CLAIM?

*Edward J. Imwinkelried**

“If the 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”¹

—FED. R. EVID. 509 Advisory Committee note to 1969 draft.

“The result [of the government’s successful assertion of the state secrets privilege] is simply that the evidence is unavailable, as though a witness had died, and the case will proceed accordingly, with no consequence save those resulting from the loss of the evidence.”²

—*Ellsberg v. Mitchell*, 709 F.2d 51 (D.C. Cir. 1983).

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¹ FED. R. EVID. 509(e) Advisory Committee note to 1969 draft. *See* Order, 56 F.R.D. 183, 254 (1972). *See also* PAUL F. ROTHSTEIN & SUSAN W. CRUMP, *FEDERAL TESTIMONIAL PRIVILEGES: EVIDENTIARY PRIVILEGES RELATING TO WITNESSES AND DOCUMENTS IN FEDERAL LAW CASES* § 5:20, at 580 (2d ed. 2003–2015) [hereinafter *FEDERAL TESTIMONIAL PRIVILEGES*] (publishing annual revisions).

² *Ellsberg v. Mitchell*, 709 F.2d 51, 64 (D.C. Cir. 1983), *cert. denied sub nom.* Russo v. Mitchell, 465 U.S. 1038 (1984), *aff’d*, 807 F.2d 204 (D.C. Cir. 1986), *and cert. denied* 484 U.S.

I. INTRODUCTION

One of the basic functions of any country's government is to protect its citizens and territory against invasion.³ In performing that function, the government sometimes has a legitimate interest in protecting secret information, such as plans for military operations. Consequently, most national legal systems recognize the government has a topical privilege⁴ to prevent disclosure of such information in public legal proceedings.⁵ In his 1807 opinion in *United States v. Burr*⁶—the treason prosecution of Vice President Aaron Burr—Chief Justice Marshall “hinted” at the existence of the privilege.⁷ In that prosecution, Burr served President Jefferson with a *subpoena duces tecum*, demanding he produce the President's correspondence with General Wilkerson. In his opinion upholding the subpoena, Chief Justice Marshall stated nothing before the Court indicated that the correspondence “contain[ed] any matter the disclosure of which would endanger the public safety.”⁸ The United States Supreme Court formally recognized the privilege in its landmark 1953 decision, *United States v. Reynolds*.⁹

As evidenced by the 146-year gap between *Burr* and *Reynolds*, throughout most of this Republic's history the federal government has rarely invoked the

870 (1987) (quoting CHARLES T. McCORMICK, McCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE (HORNBOOK SERIES) 233 (Edward W. Cleary ed. 1972)).

³ See generally THOMAS HOBBS, LEVIATHAN (1651).

⁴ While privileges, such as attorney-client and spousal protect communications between the parties, topical privileges protect certain types of facts rather than communications per se. See 2 EDWARD J. IMWINKELRIED, THE NEW WIGMORE: EVIDENTIARY PRIVILEGES § 8.1 (Richard D. Friedman ed., 2d ed. 2010) [hereinafter EVIDENTIARY PRIVILEGES].

⁵ In the leading American decision, *United States v. Reynolds*, 345 U.S. 1, 7 (1953), the United States Supreme Court relied heavily on English experience with the Crown privilege. See also EVIDENTIARY PRIVILEGES, *supra* note 4, § 12.1, at 1654 n.3 (explaining even Bentham, the most vociferous opponent of privileges, supported the privilege); EVIDENTIARY PRIVILEGES, *supra* note 4, § 12.2.1, at 1674 (English law); EVIDENTIARY PRIVILEGES, *supra* note 4, § 12.2.2, at 1686 (Irish law); EVIDENTIARY PRIVILEGES, *supra* note 4, § 12.2.3, at 1692 (Australian law); Jared T. Nelson & Geoffrey A. Vance, *What Happens in China Stays in China*, NAT'L L.J., Jan. 26, 2015, at 9 (distinguishing between “labeled” and “unlabeled” state secrets in Chinese law).

⁶ *United States v. Burr*, 25 F. Cas. 30 (C.C.D. Va. 1807). See Sean M. Ward, Note, *The State Secrets Protection Act (SSPA): Statutory Reform of the State Secrets Privilege*, 7 GEO. J.L. & PUB. POL'Y 681, 683 (2009) [hereinafter SSPA] (“The letter, written by General James Wilkinson, contained a description of Burr's alleged conspiracy to create a new country composed of the Western states and to incite an illegal war with Spanish territories.”).

⁷ J. Steven Gardner, Comment, *The State Secret Privilege Invoked in Civil Litigation: A Proposal for Statutory Relief*, 29 WAKE FOREST L. REV. 567, 568 (1994) [hereinafter *The State Secret Privilege Invoked in Civil Litigation*]. See also *Burr*, 25 F. Cas. at 37 (where the Chief Justice referred to a ‘disclosure that would endanger the public safety.’). Considerations of public safety are at the heart of the rationale for recognizing the state secret privilege. However, in *Burr* the Chief Justice never formally recognized a privilege nor even used the term, *privilege*. *Id.*

⁸ *Burr*, 25 F. Cas. at 37.

⁹ See *United States v. Reynolds*, 345 U.S. 1 (1953).

privilege. However, the government will resort to the privilege during periods of international tension. For example, *Reynolds* was decided at the height of the Cold War¹⁰ and arose during a time of “vigorous preparation for national defense.”¹¹ Thus, it was certainly no surprise that in the aftermath of 9/11, the national government began to assert the privilege more frequently.¹²

The question arises: What are the procedural effects of the government’s successful claim of the privilege in litigation? If the generalizations of the Advisory Committee on the proposed Federal Rule of Evidence 509 and *Ellsberg v. Mitchell*, quoted at the outset of this article, are accurate, then the only effects would be that the privileged information becomes unavailable and the case proceeds without the privileged evidence. A successful privilege claim would not end the litigation unless the claim deprived either the prosecution¹³ or plaintiff¹⁴ of sufficient evidence to sustain the initial burden of production.¹⁵ As authority for the generalization, *Ellsberg* relied on *McCormick’s Handbook of the Law of Evidence (Hornbook Series)*,¹⁶ which is extensively cited

¹⁰ See 2 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 5:54, at 862 (3d ed. 2007) [hereinafter FEDERAL EVIDENCE] (stating the Cold War was “during an era of heightened fears over communist espionage.”).

¹¹ *Reynolds*, 345 U.S. at 10.

¹² See *Report Accused Bush Administration of Exercising “Unprecedented” Secrecy*, 76 U.S.L.W. (BNA) 2139 (Sept. 11, 2007) (“Since 2001, the ‘state secrets’ privilege . . . has been invoked [thirty-nine] times, an average of six times per year in [six and a half] years, which is more than double the average in the previous [twenty-four] years.”). See also *The State Secret Privilege Invoked in Civil Litigation*, *supra* note 7, at 583–84 (“The executive has invoked the state secret privilege much more frequently; though the privilege was invoked approximately five times between 1951 and 1970, it has been relied upon more than fifty times between 1971 and 1994.”).

¹³ Under *Jackson v. Virginia*, 443 U.S. 307 (1979), in order to sustain its burden, the prosecution must present sufficient evidence to allow a rational trier of fact to find the existence of every element of the charged offense beyond a reasonable doubt. See also 2 EDWARD J. IMWINKELRIED ET AL., COURTROOM CRIMINAL EVIDENCE § 2919 (5th ed. 2011) [hereinafter COURTROOM CRIMINAL EVIDENCE].

¹⁴ In a civil case, to sustain the burden the plaintiff must present sufficient evidence to support a rational permissive inference of the existence of every element of the cause of action. See COURTROOM CRIMINAL EVIDENCE, *supra* note 13, § 2906.

¹⁵ The initial burden of production or going forward determines whether the prosecution or plaintiff has a submissible case, that is, whether the judge will submit the case to the jury rather than make a peremptory ruling in the defense’s favor. See COURTROOM CRIMINAL EVIDENCE, *supra* note 13, § 2903. In deciding whether the prosecutor or plaintiff has met this burden, the judge assesses the legal sufficiency of the evidence and cannot consider the credibility of the testimony. In contrast, the ultimate burden of proof is the standard that the trier of fact uses in deciding whether to return a verdict in the prosecutor’s or plaintiff’s favor. See COURTROOM CRIMINAL EVIDENCE, *supra* note 13, § 2914. The trier of fact evaluates the factual sufficiency of the evidence and may consider credibility.

¹⁶ See *Ellsberg v. Mitchell*, 709 F.2d 51, 64 (D.C. Cir. 1983), *cert. denied sub nom. Russo v. Mitchell*, 465 U.S. 1038 (1984), *aff’d*, 807 F.2d 204 (D.C. Cir. 1986), and *cert. denied* 484 U.S. 870 (1987) (quoting CHARLES T. MCCORMICK, MCCORMICK’S HANDBOOK OF THE LAW OF EVIDENCE (HORNBOOK SERIES) 233 (Edward W. Cleary ed. 1972)).

in the Advisory Committee Notes to the Federal Rules of Evidence. In short, the generalization often appears in both primary and secondary authority. However, even a cursory review of case law demonstrates the generalization is a misleading oversimplification.

In one of his most famous opinions—*United States v. Andolschek*¹⁷—Judge Hand wrote that in federal prosecutions “[t]he government must choose; either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully.”¹⁸ A decade later, *Reynolds* echoed Judge Hand in stating that it would be *unconscionable* to permit the sovereign to prosecute while withholding exculpatory evidence.¹⁹ Moreover, the proposed Draft of the Federal Rule of Evidence 509(e) announced:

Effect of Sustaining Claim. If a claim of privilege is sustained in a proceeding to which the government is a party and it appears that another party is thereby deprived of material evidence, the judge shall make any further orders which the interests of justice require, including striking the testimony of a witness, declaring a mistrial, finding against the government upon an issue as to which the evidence is relevant, or dismissing the action.²⁰

Just as the federal government can initiate a prosecution, it can also be formally joined as a party in civil litigation. For example, if the government sues a private party or entity and invokes the state secrets privilege to suppress relevant evidence in the litigation, the civil defendant can make an argument parallel to that of an accused claiming a denial of exculpatory evidence. The language of draft Rule 509(e) applies in civil cases as well as prosecutions. Hence, like an accused, a civil defendant could seek such relief as a peremptory finding against the government on an essential element of the government’s cause of action.

The thorniest problem arises when the government invokes the privilege in cases in which it is not a party. Some authorities assert that the government has much broader authority to assert the privilege in civil actions than in

¹⁷ *United States v. Andolschek*, 142 F.2d 503 (2d Cir. 1944).

¹⁸ *Id.* at 506.

¹⁹ *See United States v. Reynolds*, 345 U.S. 1, 12 (1953).

²⁰ Order, 56 F.R.D. 183, 252 (1972). Ultimately, Congress decided against adopting the specific privilege provisions proposed by the Court and instead enacted Rule 501, which generally authorizes the federal courts to continue to evolve the privilege doctrine by common-law methodology based on reason and experience. *See* Edward J. Imwinkelried, *Draft Article V of the Federal Rules of Evidence on Privileges, One of the Most Influential Pieces of Legislation Never Enacted: The Strength of the Ingroup Loyalty of the Federal Judiciary*, 58 ALA. L. REV. 41 (2006).

prosecutions.²¹ When the government is not joined as a party,²² the government is still entitled to intervene for the purpose of invoking the privilege to protect a state secret.²³ In other words, even when the only litigants are private parties and entities, the government may intervene and deny the plaintiff, the defendant, or both parties potential evidence essential to presenting their cases.²⁴ In recent years, the government has asserted the privilege in cases involving “high-technology companies, private security firms, corporations developing infrastructure, and weapons or aircraft manufacturers.”²⁵

Part II of this article describes the current state of the law governing cases when the national government has successfully invoked the state secrets privilege in litigation between private parties.²⁶ Contrary to the generalizations cited by the Advisory Committee and *Ellsberg*, in many variations of this situation, the procedural outcome is not “simply that the evidence is unavailable, as though a witness had died”²⁷ Part II also discusses two seminal decisions on state secrets privilege—*Reynolds*²⁸ and *Totten v. United States*²⁹—and how the lower courts have applied those two precedents in civil cases when the government is not a party. Part II explains that if the government’s successful privilege claim denies the plaintiff evidence needed to establish a prima facie case and sustain its burden of production, the plaintiff’s case will be dismissed. Then in Part III, this article discusses the effects of those precedents on civil defendants as well as civil plaintiffs.³⁰

Part IV of this article is a critical evaluation of the current state of the law.³¹ Part IV begins by reviewing the policy arguments favoring the status quo, which

²¹ See *El-Masri v. United States*, 479 F.3d 296, 313 n.7 (4th Cir.), *cert. denied*, 552 U.S. 947 (2007).

²² See 2 DAVID M. GREENWALD ET AL., TESTIMONIAL PRIVILEGES § 9:14, at 9–42 (3d ed. 2005) [hereinafter TESTIMONIAL PRIVILEGES].

²³ See *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1094 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 2442 (2011). See also 26 CHARLES A. WRIGHT & KENNETH W. GRAHAM, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5671, at 724 (1992).

²⁴ See, e.g., *Zuckerbraun v. Gen. Dynamics Corp.*, 935 F.2d 544, 546 (2d Cir. 1991); *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 399 (D.C. Cir. 1984).

²⁵ Laura K. Donohue, Opinion, *The State-Secrets Defense: A Privilege Too Far Gone*, WASH. POST, Oct. 8, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/10/07/AR2010100705343.html>.

²⁶ See *infra* notes 33–95 and accompanying text.

²⁷ *Ellsberg v. Mitchell*, 709 F.2d 51, 64 (D.C. Cir. 1983), *cert. denied sub nom. Russo v. Mitchell*, 465 U.S. 1038 (1984), *aff’d*, 807 F.2d 204 (D.C. Cir. 1986), and *cert. denied* 484 U.S. 870 (1987) (quoting CHARLES T. MCCORMICK, MCCORMICK’S HANDBOOK OF THE LAW OF EVIDENCE (HORNBOOK SERIES) 233 (Edward W. Cleary ed. 1972)).

²⁸ See *United States v. Reynolds*, 345 U.S. 1 (1953).

²⁹ *Totten v. United States*, 92 U.S. 105 (1875).

³⁰ See *infra* notes 96–185 and accompanying text.

³¹ See *infra* notes 186–213 and accompanying text.

often peremptorily denies the civil plaintiff relief. Later, Part IV critiques those policy arguments contending that in certain circumstances, when the civil defendant has a more direct relationship to the government than to the plaintiff, the court should require the defendant to bear the burden of lost evidence. There is a powerful argument that in those circumstances, just as a civil plaintiff is dismissed when the privilege claim precludes him or her from presenting a prima facie case, a civil defendant should be required to proceed to trial even if the sustained privilege claim deprives the defendant of evidence relevant to establishing a true affirmative defense to liability. If, as a matter of policy, the law has decided to assign the defendant the burdens of pleading, production, and proof on a factual proposition—that is, to treat the proposition as an affirmative defense in the case—it is appropriate to require the defendant to bear the burden of the loss of evidence caused by the government’s privilege claim.

Finally, Part IV constructs a case that the same result ought to obtain when the privilege claim interferes with the defendant’s ability to present a simple defense, negating an element of the plaintiff’s cause of action, but the defendant has a much stronger relationship with the government than the plaintiff.³² Admittedly, the case for requiring the defendant to shoulder the burden is not as strong as it is in the case of a true affirmative defense. However, given the nature of the defendant’s relationship to the sovereign asserting the privilege, the courts ought to rethink the facile assumption that in these cases, the plaintiff must almost always suffer a dismissal of the complaint or a summary judgment for the defense.

II. A DESCRIPTION OF THE CURRENT STATE OF THE LAW— THE BIAS FAVORING PEREMPTORY VICTORY FOR THE DEFENDANT

As Part I indicated, Subpart A begins by reviewing the two leading Supreme Court precedents on the state secret privilege, *Reynolds* and *Totten*. After considering the decisions separately, Subpart A continues to discuss the interplay between the decisions. Subpart B then describes the lower court cases examining the procedural effects when the court applies one or both precedents to restrict a civil plaintiff’s or civil defendant’s ability to present its case in a lawsuit in which the government is not a party.

³² In the case of a true affirmative defense, the defendant can concede the elements of the prosecutor’s charge or the plaintiff’s cause of action but proves additional facts that avoid criminal responsibility or civil liability. The modern affirmative defense evolved from the common-law “confession and avoidance” pleading. In the case of simple defenses, the defendant attempts to negate an element of the charge or cause of action. The latter type of defense is sometimes termed an element-negating traverse. See *People v. Pickering*, 276 P.3d 553, 555 (Colo. 2011) (en banc), cert. denied *sub nom.*, *Pickering v. Colorado*, 132 S. Ct. 2429 (2012).

A. *Leading Precedent: Reynolds and Totten*

1. *United States v. Reynolds*

As previously stated, in 1953 the Court formally recognized the existence of the state secrets privilege in *Reynolds*.³³ In that case, six crewmen and three civilian observers aboard were killed in an Air Force B-29 crash in Waycross, Georgia. The families of the civilian observers sued the government under the Federal Tort Claims Act.³⁴ During pretrial discovery, the plaintiffs moved for production of the Air Force's official accident report and the surviving crewmembers' statements. The government moved to quash the motion and cited privilege for military secrets. The Secretary of the Air Force submitted a letter to the trial judge. The letter stated: "[I]t has been determined that it would not be in the public interest to furnish this report."³⁵ The Secretary later filed a formal privilege claim, elaborating that "the aircraft in question, together with the personnel on board, were engaged in a highly secret mission of the Air Force."³⁶ The Secretary offered to produce the surviving crewmen for interviews by the plaintiffs. In addition, the Secretary stated that the crewmen would be permitted to refresh their memories by reviewing their statements before the interviews. Nevertheless, the trial judge ordered production. The judge reasoned that by enacting the Federal Tort Claims Act, Congress impliedly waived the privilege. When the government refused to comply with the judge's order, judgment was entered in favor of the plaintiffs. The intermediate appellate court affirmed. However, the U.S. Supreme Court reversed.

In an opinion authored by Chief Justice Vinson, the Court decided to follow the lead of English case law recognizing the privilege. The Chief Justice conceded that even the English experience with the doctrine was limited, but he added:

Experience in the past was [sic] has made it common knowledge that air power is one of the most potent weapons in our scheme of defense, and that newly developing electronic devices have greatly enhanced the effective use of air power. It is equally apparent that these electronic devices must be kept secret if their full military advantage is to be exploited in the national interests.³⁷

³³ See *United States v. Reynolds*, 345 U.S. 1, 7–8 (1953).

³⁴ See 28 U.S.C. §§ 2671–2680 (2015).

³⁵ *Reynolds*, 345 U.S. at 4.

³⁶ *Id.*

³⁷ *Id.* at 10.

The Chief Justice also commented on the procedures for administering the doctrine:

The privilege belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party. It is not to be lightly invoked. There must be [a] formal claim of privilege, lodged by the head of the department which has control of the matter, after actual personal consideration by that officer.³⁸

On the one hand, the Chief Justice indicated that the trial judge must assess the legitimacy of the privilege claim; the judge may not abdicate control over the evidence in a case “to the caprice of executive officers.”³⁹ On the other hand, given the vital stake in protecting true state secrets whenever possible, the judge must make his or her decision “without forcing a disclosure of the very thing the privilege is designed to protect.”⁴⁰ When a party seeks discovery and shows a compelling need for the alleged privileged information, the judge must carefully scrutinize the government’s claim. However,

It may be 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. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.⁴¹

In *Reynolds*, the Court upheld the privilege claim and then decided whether to terminate the litigation or allow the case to proceed.⁴² Given the specific facts in *Reynolds*, the Court allowed the plaintiff’s case to proceed.⁴³ In light of the availability of the surviving witnesses to the plaintiffs, it was not a foregone conclusion that the exclusion of the privileged information would prevent the plaintiff from presenting a prima facie case. The Court remanded to allow the plaintiffs to conduct further discovery and attempt to muster a prima facie

³⁸ *Id.* at 7–8.

³⁹ *Id.* at 9–10.

⁴⁰ *Id.* at 8.

⁴¹ *Id.* at 10.

⁴² *See generally id.* at 7–8. *See also* FEDERAL EVIDENCE, *supra* note 10, § 5:54, at 864.

⁴³ *See generally Reynolds*, 345 U.S. at 10–11. *See also* *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1080 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 2442 (2011).

case with nonprivileged evidence. Rather than pursuing the case to trial, the plaintiffs eventually settled with the government.⁴⁴

Although *Reynolds* is a landmark decision, its essential teachings are few and limited. *Reynolds* announced: There is an evidentiary privilege for state secrets; when the government successfully invokes the privilege, the only direct and immediate effect is that the judge must exclude the privileged information from evidence;⁴⁵ and, when the government is the defendant, the plaintiff's case may proceed if the plaintiff can marshal enough unprivileged evidence to present a prima face case satisfying the plaintiff's initial burden of production.

2. Totten v. United States

Prior to *Reynolds*, the Court decided *Totten*. Although *Totten*⁴⁶ never uses the expression *state* or *military secret*, it is one of the Court's most important pronouncements on the scope and impact of the doctrine protecting such secrets. In *Totten*, the personal representative of William Lloyd's estate sued the United States in the Court of Claims. The plaintiff alleged that the decedent had entered into a contract with President Lincoln to spy for the Union during the Civil War. In particular, the plaintiff claimed that the President had hired Lloyd to "proceed South and ascertain the number of troops stationed at different points in the insurrectionary States, procure plans of forts and fortifications . . . and report the facts to the President; for which services he was to be paid \$200 a month."⁴⁷ The plaintiff contended that although the decedent had performed the promised services, the President had not paid him the agreed upon

⁴⁴ See Allen Pusey, *March 9, 1953: A State Secrets Doctrine Is Born*, A.B.A.J. (Mar. 1, 2015, 1:10 AM), http://www.abajournal.com/magazine/article/a_state_secrets_doctrine_is_born_on_march_9_1953. As a postscript, early this century the plaintiffs' heirs filed a petition for a writ of error coram nobis with the Court. In the interim, the Air Force declassified the accident report on the crash. According to the heirs' attorneys, "[t]he accident report . . . contained nothing remotely like a military secret." Dahlia Lithwick, *Aggressive Use of 'State Secrets' Defense Threatens Judicial Review*, LEGAL TIMES, Dec. 11, 2006, at 54; Marcia Coyle, *New Light on an Old Defense of "Secrets"*, NAT'L L.J., Mar. 10, 2003, at A1. See also Emily Simpson, Comment, "*Nothing Is So Oppressive as a Secret*": Recommendations for Reforming the State Secrets Privilege, 80 TEMP. L. REV. 561, 561–62 (2007). But see Marcia Coyle, *Air Force Crash: A 1953 Case Echoes in High Court*, NAT'L L.J., June 16, 2003, at 5 (stating "[t]he government . . . contends that there was no fraud: 'The Secretary [of the Air Force] was legitimately concerned that information about the confidential equipment and mission of the aircraft might be disclosed if the report and witness statements were released.'"). Ultimately, the Court issued a one-sentence order denying the motion. David A. Churchill & Elaine J. Goldenberg, *Who Will Guard the Guardians? Revisiting the State Secrets Privilege of United States v. Reynolds*, 72 U.S.L.W. (BNA) 2227, 2231 (Oct. 28, 2003).

⁴⁵ See *Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998), cert. denied, 525 U.S. 967 (1998).

⁴⁶ See *Totten v. United States*, 92 U.S. 105 (1876).

⁴⁷ *Id.* at 105–06.

compensation. The Court of Claims dismissed the petition. In an opinion written by Justice Field, the Court affirmed the dismissal.

Justice Field did not merely hold the evidence of the spying contract inadmissible; rather, he held the application of the state secrets privilege necessitated the automatic dismissal of the plaintiff's lawsuit.⁴⁸ Justice Field argued that "[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."⁴⁹ Furthermore, the Justice enunciated, "as a general principle, that public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated."⁵⁰ In the Justice's view, the general principle required the dismissal of the plaintiff's complaint because the existence of the spying contract explicitly alleged in the complaint was "a fact not to be disclosed."⁵¹

In several subsequent decisions, the Court commented on *Totten*.⁵² For example, the Court cited and discussed *Totten* in *Weinberger v. Catholic Action of Hawaii/Peace Education Project*⁵³ in 1981 and *Tenet v. Doe*⁵⁴ in 2005.⁵⁵ In *Weinberger*, the plaintiffs alleged the Department of Defense violated the National Environmental Policy Act by failing to prepare an environmental impact statement for the storage of nuclear weapons at a Navy facility on Oahu, Hawaii. The Navy claimed that "[d]ue to national security reasons . . . [it] [could] neither admit nor deny that it propose[d] to store nuclear weapons at [the facility]."⁵⁶ Citing *Totten*,⁵⁷ the Court determined that the subject matter of the lawsuit was "beyond judicial scrutiny,"⁵⁸ that is, nonjusticiable.⁵⁹

In *Tenet* the plaintiffs, husband and wife, alleged the Central Intelligence Agency (C.I.A.) hired them to perform espionage services during the Cold War. The plaintiffs claimed the C.I.A. had not given them the promised compensation.

⁴⁸ See *Mohamed*, 614 F.3d at 1078.

⁴⁹ *Totten*, 92 U.S. at 106.

⁵⁰ *Id.* at 107.

⁵¹ *Id.*

⁵² *E.g.*, *Mohamed*, 614 F.3d at 1078.

⁵³ *Weinberger v. Catholic Action of Hawaii/Peace Educ. Project*, 454 U.S. 139 (1981).

⁵⁴ *Tenet v. Doe*, 544 U.S. 1 (2005).

⁵⁵ See *Gen. Dynamics Corp. v. United States*, 131 S. Ct. 1900 (2011).

⁵⁶ *Weinberger*, 454 U.S. at 146.

⁵⁷ *Id.* at 147.

⁵⁸ *Id.* at 146.

⁵⁹ See *Fazaga v. F.B.I.*, 884 F. Supp. 2d 1022, 1035–36 (C.D. Cal. 2012) (explaining *Totten* to be a categorical justiciability bar); *SSPA*, *supra* note 6, at 686–88 (stating that the application of the *Totten* doctrine renders the case nonjusticiable).

The Court held that *Totten* barred the suit. As in *Totten*, “the very subject matter of the action, a contract to perform espionage, was a matter of state secret.”⁶⁰ *Totten* therefore operated as a categorical bar to the plaintiff’s claim in *Tenet*.⁶¹

Two recurring motifs emerge from *Weinberger* and *Tenet*. First, *Totten* applies when, given the nature of the allegations, the litigation of the case will *necessarily* result in the disclosure of state secrets. The Court used similar terminology in *Totten*⁶² and in its discussions of *Totten* in three later decisions.⁶³ Given the other recurring theme, it is understandable that the Court initially set the bar that high. The other recurring theme is that when *Totten* applies, it triggers a categorical bar,⁶⁴ rendering the issue nonjusticiable.⁶⁵ In other words, the bar is so demanding because the procedural consequence is so drastic. When *Reynolds* alone applies, the Court excludes the privileged information but the case can sometimes proceed on the basis of the remaining unprivileged evidence.⁶⁶ However, when *Totten* also comes into play, the judge peremptorily terminates the litigation.

B. *The Interplay of Reynolds and Totten*

Although *Reynolds* and *Totten* are distinct decisions, it is best to conceive of them as two points on a continuum.⁶⁷ The decisions represent two applications of the broader underlying principle that courts must safeguard vital national secrets.⁶⁸ In some instances, the two cases converge.⁶⁹

Consider a case in which, after its successful assertion of the *Reynolds* privilege, the government invokes the spirit of *Totten* and argues that, if the case proceeds, there is a significant risk that the litigation will result in the disclosure of privileged information. If the court applied *Totten*, it would terminate the litigation only when continuing the case would *necessarily* lead to such disclosures.

⁶⁰ *Tenet v. Doe*, 544 U.S. 1, 9 (2005).

⁶¹ *Id.* at 8–10.

⁶² *See Totten v. United States*, 92 U.S. 105, 107 (1875).

⁶³ *See Weinberger v. Catholic Action of Hawaii/Peace Educ. Project*, 454 U.S. 139, 147 (1981); *Tenet*, 544 U.S. at 8; *Gen. Dynamics Corp. v. United States*, 131 S. Ct. 1900, 1906 (2011).

⁶⁴ *Tenet*, 544 U.S. at 9.

⁶⁵ *Gen. Dynamics*, 131 S. Ct. at 1906.

⁶⁶ *See, e.g., In re Sealed Case*, 494 F.3d 139 (D.C. Cir. 2007).

⁶⁷ *See Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1089 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 2442 (2011).

⁶⁸ *Id.* at 1077 n.3.

⁶⁹ *See* 3 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S FEDERAL EVIDENCE § 509.12, at 509–10 (Joseph M. McLaughlin ed., 2d ed. 1998) [hereinafter WEINSTEIN’S FEDERAL EVIDENCE].

Lower courts have yet to define the precise parameters of the *Totten* bar.⁷⁰ However, the lower courts have generally refused to narrowly confine the bar to a specific factual context.⁷¹ More specifically, the lower courts have been willing to terminate litigation even when the litigation would not necessarily result in the disclosure of privileged information. Rather, the view that has emerged among the lower courts is that, after sustaining a *Reynolds* claim, a court ought to end the litigation when the court is convinced that the litigation will pose an “intolerable,”⁷² “unacceptable,”⁷³ “unjustifiable,”⁷⁴ “reasonable,”⁷⁵ or “significant”⁷⁶ possibility⁷⁷ that there will be an accidental⁷⁸ or inadvertent⁷⁹ revelation of privileged information.⁸⁰ To be sure, this development relaxes the inevitability standard announced in *Totten*. However, the development is a modest extension of the underlying principle of judicial protection of critical national secrets.

When a *Totten* argument is made, the trial judge must make a practical⁸¹ judgment as to whether it is feasible to proceed.⁸² The judge should ask: “Is it realistic⁸³ to think that the privileged and unprivileged evidence can be safely disentangled⁸⁴ and separated⁸⁵ during discovery and trial?” Of course, the trial judge can resort to procedural measures such as protective orders. However, in some cases privileged and unprivileged information is so entwined⁸⁶ that no combination of protective measures will eliminate or significantly reduce the

⁷⁰ See *Mohamed*, 614 F.3d at 1085.

⁷¹ *Id.* at 1078–79.

⁷² *Id.* at 1083.

⁷³ *Id.* at 1079, 1088–89. *Accord In re Sealed Case*, 494 F.3d 139, 152 (D.C. Cir. 2007); *id.* at 159–60 (Brown, J., concurring and dissenting). See also WEINSTEIN’S FEDERAL EVIDENCE, *supra* note 69, § 509.12, at 509–10.

⁷⁴ *Mohamed*, 614 F.3d at 1085, 1087.

⁷⁵ WEINSTEIN’S FEDERAL EVIDENCE, *supra* note 69, § 509.12, at 509 n.1 (citing *Crater Corp. v. Lucent Tech., Inc.*, 423 F.3d 1260, 1266 (Fed. Cir. 2005)).

⁷⁶ *Mohamed*, 614 F.3d at 1088.

⁷⁷ See *Tenet v. Doe*, 544 U.S. 1, 11 (2005).

⁷⁸ See *In re Sealed Case*, 494 F.3d at 154, 158 (Brown, J., concurring and dissenting).

⁷⁹ *Id.*

⁸⁰ See *Tenet*, 544 U.S. at 11 (“Even a small chance that some court will order disclosure of a source’s identity could well impair intelligence gathering and cause sources to ‘close up like a clam.’” (quoting *C.I.A. v. Sims*, 471 U.S. 159, 175 (1985))).

⁸¹ See *Mohamed*, 614 F.3d at 1082, 1084.

⁸² See *id.* at 1082, 1087.

⁸³ See *In re Sealed Case*, 494 F.3d at 154, 158 (Brown, J., concurring and dissenting).

⁸⁴ See *Mohamed*, 614 F.3d at 1082.

⁸⁵ *Id.* at 1083.

⁸⁶ See *In re Sealed Case*, 494 F.3d at 154, 158 (Brown, J., concurring and dissenting).

risk of disclosure.⁸⁷ For example, the corpus of evidence in a case can constitute such an interwoven⁸⁸ mosaic⁸⁹ that, in the heat of battle, a trial attorney may probe too far.⁹⁰ Or, if a witness possesses both privileged and unprivileged evidence but has only a layperson's understanding of the dividing line, the witness may accidentally stray into privileged territory.⁹¹

Litigation can be unpredictable.⁹² When national stakes are high, “[c]ourts are not required to play with fire and chance . . . disclosure—inadvertent, mistaken, or even intentional—that would defeat the very purpose for which the privilege exists.”⁹³ After analyzing the evidence and considering possible protective orders, the judge may be forced to conclude that the state secret evidence is so central to the case that any attempt to proceed with litigation will create a significant threat of disclosure.⁹⁴ In these circumstances, lower courts generally deem the matter nonjusticiable and deny the litigants “their normal right of access to the formal dispute resolution forum provided by the sovereign.”⁹⁵

III. THE APPLICATION OF PRECEDENT AND THE EFFECTS ON CIVIL PLAINTIFFS AND DEFENDANTS

It may seem Draconian to deny a civil litigant his or her day in court,⁹⁶ but lower courts often apply *Reynolds* and *Totten* in a fashion that leads to that result. After first reviewing the case law determining the impact of the government's successful privilege claim on civil plaintiffs, we shall turn to the decisions considering the impact on civil defendants.

⁸⁷ See, e.g., *Mohamed*, 614 F.3d at 1089; *Kasza v. Browner*, 133 F.3d 1159, 1170 (9th Cir. 1998), *cert. denied*, 525 U.S. 967 (1998).

⁸⁸ See *In re Sealed Case*, 494 F.3d at 151 (majority opinion).

⁸⁹ See *Mohamed*, 614 F.3d at 1082.

⁹⁰ See *id.* at 1088. See, e.g., *Fitzgerald v. Penthouse Int'l, Ltd.*, 776 F.2d 1236, 1243 (4th Cir. 1985).

⁹¹ See generally *Mohamed*, 614 F.3d at 1089. See also *In re Sealed Case*, 494 F.3d at 154, 159 (Brown, J., concurring and dissenting).

⁹² E.g., *Mohamed*, 614 F.3d at 1089.

⁹³ *Sterling v. Tenet*, 416 F.3d 338, 344 (4th Cir. 2005), *cert. denied sub nom. Sterling v. Goss*, 546 U.S. 1093 (2006).

⁹⁴ See, e.g., *Mohamed*, 614 F.3d at 1081; *In re Sealed Case*, 494 F.3d 139, 151 (D.C. Cir. 2007); *id.* at 154, 158 (Brown, J., concurring and dissenting).

⁹⁵ *In re Sealed Case*, 494 F.3d at 157 (Brown, J., concurring and dissenting) (quoting *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268, 279 (4th Cir. 1980)).

⁹⁶ See, e.g., *In re Sealed Case*, 494 F.3d at 151 (majority opinion).

A. Three Categories of Cases Analyzing the Impact on Civil Plaintiffs

The First Category.

In the first category, even after sustaining the government's privilege claim, the trial judge concludes both that the plaintiff has a prima facie case, and that allowing the plaintiff to proceed to present his or her case does not pose a significant risk of inadvertent disclosure of privileged information. Here, neither *Reynolds* nor *Totten* calls for a peremptory dismissal of the plaintiff's claim. *In re Sealed Case*⁹⁷ is illustrative.

In *In re Sealed Case*, Horn, a Drug Enforcement Agency (D.E.A.) employee, sued a State Department official for unconstitutional electronic surveillance. The surveillance allegedly occurred in Burma while the plaintiff was the D.E.A.'s country attaché. The government intervened and asserted the state secrets privilege for two Inspector General investigations of the surveillance. The trial judge sustained the privilege claim and dismissed the complaint.

The United States Court of Appeals for the District of Columbia Circuit reversed. Over a forceful dissent by Judge Brown,⁹⁸ the majority found that "even after evidence relating to covert operatives, organizational structure and functions, and intelligence-gathering sources, methods, and capabilities is stricken from the proceedings under the state secrets privilege, Horn ha[d] alleged sufficient facts" to establish a prima facie case.⁹⁹ The court also rejected the government's *Totten*¹⁰⁰ argument; relying on *Reynolds*,¹⁰¹ the court explained that there was only a minimal risk of inadvertent disclosure because the privileged evidence was "peripheral to what remains of Horn's prima facie case."¹⁰²

In dissent, Judge Brown warned: "The few remaining unprivileged facts comprising Horn's prima facie case are islands surrounded by a sea of privileged material."¹⁰³ In his view, the privileged and unprivileged information were "so entwined"¹⁰⁴ that there was a "great"¹⁰⁵ risk that lay witnesses who possessed secrets, but did not comprehend the scope of the privilege, would divulge

⁹⁷ See *In re Sealed Case*, 494 F.3d 139 (D.C. Cir. 2007).

⁹⁸ See *id.* at 154 (Brown, J., concurring and dissenting) ("I am less sanguine than the majority that the unprivileged facts actually suffice to make a prima facie showing.")

⁹⁹ *In re Sealed Case*, 494 F.3d at 148 (majority opinion).

¹⁰⁰ See *id.* at 151.

¹⁰¹ *Id.*

¹⁰² *Id.* at 152.

¹⁰³ *Id.* at 158 (Brown, J., concurring and dissenting).

¹⁰⁴ *Id.* at 159.

¹⁰⁵ *Id.*

privileged information on direct or cross examination.¹⁰⁶ The majority countered by quoting the Central Intelligence Director's declaration, explicitly conceding that some of the most important state secrets "can be segregated . . . at no risk to U.S. national security."¹⁰⁷ The majority concluded it was premature for the lower court to assume that the risk of inadvertent disclosure in future proceedings was so considerable that the court needed to dismiss the plaintiff's complaint.¹⁰⁸

The Second Category.

In this category of cases, the trial judges dismissed the plaintiff's complaint because, after a successful privilege claim by the government, the plaintiff can no longer produce a prima facie case. *Ellsberg v. Mitchell* is one example. In *Ellsberg*,¹⁰⁹ the plaintiffs—the former defendants and attorneys of the *Pentagon Papers*—were prosecuted for their involvement in the unauthorized release of classified materials regarding the Vietnam War. The plaintiffs filed a civil complaint against the government and alleged the government subjected them to unconstitutional electronic surveillance. The government conceded it used surveillance on some of the plaintiffs. However, the government invoked the state secrets privilege and refused to admit or deny if it conducted electronic surveillance on the remaining plaintiffs. The trial judge dismissed all of the claims.

The appellate court affirmed the dismissal of the claims of the plaintiffs whom the government did not admit to using surveillance on.¹¹⁰ Those plaintiffs argued that the suppressed evidence would have shown the government subjected them to electronic surveillance but "were manifestly unable to make out a prima facie case without the requested information."¹¹¹ As the Court of Appeals for the Ninth Circuit observed, "[i]f, after [the government's successful *Reynolds* claim], the plaintiff cannot prove the prima facie elements of her claim with nonprivileged evidence, then the court may dismiss her claim as it would with any plaintiff who cannot prove her case."¹¹² There is judicial consensus that in this factual situation, dismissal is mandatory.¹¹³

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 152 (majority opinion).

¹⁰⁸ *See id.* at 153.

¹⁰⁹ *Ellsberg v. Mitchell*, 709 F.2d 51 (D.C. Cir. 1983), *cert. denied sub nom. Russo v. Mitchell*, 465 U.S. 1038 (1984), *aff'd*, 807 F.2d 204 (D.C. Cir. 1986), and *cert. denied* 484 U.S. 870 (1987).

¹¹⁰ *See id.* at 65.

¹¹¹ *Id.*

¹¹² *Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998), *cert. denied*, 525 U.S. 967 (1998).

¹¹³ *See Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1083, 1087 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 2442 (2011); *In re Sealed Case*, 494 F.3d 139, 153 (D.C. Cir. 2007); *Zuckerbraun v. Gen. Dynamics Corp.*, 935 F.2d 544, 547 (2d Cir. 1991). *See also* TESTIMONIAL PRIVILEGES, *supra* note 22, § 9:14, at 9–45 (3d ed. 2005); FEDERAL EVIDENCE, *supra* note 10, § 5:54, at 864; *The State Secret Privilege Invoked in Civil Litigation*, *supra* note 7, at 577, 580.

The Third Category.

In the third category of cases, despite the government's *Reynolds* claim, the plaintiff still had a prima facie case; but under *Totten*, the defense persuades the judge that permitting the plaintiff's case to proceed will present an unacceptable risk of disclosing privileged information. *Kasza v. Browner*¹¹⁴ is on point. In *Kasza*, the former workers at an Air Force facility and one worker's widow sued the Secretary of Defense for damages caused by the mishandling of hazardous material at the facility. The government made a formal privilege claim to suppress "[s]ecurity sensitive environmental data."¹¹⁵ After the trial judge sustained the claim, the judge entered summary judgment for the defendant.

The Court of Appeals for the Ninth Circuit affirmed in part. The court noted that even after privileged evidence is "completely removed from the case"¹¹⁶ the "plaintiff's case [may] go[] forward based on evidence not covered by the privilege."¹¹⁷ However, the court also observed that, even when the plaintiff has enough unprivileged evidence to piece together a prima facie case, the judge may dismiss the complaint on *Totten* grounds. At one point during the discussion of that issue, the court referred to the traditional inevitability standard.¹¹⁸ However, in another passage the court invoked the laxer, modern standard, namely, whether allowing the plaintiff to proceed would create a reasonable danger of exposure of state secrets.¹¹⁹ The court alluded to the mosaic analogy¹²⁰ several times and stressed the practical difficulty of disentangling the classified information from the *seemingly innocuous* evidence.¹²¹ The court stated,

[A]ny attempt on the part of the plaintiff to establish a prima facie case would so threaten disclosure of state secrets that the overriding interest of the United States and the preservation of its state secrets that the overriding interest of the United States and the preservation of its state secrets precludes any further attempt to pursue this litigation.¹²²

¹¹⁴ See *Kasza v. Browner*, 133 F.3d 1159 (9th Cir. 1998), *cert. denied*, 525 U.S. 967 (1998).

¹¹⁵ *Id.* at 1163 (alteration in original).

¹¹⁶ *Id.* at 1166.

¹¹⁷ *Id.*

¹¹⁸ See *id.*

¹¹⁹ See *id.*

¹²⁰ See *id.*

¹²¹ *Id.*

¹²² *Id.* at 1170 (citation omitted).

In a given case, if the privileged and unprivileged evidence are inextricably linked, any attempt by the plaintiff to establish his or her case can risk compromising the privileged state secrets.¹²³

So far, we have examined three variations of the potential impact of a successful government privilege claim on private litigants' cases. All of the cases focused on the effect of the privilege claim on the plaintiff's case; in these variations, the courts inquired into whether the claim precluded the plaintiff from presenting a prima facie case or proceeding without a significant risk for inadvertent disclosure. In two of the three situations, under *Reynolds* and *Totten*, the court dismissed the plaintiff's lawsuit.

We now turn to the decisions considering the impact of a successful claim on the defendant's case. Here again, we shall see that according to lower courts, a claim's effect on a defendant's case can warrant peremptorily ruling against the plaintiff. In these cases, the procedure is that the court enters summary judgment for the defense rather than dismissing the plaintiff's complaint.¹²⁴ As we shall see, in the current state of the law, even when the impact of the privilege claim on a plaintiff's case does not necessitate dismissal, the defense may sometimes prevail by pointing to the impact of the claim on the defense's ability to rebut the plaintiff's evidence.

B. Four Categories of Cases Analyzing the Impact on Civil Defendants

As was true with the case law addressing the impact of a successful privilege claim on the plaintiff's case, the decisions analyzing the impact of such a claim on the defendant's case can be sorted into several distinct categories.

The First Category.

In the first category, the defendant's argument is the strongest for a peremptory victory because the privileged evidence clearly establishes that the defendant has a meritorious defense to liability. The leading case is *Molerio v. F.B.I.*, a 1984 United States Court of Appeals for the District of Columbia Circuit decision authored by then Judge Scalia.¹²⁵ The plaintiff—a criminal investigator for the Immigration and Naturalization Service (I.N.S.)—applied to be a Federal Bureau of Investigation (F.B.I.) special agent. As an I.N.S. investigator, the plaintiff already held a secret security clearance. To become an F.B.I. agent, the

¹²³ See WEINSTEIN'S FEDERAL EVIDENCE, *supra* note 69, § 509.12, at 509–10 n.6 (citing *Bareford v. Gen. Dynamics Corp.*, 973 F.2d 1138, 1143 (5th Cir. 1992), *cert. denied*, 507 U.S. 1029 (1993)).

¹²⁴ See *In re Sealed Case*, 494 F.3d 139, 153 (D.C. Cir. 2007); *Kasza*, 133 F.3d at 1160; *Molerio v. F.B.I.*, 749 F.2d 815, 820 (D.C. Cir. 1984).

¹²⁵ *Molerio*, 749 F.2d at 818.

plaintiff needed to qualify for a *Top Secret* level clearance. The plaintiff passed the initial F.B.I. interview and then underwent a background investigation to obtain *Top Secret* clearance. The plaintiff was told that the background investigation turned up “something in New York having to do with his family”¹²⁶ and that he would have to undergo a second interview. The second interview touched on family relationships and political beliefs.¹²⁷ The plaintiff’s father, Dagoberto, previously belonged to a group that supported the Castro revolution¹²⁸ and participated in the United States Socialist Worker’s Party, which was involved in litigation with the F.B.I.¹²⁹ Ultimately, the F.B.I. informed the plaintiff that they would not hire him. A civil case ensued.

The plaintiff alleged that the F.B.I. discriminated against him because he was Hispanic and based the hiring decision on his father’s activities, which were protected by the First Amendment. After filing the complaint, the plaintiff began pretrial discovery. During discovery, the government refused to produce certain documents about the background investigation of the plaintiff. The government asserted that revealing the information would “jeopardize or interfere with National-State Secrets or the National Security.”¹³⁰ The district court dismissed the complaint.

On appeal, Judge Scalia upheld the district court’s decision. Early in his analysis, the judge concluded that the district court had correctly dismissed the claim based on alleged racial discrimination. Judge Scalia found that the plaintiff could not make out a *prima facie* case of Title VII discrimination. In its unprivileged interrogatory answers, the F.B.I. admitted that in processing the plaintiff’s job application, it:

[C]onsidered among other things the fact that he had relatives in Cuba, and that it generally “would attach special weight to the fact that an applicant had relatives residing in any foreign country controlled by a government whose interests or policies are hostile or inconsistent with those of the United States.”¹³¹

However, without more, the unprivileged evidence was legally insufficient to prove that the F.B.I. had discriminated against the plaintiff because he was Hispanic. In the judge’s mind the unprivileged evidence showed only that the government had treated the plaintiff in the same fashion that it would have treated

¹²⁶ *Id.* at 819.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* at 825.

¹³⁰ *Id.* at 819.

¹³¹ *Id.* at 823.

an applicant with relatives living in East Germany, Iran, or North Vietnam.¹³² As the initial section of Subpart B noted, the lower courts agree that when the government's successful privilege claim deprives the plaintiff of evidence needed to establish a *prima facie* case, the defense is entitled to a peremptory victory.

The judge then turned to the plaintiff's second claim that the F.B.I. had acted unconstitutionally by denying his application on the basis of his father's First Amendment activity. Judge Scalia was willing to assume *arguendo* that the plaintiff had standing to raise his father's constitutional rights as a ground for relief.¹³³ Next, the judge distinguished the plaintiff's First Amendment claim from the racial discrimination claim. While the judge found that the plaintiff did not have a *prima facie* case of racial discrimination, the judge stated the "appellant had made a circumstantial case permitting the inference that his father's political activities were a 'substantial factor'—or, to put it in other words, . . . a 'motivating factor'" in the F.B.I.'s decision not to hire him.¹³⁴

Nevertheless, Judge Scalia denied relief. He wrote forcefully that the judges' review of the government's state secret submission had convinced them that the F.B.I. had a good defense to the plaintiff's *prima facie* case:

[W]e honored the invocation of that privilege because we satisfied ourselves that the in camera affidavit set forth the genuine reason for denial of employment, and that that reason could not be disclosed without risking impairment of the national security. As a result of that necessary process, the court knows that the reason Daniel Molerio was not hired had nothing to do with Dagoberto Molerio's assertion of First Amendment rights. Although there may be enough circumstantial evidence to permit a jury to come to that erroneous conclusion, it would be a mockery of justice for the court—knowing the erroneousness—to participate in that exercise . . . [F]urther activity in this case would involve an attempt, however well intentioned, to convince the jury of a falsehood. [A]s a necessary consequence of our in camera consideration of the state secrets privilege, we have satisfied ourselves as to the reason for the Bureau's failure to hire Molerio; and since that reason does not implicate any First Amendment concerns; this count of the complaint was properly dismissed.¹³⁵

¹³² *Id.*

¹³³ *See id.* at 824.

¹³⁴ *Id.* at 825 (citation omitted).

¹³⁵ *Id.*

Molerio is an exceptional case that sets a high threshold for dismissal.¹³⁶ In *Molerio*, the government's assertion of the privilege did not merely interfere with the defendant's ability to present a colorable,¹³⁷ plausible,¹³⁸ possible,¹³⁹ or potential¹⁴⁰ defense. Rather, the government's state secret submission was so powerful that it established that the defendants were deprived of a truly dispositive defense¹⁴¹—a defense that had been verified¹⁴² by the court's careful review of the submission. "[I]pso facto" the submission showed that the defense was meritorious.¹⁴³ The submission was so strong that the "truthful state of affairs"¹⁴⁴ would lead to a defense verdict, while a plaintiff's verdict would represent "an erroneous result"¹⁴⁵ and a miscarriage of justice.

The Second Category.

In the second category of cases the defense's argument is the weakest. For this category, assume the plaintiff has run the gauntlet of all cases discussing the impact of the privilege claim on the plaintiff's case. In particular assume that after the privilege assertion, the plaintiff has sufficient evidence to make out a prima facie case and that the privileged and unprivileged evidence are so segregable that permitting the plaintiff to proceed will not create a significant risk of disclosure. At this point in the analysis, neither *Reynolds* nor *Totten* dictates dismissal.

Additionally, suppose the court concludes that the privilege claim does not significantly hamper the defense's ability to either rebut the plaintiff's prima facie case, or establish an affirmative defense. In these circumstances, neither *Reynolds* nor *Totten* nor *Molerio* justifies entering summary judgment for the defendant and summarily terminating the litigation.

The Third Category.

The third category of cases overlaps with the second. In the second category, *Totten* did not present an insuperable barrier to allowing the litigation to

¹³⁶ See *In re Sealed Case*, 494 F.3d 139, 154–55, 160 (D.C. Cir. 2007) (Brown, J., concurring and dissenting) (explaining *Molerio* was an "easy case" which satisfied a "severe" standard).

¹³⁷ See *id.* at 150 (majority opinion). See also *S.E.C. v. Nacchio*, 614 F. Supp. 2d 1164, 1168 (D.Colo. 2009) (stating the defense must be "more than merely colorable.").

¹³⁸ See *In re Sealed Case*, 494 F.3d at 149–50.

¹³⁹ *Id.* at 149.

¹⁴⁰ *Id.* at 150.

¹⁴¹ See *id.* at 149; *id.* at 154–55 (Brown, J., concurring and dissenting).

¹⁴² See *id.* at 153 (majority opinion).

¹⁴³ *Molerio v. F.B.I.*, 749 F.2d 815, 825 (D.C. Cir. 1984).

¹⁴⁴ *In re Sealed Case*, 494 F.3d at 151.

¹⁴⁵ *Id.*; see also *Zuckerbraun v. Gen. Dynamics Corp.*, 935 F.2d 544, 547 (2d Cir. 1991).

proceed. In that category, the judge concluded the privileged and unprivileged evidence were sufficiently separable that with appropriate protective orders, it was reasonably safe to proceed with discovery and trial. However, the third category of cases supposes that after realistically appraising the case, the judge reaches a contrary conclusion. One example is *General Dynamics Corp. v. United States*.

In *General Dynamics*,¹⁴⁶ the government claimed the defendant-corporation breached a contract to develop an A-12 stealth aircraft for the Navy. General Dynamics raised a superior knowledge affirmative defense. The affirmative defense was supported because case law “recognized a governmental obligation not to mislead contractors about, or silently withhold, its ‘superior knowledge’ of difficult-to-discover information ‘vital’ to contractual performance.”¹⁴⁷ General Dynamics alleged the government did not share the superior knowledge gained from prior stealth projects.¹⁴⁸ The government responded by making a successful state secrets claim for its information about stealth technology.

The Court found General Dynamics “brought forward enough unprivileged evidence to ‘make a *prima facie* showing’” of its defense.¹⁴⁹ However, the Court invoked *Totten* to deny General Dynamics relief. Initially, the Court mentioned the original, strict *Totten* inevitability standard: “Where liability depends upon the validity of a plausible superior-knowledge [affirmative] defense, and when full litigation of that defense ‘would inevitably lead to the disclosure of’ state secrets, neither party can obtain judicial relief.”¹⁵⁰ Then, the Court turned to the more relaxed and modern version of the *Totten* standard. The Court commented that:

Every document request or question to a witness would risk further disclosure, since both sides have an incentive to probe up to the boundaries of state secrets. State secrets can also be indirectly disclosed. Each assertion of the privilege can provide another clue about the Government’s covert programs or capabilities.¹⁵¹

Similarly, in *Mohamed v. Jeppesen Dataplan, Inc.*,¹⁵² a decision from the Court of Appeals for the Ninth Circuit involving the Central Intelligence Agency’s

¹⁴⁶ See *Gen. Dynamics Corp. v. United States*, 131 S. Ct. 1900 (2011).

¹⁴⁷ *Id.* at 1904.

¹⁴⁸ See *id.*

¹⁴⁹ *Id.* at 1906.

¹⁵⁰ *Id.* at 1907 (citation omitted).

¹⁵¹ *Id.*

¹⁵² *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 2442 (2011).

clandestine program of extraordinary rendition of suspected terrorists, the court employed the modern, relaxed version of the *Totten* standard. There, the plaintiff, an Egyptian national, alleged that the defendant-corporation assisted the C.I.A. in transferring him to a foreign country for detention and interrogation. The government asserted its state secrets privilege to suppress privileged information about the rendition program. The defendant sought dismissal on the ground that the successful privilege claim interfered with its ability to present a defense. Rather than demanding a showing of inevitable disclosure, the court remarked:

[T]here is no feasible way to litigate Jeppesen's alleged liability without creating an unjustifiable risk of divulging state secrets Because the facts underlying the plaintiffs' claims are so infused with these secrets, 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 unprivileged evidence.¹⁵³

As support for the decision, the court cited to several contemporary cases using standards such as "an undue threat that privileged information will be disclosed," "a significant risk," and an "unacceptably high" risk¹⁵⁴ rather than inevitability.

Hence, even when the plaintiff has enough unprivileged evidence to present a prima facie case and the government's submission falls short of triggering *Molerio*, the defendant can prevail by demonstrating that its attempt to present rebuttal evidence will pose a substantial risk of revealing privileged information. This is true especially if the court applies the modern, relaxed version of the *Totten* standard; under that standard, a risk of that magnitude will trigger a non-justiciable bar, leading to a preemptory victory for the defense.

The Fourth Category.

The paradigmatic example of the first category of cases is *Molerio*.¹⁵⁵ There, the facts were so "extreme"¹⁵⁶ that it was a relatively easy case for the court.¹⁵⁷ As the same circuit court observed two decades later, in *Molerio*, the defense was not merely "plausible,"¹⁵⁸ "possible,"¹⁵⁹ or "potential."¹⁶⁰ The government's

¹⁵³ *Id.* at 1087–88.

¹⁵⁴ *Id.* at 1088–89.

¹⁵⁵ *Molerio v. F.B.I.*, 749 F.2d 815 (D.C. Cir. 1984).

¹⁵⁶ *See In re Sealed Case*, 494 F.3d 139, 154–55 (D.C. Cir. 2007) (Brown, J., concurring and dissenting).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 149–50 (majority opinion).

¹⁵⁹ *Id.* at 149.

¹⁶⁰ *Id.* at 150.

submission was so strong and credible that the defense was dispositive.¹⁶¹ The submission convinced Judge Scalia and his colleagues that they knew the real reason why the F.B.I. had not hired Molerio and that the reason had nothing to do with his father's constitutionally protected political activities.¹⁶² Although Molerio had enough unprivileged, circumstantial evidence to make out a prima facie case,¹⁶³ a verdict for the plaintiff would have been "erroneous"¹⁶⁴ and "a mockery of justice."¹⁶⁵ In the fourth category of cases, the courts go beyond *Molerio* and enters summary judgment for the defendant when the government's successful claim prevents the defendant from advancing a merely *plausible* defense.

To be frank, there is only a small body of case law exploring the distinction between the first and fourth categories. The court of appeals cases that have addressed the distinction¹⁶⁶ are split. One line of authority insists that the court declare a peremptory victory for the defense only when the facts satisfy the *Molerio* benchmark. The proponents of this view point to the United States Court of Appeals for the District of Columbia Circuit decision *In re Sealed Case*¹⁶⁷ and some broad dicta by the same court from *Ellsberg* for support.¹⁶⁸ In *Molerio*, Judge Scalia stopped short of holding that the defense is entitled to summary judgment only when the facts are as extreme as those in that case. Yet, a number of subsequent decisions have treated *Molerio* as a "new baseline for dismissal."¹⁶⁹

A competing line of authority holds that the defendant can obtain summary judgment when the government's successful privilege claim interferes with a defense that is merely plausible and not dispositive. As previously stated, only a few courts have even addressed this issue. However, the prevailing view is that interference with a plausible or potential defense suffices.¹⁷⁰ Indeed, it appears that

¹⁶¹ See *id.* at 149.

¹⁶² See *Molerio v. F.B.I.*, 749 F.2d 815, 825 (D.C. Cir. 1984).

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ See, e.g., *In re Sealed Case*, 494 F.3d at 154, 156 (Brown, J., concurring and dissenting).

¹⁶⁷ *Id.* at 149–51 (majority opinion).

¹⁶⁸ See *Ellsberg v. Mitchell*, 709 F.2d 51 (D.C. Cir. 1983), *cert. denied sub nom. Russo v. Mitchell*, 465 U.S. 1038 (1984), *aff'd*, 807 F.2d 204 (D.C. Cir. 1986), and *cert. denied* 484 U.S. 870 (1987); *In re Sealed Case*, 494 F.3d at 154, 155–56 (D.C. Cir. 2007) (Brown, J., concurring and dissenting) (discussing the dicta in *Ellsberg*).

¹⁶⁹ *In re Sealed Case*, 494 F.3d at 155 (Brown, J., concurring and dissenting).

¹⁷⁰ *Id.* at 156.

no other circuit has taken the position that only interference with a dispositive defense warrants dismissal.¹⁷¹

The prevailing view enjoys substantial support in case law. In the Court's most recent state secret case, *General Dynamics*,¹⁷² Judge Scalia authored the opinion, as he did in *Molerio*. In the text of his opinion, the Justice referred to interference with a *plausible* superior-knowledge affirmative defense.¹⁷³ Other lower courts have expressly used the same adjective.¹⁷⁴ Still other courts¹⁷⁵ and treatise writers¹⁷⁶ refer generally to a valid defense without differentiating between plausible and dispositive defenses.

Advocates of the majority view advance a defensible policy rationale for their position. For instance, assume that the defense is plausible, but the facts are not so strong that the defense is dispositive, as in *Molerio*. It can be argued that when the invocation of the state secrets privilege has obscured highly relevant facts, there will necessarily be grave doubts about the reliability of any judgment for the plaintiff.¹⁷⁷ The restriction of the defense's ability to rebut¹⁷⁸ the plaintiff's prima facie case or prove up an affirmative defense could easily distort¹⁷⁹ the outcome and lead to a substantive injustice. The possibility of such injustice is acute when the defense in question is a true affirmative defense¹⁸⁰ rather than a simple defense that merely negates an element of the plaintiff's prima facie case.

If the judge restricts a mere simple defense, the defense still has a hope for victory: A scheduled plaintiff's witness may not appear for trial, the witness might unexpectedly forget critical testimony, or the jury could find the witness's

¹⁷¹ *Id.*

¹⁷² *Gen. Dynamics Corp. v. United States*, 131 S. Ct. 1900 (2011).

¹⁷³ *Id.* at 1907.

¹⁷⁴ See *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1088 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 2442 (2011).

¹⁷⁵ See *Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998), *cert. denied*, 525 U.S. 967 (1998); *Zuckerbraun v. Gen. Dynamics Corp.*, 935 F.2d 544, 547 (2d Cir. 1991).

¹⁷⁶ See TESTIMONIAL PRIVILEGES, *supra* note 22, § 9:14, at 9–45; FEDERAL TESTIMONIAL PRIVILEGES, *supra* note 1, § 5:14, at 539.

¹⁷⁷ See *Gen. Dynamics*, 131 S. Ct. at 1910 (stating “too many of the relevant facts remained obscured by the state-secret privilege to enable a reliable judgment.”).

¹⁷⁸ See FEDERAL EVIDENCE, *supra* note 10, § 5:54, at 864 n.28.

¹⁷⁹ See *In re Sealed Case*, 494 F.3d 139, 154, 157 (D.C. Cir. 2007) (Brown, J., concurring and dissenting).

¹⁸⁰ In *General Dynamics*, the Court described General Dynamics' superior-knowledge contention as an “affirmative defense.” *General Dynamics*, 131 S. Ct. at 1903. See also FEDERAL TESTIMONIAL PRIVILEGES, *supra* note 1, § 5:14, at 540 n.21 (discussing *General Dynamics*); WEINSTEIN'S FEDERAL EVIDENCE, *supra* note 69, § 509.12, at 509–11 (discussing *General Dynamics*).

demeanor unconvincing. In contrast, the consequences for the defense are far more radical when the judge bars a true affirmative defense. One reason is that the jury learns about true affirmative defenses from the judge's instructions.¹⁸¹ However, if the defense is barred, there will be no instruction and the jury will not learn about a potential defense to the plaintiff's prima facie case. Furthermore, if the defense offers an item of evidence that pertains only to an element of the barred affirmative defense, on an appropriate objection, the judge will exclude the evidence as irrelevant.¹⁸²

In sum, when we earlier considered the impact of a government privilege claim on a plaintiff's case, we found that, in two of the three variations of the problem, the lower courts dismissed the plaintiff's lawsuit. After a review of the four categories of cases impacting claims on the defendant's cases, in three of the four categories, the defense obtained a peremptory victory. In most of these categories of cases, when the government successfully asserts the state secrets privilege, the plaintiff's efforts will be unavailing. Not only will the plaintiff fail to obtain a favorable verdict but also the trial judge will declare a peremptory victory for the defense and preclude the plaintiff from either conducting discovery or trying the case. These decisions show that the case law tilts significantly in favor of maintaining the status quo ante; in effect, the court leaves the parties where it found them before the plaintiff filed suit.¹⁸³ Finally, in most of the cases, even though the plaintiff may have sufficient unprivileged evidence to establish a prima facie case, the court treats the dispute as "nonjusticiable."¹⁸⁴ In the words of the poet T.S. Eliot, it is the plaintiff who dares to "[d]isturb the universe"¹⁸⁵ and endeavors to change the legal status quo.

IV. A CRITICAL EVALUATION OF THE CURRENT STATE OF THE LAW

Part III demonstrated that the current state of the law displays a pronounced bias in favor of a peremptory victory for the defense. It makes little difference whether the government's state secret claim affects the plaintiff's case or the defendant's case. Part III pointed out that in most categories of cases, the outcome is either a dismissal of the plaintiff's complaint or the entry of summary judgment for the defendant. That outcome is especially curious when it is driven by the effect of the government's claim on the defense case. It is one thing to say that the plaintiff must bear the burden when the government's privilege claim affects the plaintiff's ability to marshal a prima facie case or present a case without

¹⁸¹ See 3A KEVIN F. O'MALLEY ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS: CIVIL §§ 150:80–84, 155:50–53 (6th ed. 2012).

¹⁸² See FED. R. EVID. 401.

¹⁸³ See *Gen. Dynamics*, 131 S. Ct. at 1907, 1909.

¹⁸⁴ *Id.* at 1908; see FEDERAL TESTIMONIAL PRIVILEGES, *supra* note 1, § 5:14, at 540 n.21.

¹⁸⁵ T.S. ELIOT, THE LOVE SONG OF J. ALFRED PRUFROCK (1920).

creating a significant risk of revealing privileged information. It is quite another matter to say that the plaintiff should suffer a peremptory defeat when the government's privilege claim handicaps the defense's ability to rebut the plaintiff's case or mount an affirmative defense. Logic certainly does not dictate that the plaintiff must bear the burden when the privilege claim restricts the defense's capacity to attack the plaintiff's case. Yet, there could be a policy justification for allocating the burden to the plaintiff.

The first sub-section of Part IV reviews the policy arguments that have been advanced to justify the above-mentioned allocation. The second sub-section critiques those arguments and ultimately concludes that the current state of the law must be reformed. At the very least, in one set of circumstances, the burden ought to be shifted to the defendant, namely, when: (1) the plaintiff has sufficient unprivileged evidence to present a *prima facie* case, (2) proceeding does not pose a significant *Totten* concern about the inadvertent disclosure of privileged material during discovery or trial, (3) the privilege claim affects the defense's ability to develop an affirmative defense, and (4) unlike the plaintiff, the defendant had such a close relationship to the government that the defendant could have anticipated that a privilege claim would interfere with the performance of the defendant's obligations to the plaintiff. In the initial sub-section of Part IV, the factual proposition in question is an affirmative defense precisely because the law has made the decision that a policy or combination of policies warrants assigning the defendant the burdens of pleading, production, and proof on the issue. Even after the government's privilege claim, those policies persist.

The second sub-section of Part IV points out that there is a plausible argument for shifting the burden in the case of simple defenses when there is a close relationship between the defendant and the sovereign asserting the privilege. In this setting, the argument for requiring the defendant to bear the burden is not as strong as in the case of affirmative defenses. Ultimately the question is of policy: In allocating the risk between the plaintiff and the defendant, does the defendant's more intimate relationship with the sovereign serve as a principled basis for assigning the risk to the defendant?

It must be emphasized that if the government's privilege claim interferes with the defendant's ability to present a simple defense or to mount a true affirmative defense, the burden should not be shifted to the defense in the sense that the court declares a peremptory victory for the plaintiff. Rather, the plaintiff ought to proceed with discovery and trial even though the privilege claim has disadvantaged the defense. Even if the plaintiff is allowed to proceed, the final outcome may not be a plaintiff's verdict. This reform leaves both *Totten* and *Molerio* undisturbed. But at least in some cases when the defensive theory is merely plausible, not dispositive as it was in *Molerio*, the courts should consider granting the plaintiff the right to proceed.

A. *Policy Arguments Favoring the Current State of Law*

In *General Dynamics*,¹⁸⁶ the Court presented two broad policy arguments for withholding judicial intervention when the government's successful privilege claim frustrated a contractor's ability to mount an affirmative defense. The first argument rests on an analogy to contract law. Justice Scalia wrote: "Judicial refusal to enforce promises contrary to public policy . . . is not unknown to the common law, and the traditional course is to leave the parties where they stood when they knocked on the courthouse door."¹⁸⁷ Quoting the Second Restatement of Contracts, the Justice explained that in such situations, courts award the plaintiff neither damages for prospective profits nor restitution for benefits previously conferred on the defendant.¹⁸⁸ Rather, the government's successful assertion of the privilege can render the contract "unenforceable."¹⁸⁹ The very notion of unenforceability is that the court refuses to intervene and withholds its coercive, remedial machinery.¹⁹⁰

The second argument is that it is unsound to attempt to separate a plaintiff's offensive claim from the defendant's responsive argument. In the Justice's words: "It is claims and defenses *together* that establish the justification, or lack of justification, for judicial relief; and when public policy precludes judicial intervention for the one it should preclude judicial intervention for the other as well."¹⁹¹ On the facts in *General Dynamics*, the result did not strike the Justice as unfair, since "[b]oth parties—the Government no less than [the private] petitioners—must have assumed the risk that state secrets would prevent the adjudication of claims of inadequate performance."¹⁹² The essential purpose of a lawsuit is to decide the merits of the parties' dispute. The argument runs that if a fair determination of the merits requires an analysis of the claim as well as an evaluation of the defense, whenever a privilege claim prevents a full airing of the merits—due to its impact on either the claim or defense—the lawsuit becomes nonjusticiable and must be terminated.

B. *The Policy Arguments Favoring the Proposed Reform*

Although the policy arguments advanced in *General Dynamics* have merit, it is submitted that in the final analysis those arguments should not stand in the way of adopting the proposed reform.

¹⁸⁶ *Gen. Dynamics Corp. v. United States*, 131 S. Ct. 1900 (2011).

¹⁸⁷ *Id.* at 1907.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 1910.

¹⁹⁰ *Id.* at 1907.

¹⁹¹ *Id.*

¹⁹² *Id.* at 1909.

1. *The Unfairness of Attempting to Separate Plaintiff's Claim from the Defense—Affirmative Defenses*

Assuming all four circumstances mentioned at the outset of Part IV are present, it is undeniable that in some cases the evidence relating to the claim is closely related to the evidence tending to establish the defense. When, in a given case, the plaintiff's unprivileged evidence and the privileged evidence are intricately interwoven, *Totten* may come into play. *Totten* may apply because allowing the plaintiff to proceed will give rise to a significant risk that privileged evidence will be inadvertently exposed at trial. However, now assume that the defendant objects on the ground that the privilege claim interferes with a plausible valid defense rather than under *Totten*. These hypothesized circumstances do not raise significant *Totten* concerns.

In litigation, courts routinely sort through the facts determining the merits of cases, and assign the facts to one side or the other. They do so to determine the burden of pleading,¹⁹³ the initial burden of production or going forward,¹⁹⁴ and the ultimate burden of proof.¹⁹⁵ In doing so, courts consider such factors as the relative probability of the occurrence of certain types of events, the parties' respective access to the information in question, and policy preferences for particular litigation outcomes.¹⁹⁶

The allocation of these burdens can have dramatic impacts during litigation. If a court assigns a fact to the defendant and characterizes it as an affirmative defense, the defendant's failure to mention the defense in his or her answer may altogether preclude the defendant from raising the argument during the litigation.¹⁹⁷ Likewise, even when the defendant properly pleads an affirmative defense, the judge can refuse to instruct the jury on the defense if, at trial, the defendant does not present sufficient evidence to sustain his or her initial burden of production on the factual proposition.¹⁹⁸ The original policy decision to assign the defense a burden of pleading, production, or proof on a proposition can be outcome determinative: The defense could lose because of the assignment of one of the three burdens.

¹⁹³ See JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 5.20 (4th ed. 2005); 5B CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 1270, 1274 (3d ed. 1998).

¹⁹⁴ See RONALD L. CARLSON ET AL., EVIDENCE: TEACHING MATERIALS FOR AN AGE OF SCIENCE AND STATUTES 760 (7th ed. 2012) [hereinafter EVIDENCE].

¹⁹⁵ See EVIDENCE, *supra* note 194, at 789–92.

¹⁹⁶ See EVIDENCE, *supra* note 194, at 791.

¹⁹⁷ See *supra* note 193 and accompanying text.

¹⁹⁸ See EVIDENCE, *supra* note 194, at 762–63.

If the relevant policy factors were originally weighty enough to justify assigning the burden to the defense and in certain circumstances result in a plaintiff's victory, the defendant should arguably continue to bear the burden—and the consequent risk of a plaintiff's victory—when a government privilege claim interferes with the defense's ability to develop the defense at trial. Earlier in the lawsuit, the policy factors were sufficiently important to warrant allocating the burdens to the defense, and the subsequent government privilege claim neither extinguished those policies nor diminished their legitimacy.

It might be argued here that the defense's inability is not due to the defendant's own conduct, but rather the result of the government's intervention. However, as previously stated, the proposed reform posits that the defendant has a closer relationship to the government than the plaintiff. When the defendant has such a relationship, that relationship cuts in favor of continuing to assign the burden to the defense not only in a formal sense but also in a practical sense. The defense ought to face the risk of a plaintiff's verdict if the case proceeds to trial although the privilege claim has handicapped the defense. Thus, a policy choice must be made as between the plaintiff and the defendant, and that relationship is a legitimate basis for assigning the risk to the defendant.

2. *Analogy to Contract Law—Simple Defenses*

The preceding paragraphs discussed the factual situation in which all four circumstances listed at the outset of Part IV are present, including the third circumstance of the government's privilege claim restricting the defendant's ability to present a true affirmative defense. In that situation, the fourth salient circumstance, cutting in favor of continuing to assign the burden to the defense, is the defendant's close relationship with the sovereign making the claim. The same policy consideration can come into play when the privilege claim impinges on the defendant's ability to advance a simple defense based on evidence that negates an element of the plaintiff's cause of action. The existence of the relationship between the defendant and the government bears directly on the contract law analogy of *General Dynamics*. There, the Court was certainly correct in stating that in some situations when a court deems a contract unenforceable, the court must leave the parties where it found them. The classic example is the illegal contract doctrine.¹⁹⁹ As the Court indicated in *General Dynamics*, if a contract is illegal because it violates a statute or common-law policy, the court leaves the parties where it found them. The common-law maxim is, *in pari delicto potior est conditio defendentis*—in the case of equal fault, the condition of the defendant party is the better one.²⁰⁰ In other words, the court dismisses the suit, and the defense wins a peremptory victory. Further, in the typical illegal contract

¹⁹⁹ See JOSEPH M. PERILLO, CONTRACTS § 22 (7th ed. 2014) [hereinafter CONTRACTS].

²⁰⁰ See CONTRACTS, *supra* note 199, § 22.1, at 773.

case, the court will deem the parties equally at fault in a legal sense, since both parties are required to know the law.²⁰¹

Although that common-law maxim is the starting point for analysis under the illegal contract doctrine, the maxim is not the end of the analysis. Even when both parties are technically at fault in the sense that they ought to have known the law was violated by their agreement, courts inquire further to determine whether both parties were equally blameworthy in a broader sense.²⁰² Morally, one party might be more responsible.²⁰³ If so, the other party is deemed “not *in pari delicto*” and may obtain relief.²⁰⁴ As previously stated in its opinion, the *General Dynamics* Court appealed to the Second Restatement of Contracts.²⁰⁵ Another provision of the same Restatement limits the scope of the illegal contract doctrine and expressly states that a party to an illegal contract may obtain relief when he or she was “excusably ignorant” of the law, rendering the agreement illegal.²⁰⁶ Of course, as a general proposition, every citizen is expected to know the law.²⁰⁷ However, Comment a to section 180 explains that if the agreement violates a statute “of a local, specialized or technical nature,” the more inexperienced party to the agreement may have a tenable contention that he or she was not *in pari delicto*.²⁰⁸ In short, the court should realistically assess the party’s situation to determine whether there is a sensible basis for allocating the risk of illegality to the party and denying them all judicial relief.

The same mode of analysis applies here. The proposed reform allowing the plaintiff’s case to proceed would come into play when the defendant has a much closer relationship to the sovereign invoking the privilege. More specifically, the reform would apply when the defendant should have foreseen that there was a distinct possibility that during performance the government might invoke its privilege and interfere with performance.

To illustrate, suppose an experienced government contractor bids on and is awarded a prime military contract for a new weapons system. In the words of the *General Dynamics* Court, the contractor is “a repeat player” in the industry.²⁰⁹

²⁰¹ Another common-law maxim is “*ignorantia eorum quae scire tenetur non excusat*,” which means ignorance is no excuse. *Ignorantia eorum quae scire tenetur non excusat*, BLACK’S LAW DICTIONARY (6th ed. 1990).

²⁰² See CONTRACTS, *supra* note 199, § 22.1(c), at 777.

²⁰³ See CONTRACTS, *supra* note 199, § 22.1, at 777–78.

²⁰⁴ See CONTRACTS, *supra* note 199, § 22.1, at 777–78.

²⁰⁵ *Gen. Dynamics Corp. v. United States*, 131 S. Ct. 1900, 1907 (2011).

²⁰⁶ See RESTATEMENT (SECOND) OF CONTRACTS § 180 (AM. LAW INST. 1981).

²⁰⁷ See *supra* note 201 and accompanying text.

²⁰⁸ RESTATEMENT (SECOND) OF CONTRACTS § 180 cmt. a.

²⁰⁹ *Gen. Dynamics*, 131 S. Ct. at 1909.

As a veteran repeat player, again in the words of *General Dynamics*, the contractor would “assume[] the risk that state secrets would prevent the adjudication of claims of inadequate performance.”²¹⁰ Next, assume that the general contractor subcontracts with a supplier with little or no prior experience in government contracting. Although the prime contract gives the general contractor’s employees limited access to classified information relevant to the weapons project, the subcontractor’s employees do not gain such access. Suppose further that during the later performance of the prime contract and subcontract, the government asserts its state secrets privilege and that when the general contractor ceases performance of the subcontract, the subcontractor sues. As in *General Dynamics*, the general and subcontractor may now be parties to an unenforceable contract. However, there is clearly a stronger inference of assumption of risk by the defendant, the general contractor. Even if the government’s privilege claim interferes with the general contractor’s ability to defend the subcontractor’s suit, it is justifiable to allocate the risk to the general contractor and, therefore, to permit the plaintiff subcontractor’s lawsuit to proceed.

This line of argument harks back to the seminal *Totten* decision. As previously stated, in *Totten*, Justice Field asserted that “[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.”²¹¹ In *Totten*, there was an equally strong inference of assumption of risk for both parties. Then in *Tenet*,²¹² the Court resorted to the same rationale and quoted that very same passage from *Totten*.²¹³ That line of reasoning is germane here.

In contrast, on the facts of the hypothetical, there is a much clearer inference of assumption of risk by the defendant general contractor. Hence, it is perfectly consistent with the policy rationale of the Court’s early state secret case, *Totten*, and its last, *General Dynamics*, to permit the plaintiff subcontractor’s lawsuit against the general to proceed with discovery and to trial. This line of reasoning is broad and powerful enough to apply to both simple defenses and true affirmative defenses.

V. CONCLUSION

The purpose of this article has been twofold. The first purpose was to debunk the generalization cited at the beginning of the article that after a successful state secret claim a case “will proceed . . . with no consequences save

²¹⁰ *Id.*

²¹¹ *Totten v. United States*, 92 U.S. 105, 106 (1876).

²¹² *See Tenet v. Doe*, 544 U.S. 1 (2005).

²¹³ *Id.* at 7–8.

those resulting from the loss of evidence.”²¹⁴ If that generalization were true and the plaintiff had enough unprivileged evidence to satisfy his or her initial burden of production, most cases would still proceed to trial. However, as we have seen, that is not the case. Quite to the contrary, in many cases where the plaintiff has a prima facie case, the case terminates immediately after a successful privilege claim is brought. The case terminates: (1) under *Totten* because allowing the case to proceed would create an intolerable risk of inadvertent disclosure of privileged information; (2) under *Molerio* because the government’s submission establishes that there is a dispositive defense; or (3) because the exclusion of the privileged information would interfere with the defendant’s ability to present a plausible simple or affirmative defense.

After exposing the exaggerated nature of the generalization, this article turned to a second objective: undertaking a critical evaluation of the current state of the law. Parts II and Part III of this article demonstrated that in most of the categories of cases, the government’s privilege claim leads to a preemptory defense victory, leaving the litigants where they were before the plaintiff filed suit against the defendant. Although the Court in *General Dynamics* advanced two broad policy arguments for leaving T.S. Eliot’s universe undisturbed,²¹⁵ Part IV explained that there are limits to those policy arguments. When there is a sensible basis for allocating the burden of the lost evidence to the defendant, the defendant should not be entitled to summary judgment simply because the evidentiary loss handicaps the defense presentation at trial. If the defendant was so closely aligned with the government that it was in a superior position to foresee the privilege assertion and the consequent disruption of its relationship with the plaintiff, there is a solid policy basis for allocating the risk to the defendant. This argument is broad enough to extend to simple defenses, but applies with special force to affirmative defenses. The issue in question is an affirmative defense because of the weighty policy considerations justifying the defendant carrying the burdens of pleading, production, and proof on the issue. The government’s privilege claim neither eliminates those policies nor reduces their importance.

In these exceptional circumstances, the court should consider permitting the plaintiff to proceed. As previously stated, the court should certainly not grant the plaintiff the sort of preemptory victory that the defense usually obtains. The court should neither enter summary judgment in the plaintiff’s favor nor direct a verdict in the plaintiff’s favor. Even if the plaintiff proceeds, the final denouement of the litigation may be a defense victory: A key witness for the plaintiff may unexpectedly die; the witness might be so nervous that he or she forgets testimony

²¹⁴ *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1082 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 2442 (2011).

²¹⁵ *See supra* note 185 and accompanying text.

vital to the plaintiff's case on the stand; or the witness may display negative demeanor prompting the jury to disbelieve the witness's testimony. Accordingly, the plaintiff's limited right to proceed with trial will not guarantee a plaintiff's verdict. Nevertheless, the government's successful privilege claim should not deny the plaintiff his or her day in court. In the rare circumstances described in Part IV, in the grand tradition of the adversary system,²¹⁶ courts should give the plaintiff the opportunity to fairly win a verdict.

²¹⁶ See Stephan Landsman, *Readings on Adversarial Justice: The American Approach to Litigation* (1988); Stephan Landsman, *The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England*, 75 CORNELL L. REV. 497 (1990).