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ON THE CONFLATION OF THE STATE SECRETS PRIVILEGE AND THE *TOTTEN* DOCTRINE

D. A. JEREMY TELMAN*

I. INTRODUCTION

In *Intolerable Abuses*, an article recently published in the *Alabama Law Review*,¹ I criticized the Ninth Circuit’s *en banc* decision in *Mohamed v. Jeppesen Dataplan Inc.*,² in which the court dismissed, *before defendant had answered the complaint*, plaintiffs’ claims alleging that Jeppesen Dataplan had assisted in an illegal government program of extraordinary rendition and torture. Five judges purportedly based their dismissal of plaintiffs’ claims on the state secrets privilege (SSP) alone, while the fifth and deciding vote urged dismissal based on both the SSP and the *Totten* doctrine.³ *Intolerable Abuses* argues that both the majority and the lone concurring judge erred because their analyses conflated the SSP and the *Totten* doctrine. They thus imported reasoning appropriate to assessing claims brought by parties that had entered into voluntary agreements with the government (or its contractors) into a case involving torts claims.

In his *Response*,⁴ Major Robert Barnsby likens the objections to the *Jeppesen Dataplan* decision raised in *Intolerable Abuses* to “a baseball team asking for a highly qualified umpire to stand behind home plate, then arguing that the umpire is not doing his job when he calls a strike on that team.”⁵ The problem with the analogy is that, because *Jeppesen Dataplan* was decided on a pre-Answer motion to dismiss, the “umpires” in *Jeppesen Dataplan* could not call a strike because the players had yet

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1 D. A. Jeremy Telman, *Intolerable Abuses: Rendition for Torture and the State Secrets Privilege*, 63 ALA. L. REV. 429 (2012) [hereinafter *Intolerable Abuses*].

2 614 F.3d 1070 (9th Cir. 2010) (en banc), *cert. denied*, 131 S.Ct. 2442 (2011).

3 In *Totten v. United States*, 92 U.S. 105 (1876), the administrator of the estate of William A. Lloyd brought suit to enforce an espionage contract allegedly entered into between Mr. Lloyd and President Lincoln. *Intolerable Abuses*, *supra* note 1, at 440. The *Totten* doctrine precludes any suit to enforce a secret agreement with the government, or a secret promise by the government. Such claims are non-justiciable. See *id.* at 441-42 (summarizing *Totten*’s holding and reasoning).

4 Robert E. Barnsby, *So Long, and Thanks for All the Secrets: A Response to Professor Telman*, 63 ALA. L. REV. 667 (2012) [hereinafter *Response*].

5 *Id.* at 668.

to take the field. If the baseball analogy is to serve, then what happened in *Jeppesen Dataplan* is more akin to umpires declaring the winner of the World Series on opening day, before the first pitch is thrown. The Ninth Circuit “umpires” acknowledged that they did not and could not know which team was superior. They ruled that the entire season must be called because proceeding would endanger national security in ways that the “umpires” were not at liberty to specify or to share with interested parties. We would not accept such an outcome in baseball, and we certainly should not accept it in the federal court system.⁶

This brief Reply to Major Barnsby’s *Response* highlights the ways in which that *Response* typifies the government’s conflation of the SSP with *Totten* so as to transform it from an evidentiary privilege into a broad doctrine of immunity applied in favor of the federal government and its contractors after *ex parte* proceedings. Major Barnsby contends that “the government should continue to be allowed to use the SSP to put an end to litigation that might expose national security information,” and he writes as if pre-discovery dismissal of a case is the “entire purpose”⁷ of the SSP. That characterization of the SSP indicates a fundamental confusion about the nature of the doctrine. The *Response*’s mischaracterization of the SSP derives from a conflation of the SSP, an evidentiary privilege, with the *Totten* doctrine, which provides that suits to enforce secret agreements with the government are non-justiciable.⁸

The Reply proceeds in three sections. First, the Reply quickly corrects three mischaracterizations of *Intolerable Abuses*. Next, with reference to the recent *Fazaga* case,⁹ the Reply illustrates the continuing impact of *Jeppesen Dataplan* on SSP litigation, especially because it encourages courts to treat the *Totten* doctrine as an element of the SSP. Finally, the Reply addresses the *Response*’s claim that *Intolerable Abuses* constitutes an overreaction to the problems raised by the SSP.

II. THREE MISCHARACTERIZATIONS OF *INTOLERABLE ABUSES*

Those who support the use of the SSP to dismiss cases before discovery often characterize such cases as forcing judges to choose between national security and civil liberties.¹⁰ But *Intolerable Abuses* maintains that the SSP almost never necessitates such a choice. Courts have ample means of pro-

6 The *Response* states that the SSP cannot be used lawfully to “defend criminal or willful conduct on behalf of the government” and that it was not so used in *Jeppesen Dataplan*. *Id.* at 687-88. This is incorrect. The SSP is an absolute bar and operates to exclude evidence or end litigation regardless of the nature of the claim. *United States v. Reynolds*, 345 U.S. 1, 11-12 (1953).

7 See *Response*, *supra* note 4, at 669, 678 (stating that “the entire purpose of the [SSP] is to put an end to litigation that might expose national security information”).

8 See *Totten*, 92 U.S. at 106-07 (dismissing claims on behalf of an alleged Civil War spy who had alleged a contractual agreement with President Lincoln).

9 *Fazaga v. Fed. Bureau of Investigation*, Case No. 8:11-cv-00301-CJC (VBKx) (C.D. Ca. Aug. 14, 2012), slip op. at 13 (citations to *Jeppesen Dataplan* omitted).

10 See, e.g., *Response*, *supra* note 4, *passim* (contending that some cases create an “irreconcilable conflict” between national security and civil liberties, which courts must settle in favor of national security); *Jeppesen Dataplan*, 614 F.3d at 1073 (observing that “there are times when exceptional circumstances create an irreconcilable conflict between” liberty, judicial transparency, and national security).

protecting civil liberties without disclosing national security information. They do so in the criminal context through the Classified Information Procedures Act (CIPA),¹¹ and they used to do so in the civil context by allowing cases to proceed without the introduction of information subject to the SSP. Decisions such as *Jeppesen Dataplan* undermine our government's commitment to civil liberties without providing any national security benefit that could not be achieved through less onerous means.

A. *Intolerable Abuses Does Not Advocate the Disclosure of National Security Information*

The *Response* notes that, once sensitive information is “released through the litigation process (even as early as the discovery stage), that critical bell cannot be un-rung.”¹² That is certainly true, but since *Intolerable Abuses* does not advocate the release of sensitive information,¹³ the argument is not relevant. The *Response* characterizes *Intolerable Abuses* as being hostile to all government's assertions of the SSP. It is not. The government should assert the SSP whenever necessary to prevent the disclosure of national security secrets. However, the consequence of a successful assertion of the SSP is not an end to the litigation; the litigation simply proceeds without the privileged evidence.¹⁴

The *Response* attempts to illustrate the dangers of releases of sensitive information through a discussion of alleged leaks of vital information during the prosecution of those responsible for the World Trade Center Bombing of 1993.¹⁵ However, that example is inapposite, as those leaks were the product of a decision by government attorneys to release classified information in a criminal proceeding.¹⁶ If anything, the *Response's* example supports the argument in *Intolerable Abuses* that the political branches are the source of almost all national security leaks and that the Executive Branch's mistrust of courts as incapable of protecting secrets is ill-founded.¹⁷

B. *Intolerable Abuses Does Not Call for Judgment for Plaintiffs Each Time the SSP Is Invoked*

The *Response* characterizes *Intolerable Abuses* as advocating “automatic judgment for the plaintiff if the government invokes the privilege, as a way of socializing the costs to the government of as-

11 Classified Information Procedures Act, Pub. L. No. 96-456, 94 Stat. 2025 (1980) (codified as amended at 18 U.S.C. app. 3, §§ 1-16 (2006)).

12 *Response*, *supra* note 4, at 674.

13 See *Intolerable Abuses*, (“[N]othing here proposed would entail *any* public disclosure of state secrets unless the government chose to do so.”).

14 See *Ellsberg v. Mitchell*, 709 F.2d 51, 64 (D.C. Cir. 1983) (observing that when the SSP is successfully asserted, the “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”) (quoting MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE 233 (1972)).

15 See *Response*, *supra* note 4, at 684-85.

16 *Response*, *supra* note 4, at 685 (citing James Taranto, Two Decades of Pursuing al Qaeda, Wall St. J., Sept 10, 2011, at A13).

17 See *Intolerable Abuses*, *supra* note 1 at 497 (noting the lack of evidence showing courts to be the source of national security leaks).

serting the privilege.”¹⁸ The *Response* calls this position “ridiculous”¹⁹ and it certainly is. The closest *Intolerable Abuses* comes to making any such argument is to advocate that the SSP operate like any other evidentiary privilege and not as both a sword and a shield for the government.²⁰ In the rare cases when the SSP is found to prevent plaintiffs from being able to establish a *prima facie* case, courts may dismiss cases on SSP grounds. On the other hand, in the even rarer cases where the SSP is found to prevent the government or its contractors from establishing their affirmative defenses, a court may have no alternative but to order judgment for the plaintiffs.

There likely would be almost no cases that would yield the latter result because, with the government’s cooperation, courts can almost always find a way for litigation to proceed without endangering national security secrets. If the government had to choose between losing on summary judgment and working with courts and plaintiffs’ attorneys to allow litigation to proceed while protecting against the disclosure of national security secrets, the government would have less incentive to seek an end to litigation through the SSP. The *Response’s* representation of an argument that would apply to almost no cases as one that would apply to all cases in which the government asserts the SSP is a product of its conflation of the SSP and *Totten*. The *Response* treats pre-discovery dismissal as the natural outcome of an assertion of the SSP.²¹ But that is not how evidentiary privileges operate.

C. The Problem of Overclassification

Intolerable Abuses reports on the widespread consensus that overclassification is a problem and discusses the current classification system, which creates incentives for overclassification and does not penalize overclassification.²² The *Response* attempts a partial defense of government classification policies. The *Response* contends that it is “administratively burdensome” to have too many classified documents²³ and so that is one consideration that prevents overclassification. In addition, Major Barnsby notes that he is unaware of any *intentional* overclassification.²⁴

Intolerable Abuses never contends that the problem of overclassification is the product of people intentionally classifying materials that they know should not be classified. Overclassification occurs despite the best intentions and good faith of those with the authority to classify. The problem is that the incentives are set up so that, when in doubt, people classify, as former CIA Director Porter Goss and former Defense Secretary Donald Rumsfeld and countless others have acknowledged.²⁵

18 *Response*, *supra* note 4 at 680.

19 *Id.*

20 *Intolerable Abuses*, *supra* note 1 at 487-94 (“If the SSP deprives plaintiffs of information necessary to their claim, the court may have to dismiss the complaint; although for reasons discussed below, that extreme remedy should rarely be necessary.”).

21 *See Response*, *supra* note 4 at 678 (“[T]he entire purpose of the [SSP] is to put an end to litigation that might expose national security information. . . .”).

22 *Intolerable Abuses*, *supra* note 1 at 442-46.

23 *Response*, *supra* note 4 at 682-83.

24 *Id.* at 682

25 *See Intolerable Abuses*, *supra* note 1 at 443 (citing comments by then Congressmen Goss and Rumsfeld on the problem of overclassification).

In contending that “those in the field . . . distinctly do not have an incentive to overclassify,”²⁶ the *Response* references a recent report by the Brennan Center for Justice.²⁷ That report itself identifies the same problems with incentives that encourage overclassification highlighted in *Intolerable Abuses*.²⁸

III. *JEPPESEN DATAPLAN*’S LEGACY: CONFLATION OF *TOTTEN* AND THE SSP IN *FAZAGA V. F.B.I.*

Although the *Response* characterizes the result in *Jeppesen Dataplan* as the product of a court reaching the same conclusion via two separate doctrines,²⁹ its conclusions are entirely the product of the erroneous conflation of *Totten*, a contracts doctrine, with the SSP. This is necessarily so because the SSP, properly understood as an evidentiary privilege, could never result in the pre-discovery dismissal of a case. Before a court knows what evidence will be relevant to the parties’ legal positions, it cannot determine whether or not a case can proceed without privileged evidence.

The purpose of evidentiary privileges such as the SSP is not to end litigation but to permit it to continue without the information subject to the privilege. In cases in which it is difficult for the litigation to proceed, courts may avail themselves of *in camera* proceedings conducted by security-cleared counsel – or even of *ex parte* proceedings – in order to prevent the disclosure of secret information. The record of such *in camera* proceedings can be sealed.³⁰

The *Reynolds* case³¹ on which the *Response* relies,³² recognized the SSP as an evidentiary privilege, which may excuse the government from certain discovery obligations,³³ but the question of whether the SSP can be grounds for dismissal was never raised in *Reynolds*.³⁴ The *Response* reads as if some Supreme Court precedent guided the Ninth Circuit in *Jeppesen Dataplan* and left it no choice but to dismiss the case before an Answer had been filed.³⁵ The Supreme Court has never weighed in on whether the SSP can be a basis for dismissal, and it has never addressed the question of whether the SSP can apply before discovery has begun.

26 *Response*, *supra* note 4 at 683.

27 *Id.* at 682-83 (citing Elizabeth Goitein & David M. Shapiro, Brennan Ctr. for Justice, *Reducing Overclassification Through Accountability* (2011), available at http://brennan.3cdn.net/3cb5dc88d210b8558b_38m6b0ag0.pdf).

28 See Elizabeth Goitein & David M. Shapiro, Brennan Ctr. For Justice, *Reducing Overclassification Through Accountability*, 21-38 (2011) (discussing both incentives for overclassification and the lack of incentives to refrain from or challenge overclassification).

29 *Response*, *supra* note 4 at 677-78.

30 See *Intolerable Abuses*, *supra* note 1 at 494-97 (detailing court-implemented alternatives to dismissal that permitted litigation to proceed without disclosure of classified information); see also D. A. Jeremy Telman, *Our Very Privileged Executive: Why the Judiciary Can (and Should) Fix the State Secrets Privilege*, 80 TEMPLE L. REV. 499, 518-22 (2007).

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

32 See *Response*, *supra* note 4 at 670-71 (characterizing *Reynolds* as precedent that has not been disturbed in nearly sixty years).

33 *Reynolds*, 345 U.S. at 10-12 (holding that the United States was excused from its obligation to produce an official accident investigation report on the ground that it contained information relating to electronic equipment aboard a military aircraft that crashed).

34 See *Reynolds*, 345 U.S. 1 (1953).

35 See *Response*, *supra* note 4 at 688 (arguing that “courts should continue to follow well-established Supreme Court precedent” dismissing cases based on the SSP).

It should go without saying that evidentiary privileges have to do with evidence. As articulated in *Reynolds*, the SSP comes into play when a party seeks discovery from the government or from some other entity in possession of national security information.³⁶ If the SSP is successfully invoked, and if there is no way for it to be introduced *in camera*, it may prevent the plaintiff from making out a *prima facie* case. In such cases, the court must dismiss the complaint. However, in *Jeppesen Dataplan*, plaintiffs made no discovery requests.³⁷ The case was dismissed before they could do so and before *Jeppesen Dataplan* could articulate its defenses.³⁸

The *Response* credits the Ninth Circuit for its “searching inquiry into the underlying evidence,”³⁹ but what was the nature of that inquiry? The government submitted classified affidavits through which it claimed that there was no way for the case to proceed without the release of information subject to the SSP. Such a claim makes no sense when the defendant has yet to articulate its legal theories and when no discovery has been sought.

Moreover, both the Ninth Circuit in *Jeppesen Dataplan* and the Central District of California in *Fazaga* were explicit in their conflation of the doctrines. As the Ninth Circuit explains it, the “contemporary state secrets privilege” encompasses two applications of the principle that courts may sometimes have to dismiss cases in order to prevent disclosure of state secrets: “One completely bars adjudication of claims premised on state secrets (the ‘Totten bar’); the other is an evidentiary privilege (the ‘Reynolds privilege’) that excludes privileged evidence from the case and *may* result in dismissal of the claims.”⁴⁰ The Central District decision goes further still in blurring any distinction between the two doctrines:

There are two modern applications of the state secrets doctrine: (1) a justiciability bar that forecloses litigation altogether because the very subject matter of the case is a state secret (the “Totten bar”) and (2) an evidentiary privilege that excludes certain evidence because it implicates secret information and may result in dismissal of claims (the “Reynolds privilege”). . . . While distinct, the *Totten* bar and the *Reynolds* privilege converge in situations where the government invokes the privilege – as it may properly do – before waiting for an evidentiary dispute to arise during discovery or trial.⁴¹

Thus, in small steps, the courts transform an evidentiary privilege into a doctrine that can lead to pre-discovery dismissal.

There are numerous errors in reasoning along the way. The *Jeppesen Dataplan* court errs by folding the *Totten* doctrine into the “contemporary state secrets privilege.” It is nothing of the sort. It is not a privilege, and (thus far) it only has been applied in a handful of cases brought by people who entered into voluntary agreements with the government. But even if courts do not dismiss

36 *Reynolds*, 345 U.S. at 10-11.

37 *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1076 (2010).

38 *Id.* at 1076-77.

39 *Response*, *supra* note 4 at 675.

40 *Jeppesen Dataplan*, 614 F.3d at 1077 (emphasis in original).

41 *Fazaga v. Fed. Bureau of Investigation*, Case No. 8:11-cv-00301-CJC (VBKx) (C.D. Ca. Aug. 14, 2012), slip op. at 13 (citations to *Jeppesen Dataplan* omitted).

torts cases based on *Totten*, *Totten* has infected their understanding of the SSP. *Reynolds* did concede that the SSP could in some cases require dismissal of a case, but that is no different from having to dismiss a prosecution because a key witness has died. *Reynolds* did not conceive of the SSP as necessitating pre-discovery dismissal, and that result cannot be squared with the evidentiary nature of the privilege that the Court recognized in *Reynolds*.

With the *Jeppesen Dataplan* opinion as its guide, the *Fazaga* court stumbles into erroneous conclusions, blithely stating that the *Totten* doctrine is part of the SSP and that the “*Reynolds* privilege” can result in pre-discovery dismissal.⁴² Both of these statements are doctrinally incoherent. A justiciability doctrine is not a component of an evidentiary privilege, and an evidentiary privilege cannot provide a basis for dismissal before any evidence has been sought or introduced.

IV. INTOLERABLE ABUSES DOES NOT OVERSTATE THE SIGNIFICANCE OF THE SSP

A. Is the SSP a Serious Problem?

The *Response* characterizes *Intolerable Abuses* as an overreaction to the government’s use of the SSP to end litigation in select cases.⁴³ The *Response* suggests that because the SSP is seldom invoked and only after the Department of Justice’s “onerous requirements” have been satisfied,⁴⁴ it is not subject to abuse. But the *Response* ignores Laura Donohue’s scholarship,⁴⁵ which details the enormous impact of the assertion of the SSP (or the threatened assertion of the SSP) not only in published opinions but also at earlier stages of litigation. Donohue summarizes the impact of the SSP as follows:

It has been used to undermine contractual obligations and to pervert tort law, creating a form of private indemnity for government contractors in a broad range of areas. Patent law, contracts, trade secrets, employment law, environmental law, and other substantive legal areas have similarly been affected, even as the executive branch has gained significant and unanticipated advantages over opponents in the course of litigation.⁴⁶

Clearly, the SSP has an impact well beyond that of high profile cases such as *Jeppesen Dataplan*. If *Intolerable Abuses* is to be faulted, it should be on the ground that it, like other scholarship on the SSP other than Donohue’s, focuses on the tip of the iceberg – on reported opinions – rather than on the bulk of the fights over the SSP, which do not make their way into published opinions. If anything, *Intolerable Abuses* understates the myriad ways in which the SSP undermines legal processes.

The *Response* also invokes the additional precautions that the Obama administration has taken to

42 *Id.*

43 See *Response*, *supra* note 4 at 678-681 (contending that *Intolerable Abuses* “exhibits an unmerited ‘sky is falling’ mentality”).

44 *Id.* at 679.

45 See Laura K. Donohue, *The Shadow of State Secrets*, 159 U. PA. L. REV. 77 (2010).

46 *Id.* at 91.

prevent abuses of the SSP.⁴⁷ This is cold comfort. Whatever standards are put in place during one administration can be abandoned by the next. In any case, despite the Obama administration's laudable efforts to curb use of the SSP, its invocation has already effected great harms to our constitutional order because it has prevented the judiciary from serving its constitutional purpose. Given an actual case or controversy, it is the province and duty of the courts to say what the law is. Because of the SSP, we do not know what the law is with respect to a whole range of highly questionable policies associated with the War on Terror. That uncertainty sows distrust of government actors (and their contractors) and cynicism at home, and it harms the reputation of the United States as a member of the community of nations. Moreover, as *Jeppesen Dataplan* and *Fazaga* demonstrate, despite the Holder Memo, the government continues to use the SSP to seek pre-discovery dismissal of cases, which is never appropriate.

V. CONCLUSION

My argument is simple. The government should invoke the SSP whenever necessary to prevent disclosure of information that might jeopardize national security. Courts should carefully review assertions of the SSP and work with government attorneys and plaintiffs' attorneys, who may include court-appointed, security-cleared counsel, to find a way for litigation to proceed without the disclosure of privileged information. The *Totten* doctrine can never apply to plaintiffs whose interaction with our government or its contractors was involuntary, and an evidentiary privilege can never provide a basis for pre-discovery dismissal of claims.

⁴⁷ See *Response, supra* note 4 at 679 (citing Memorandum from Eric Holder, Attorney Gen., to Heads of Exec. Dep'ts & Agencies (Sept. 23, 2009) available at <http://www.justice.gov/opa/documents/state-secret-privileges.pdf>).

