No. _____

IN THE

Supreme Court of the United States

BINYAM MOHAMED, ET AL.,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent,

JEPPESEN DATAPLAN, INC.,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals, sitting en banc, erred in affirming the pleading-stage dismissal on the basis of the evidentiary state secrets privilege of a suit seeking compensation for Petitioners' unlawful abduction, arbitrary detention, and torture.

PARTIES TO THE PROCEEDINGS

Petitioners in this case are Binyam Mohamed, Ahmed Agiza, Abou Elkassim Britel, Bisher Al-Rawi, and Mohamed Farag Ahmad Bashmilah. The respondents are Jeppesen Dataplan, Inc., and the United States of America (Intervenor-Appellee below).

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The en banc opinion of the Court of Appeals (App. 21a-93a) is reported at 614 F.3d 1070 (9th Cir. 2010). The opinion of the original three-judge panel of the Court of Appeals is reported at 579 F.3d 943 (9th Cir. 2009). The opinion of the district court (App. 1a-20a) is reported at 539 F.Supp.2d 1128 (N.D. Cal. 2008).

JURISDICTION

The Court of Appeals for the Ninth Circuit, sitting en banc, entered its judgment on September 8, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This petition involves application of the state secrets privilege, which has not been codified by any Act of Congress. Petitioners' underlying complaint raises claims under the Alien Tort Statute, 28 U.S.C. § 1350, which provides: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

STATEMENT OF THE CASE

A. The Petitioners

Each of the five petitioners in this action was forcibly disappeared and transported to arbitrary detention and torture on flights organized by Jeppesen Dataplan at the direction of the Central Intelligence Agency (CIA). The information collected below is corroborated by sworn declarations, government documents, flight records, official reports, and other reliable and publicly available evidence.

Ahmed Agiza

On December 18, 2001, Swedish authorities seized Plaintiff Ahmed Agiza, a 48-year-old Egyptian father of five seeking asylum in Sweden, and drove him to an airport, where they handed him to agents of the U.S. and Egyptian governments. Mr. Agiza's clothes were sliced from his body and a suppository was forced into his anus. He was then dressed in a diaper and overalls and dragged – barefooted, blindfolded, and shackled – to an awaiting aircraft, where he was strapped to a mattress on the floor. The flight planning and logistical support for this aircraft – a Gulfstream V jet, registered with the U.S. Federal Aviation Administration (FAA) as N379P

– were organized by Jeppesen. First Amended Compl. ¶¶ 133-38, 243-45; ER 786-87, 816.[1]

Mr. Agiza was flown to Egypt and transferred to authorities there. For five weeks, he was held incommunicado in a squalid, windowless, and frigid cell approximately two square meters in size. *Id.* ¶¶ 140-42; ER 787-88. During this period, Mr. Agiza was routinely beaten by interrogators, and he was often strapped to a wet mattress and subjected to electric shock through electrodes attached to his ear lobes, nipples, and genitals. *Id.* ¶¶ 143-45; ER 788-89. After two and a half years in detention, Mr. Agiza was given a six-hour show trial before a military court. He was convicted of membership in a banned Islamic organization and is presently serving a 15-year sentence in an Egyptian prison. *Id.* ¶ 148; ER 789.

Virtually every aspect of Mr. Agiza's rendition, including the torture he suffered in Egypt, has been publicly acknowledged by the Swedish government. Jeppesen's involvement is also a matter of public record. The Swedish government's decision to expel Mr. Agiza to Egypt and its subsequent decision to repeal that expulsion are substantiated in government documents. Declaration of Anna Wigenmark ("Wigenmark Decl.") ¶¶ 2, 7; ER 491 and 493. The decision-making process of the Swedish government leading up to Mr. Agiza's expulsion, as well as its involvement with the U.S. and

[1] "ER" refers to the Excerpts of Record submitted to the court of appeals below.

Egyptian governments, have been exhaustively and publicly investigated by the Chief Parliamentary Ombudsman and the Swedish Parliament's Standing Committee of the Constitution.

The Ombudsman's report explicitly discusses contacts between the CIA and the Swedish government over Mr. Agiza's transport to Egypt: "Some time before the expulsion decision was made . . . the Security Police received an offer from the American Central Intelligence Agency (CIA) of the use of a plane that was said to have what was referred to as direct access so that it could fly over Europe without having to touch down." Wigenmark Decl. ¶ 11; ER 495. Quoting from a memorandum drawn up by the Swedish security police on February 7, 2002, the Ombudsman also notes: "After some consultation with the staff of the Ministry for Foreign Affairs the Foreign Minister then gave approval of the acceptance by SÄPO/RPS of the help offered by the USA for the transport of A. [Mr. Agiza]." *Id*. The Ombudsman further documents the disturbing details of Mr. Agiza's mistreatment and humiliation at Bromma airport. *Id.* ¶ 14; ER 496. The Political Director at the Ministry for Foreign Affairs at the time of Mr. Agiza's rendition, Mr. Sven-Olof Petersson, advised the Standing Committee of the Constitution of the involvement of the U.S. government in initially providing information about Mr. Agiza and in convincing Egypt to accept his return. Wigenmark Decl. ¶ 20; ER 498.

The fact of Mr. Agiza's abuse and the negotiation between Sweden and Egypt of "diplomatic assurances" for his well-being following his removal to Egypt were reviewed by the United Nations Committee Against Torture. That Committee, which based its conclusions in part on documents obtained from the Swedish government, found that Sweden had violated its obligations under international human rights law. Wigenmark Decl. ¶ 6; ER 492-93. On May 16, 2007, the Swedish government, recognizing the illegality of the order that expelled Mr. Agiza from Sweden, repealed that order and reopened his application for a residence permit in Sweden. The Swedish government thereafter agreed to pay the equivalent of $450,000 in damages to Mr. Agiza in compensation for Sweden's participation in his rendition to Egypt. *See Ex-Terrorism Suspect to be Compensated*, WASH. POST, Sept. 20, 2008, at A14.

Separate inquires by the Council of Europe and the European Parliament identified the aircraft – a Gulfstream V jet, then registered with the FAA, as N379P – used to transport Mr. Agiza to Egypt. Wigenmark Decl. ¶ 21; ER 499. These inquiries, as well as investigations by plaintiffs' attorneys, have also produced three documents from public records confirming that Jeppesen provided flight planning and logistical support to the aircraft and crew used for this rendition flight. First, the local "data string" for the flight plan filed for this flight contains an originator code, KSFOXLDI, uniquely identifying Jeppesen as the entity having filed the plan with European air traffic control authorities. Declaration of

Steven Macpherson Watt ("Watt Decl.") ¶ 57; ER 298.[2] Second, an invoice, numbered 19122416, from Luftfartsverket Division, Stockholm to Jeppesen, notes that Jeppesen was billed for noise, landing, terminal navigation, emission, passenger, and security fees for a Gulfstream V aircraft with registration N379P for December 18, 2001. *Id.* ¶ 56; ER 297. Third, the information in the Luftfartsverket invoice is corroborated by a record from the Swedish Civil Aviation Administration, which also notes that the aircraft landed at Bromma airport at 19:54 and departed for Cairo at 20:49 on December 18, 2001 with nine passengers on board. Id.

Abou Elkassim Britel

On March 10, 2002, Plaintiff Abou Elkassim Britel, a 43-year-old Italian citizen of Moroccan origin, was arrested and detained in Pakistan on immigration charges. First Amended Compl. ¶¶ 90, 94; ER 777-78. While detained, Mr. Britel was interrogated by U.S. and Pakistani officials. Over the course of the following weeks, he was beaten repeatedly and suspended from the ceiling of his cell by his Pakistani captors. His

[2] "KSFOXLDI" is the originator code assigned to Jeppesen in the Aeronautical Fixed Telecommunication Network (AFTN). Every flight plan submitted by Jeppesen to air traffic control authorities, including Eurocontrol, includes this originator code, which indicates the entity responsible for filing the plan. Eurocontrol's Integrated Initial Flight Plan Processing System, IFPS Users Manual notes that the "AFTN address KSFOXLDI is a collective address for Jeppesen flight planning services in San Francisco." Watt Decl. ¶ 51; 294-295.

numerous requests to both U.S. and Pakistani officials to meet with the Italian Embassy were refused. *Id.* ¶¶ 94-98; ER 777-79. To escape further abuse, Mr. Britel confessed falsely to being a "terrorist."

On May 24, 2002, Mr. Britel was handed over to U.S. officials. He was stripped of his clothing, dressed in a diaper and overalls, and chained, shacked, and blindfolded, then transported to Morocco on the same Gulfstream V jet aircraft that had been used five months earlier to transport Mr. Agiza to Egypt. The flight planning and logistical support for the aircraft and its crew were once again provided by Jeppesen. *Id.* ¶¶ 96, 100, 102, 241-42; ER 778, 779-80, 815. Upon arrival in Morocco, Mr. Britel was handed over to agents of the Moroccan security services who detained him incommunicado at the notorious Temara prison.

For the next eight months, Mr. Britel was severely beaten, deprived of sleep and food, and threatened with forms of sexual violation – including being sodomized with a bottle and having his genitals cut off – by his Moroccan captors. *Id.* ¶¶ 104-05; ER 780. On February 11, 2003, Mr. Britel was released without charge. *Id.* ¶ 107; ER 781. With the assistance of his Italian wife and the Italian Embassy, Mr. Britel made arrangements to return to his home in Italy. On the eve of his return, however, Mr. Britel was caught up in a government dragnet in the wake of the May 16, 2003 bombings in Casablanca. He was once again detained incommunicado at the Temara prison, where he was coerced into signing

a false confession he was never permitted to read. *Id.* ¶¶ 111, 113-14; ER 781-82. On October 3, 2003, Mr. Britel was convicted of a terrorism-related charge by a Moroccan court and sentenced to 15 years in prison. An observer from the Italian Embassy reported that the trial was fundamentally flawed and failed to meet universally accepted minimum fair trial standards.

Citing a complete lack of evidence of any criminal wrongdoing, on September 29, 2006, Italian authorities closed an exhaustive six-year investigation into Mr. Britel's alleged involvement in terrorist activities. Declaration of Abou Elkassim Britel ("Britel Decl.") ¶ 27; ER 93. In January 2007, nearly one hundred Italian parliamentarians and members of the European Parliament supported a request calling on Moroccan authorities to pardon Mr. Britel. The Italian government also separately sought a pardon from the King of Morocco, as well as Mr. Britel's immediate release and repatriation to Italy. Mr. Britel remains incarcerated in Ain Bourja prison in Casablanca. *Id.* ¶ 28; ER 94.

Mr. Britel's allegations of forced disappearance and abuse in Morocco have been investigated and corroborated by the European Parliament and by the International Federation for Human Rights. Watt Decl. ¶ 33; ER 272-73. The European Parliament has identified the aircraft used to transport Mr. Britel from Pakistan to Morocco as a Gulfstream V jet aircraft, then registered with the FAA as N379P. Flight records examined by the European

Parliament also confirm that on May 24, 2004, this aircraft flew from Pakistan to Rabat and then on to Porto, Portugal. Britel Decl. ¶ 14; ER 91-92. Jeppesen's involvement in providing the flight planning and logistical support to the aircraft and crew is also substantiated by flight records. The local "data string" for the flight plan filed with European air traffic control authorities for this flight contains Jeppesen's originator code, KSFOXLDI. Britel Decl. ¶ 14-15; ER 91-92.

Binyam Mohamed

On April 10, 2002, Plaintiff Binyam Mohamed, a 31-year-old Ethiopian citizen and legal resident of the United Kingdom, was arrested at the airport in Karachi, Pakistan on immigration charges. For more than three months, Mr. Mohamed was held in secret detention, interrogated, and abused by his Pakistani captors. During this time, he was also interrogated by agents of the U.S. and British governments. First Amended Compl. ¶¶ 59-60; ER 771. On July 21, 2002, Mr. Mohamed was handed over to U.S. officials, who stripped, shackled, blindfolded, and dressed him in a tracksuit before dragging him on board a Gulfstream V jet aircraft, then registered with the FAA as N379P – the same aircraft used to render plaintiffs Agiza and Britel to Egypt and Morocco – and flying him to Morocco. On information and belief, Jeppesen provided the flight and logistical support for this aircraft and its crew. *Id.* ¶¶ 65-68, 238; ER 772-73, 814.

Mr. Mohamed was handed over to agents of the Moroccan security services. Over the next 18 months, he was routinely beaten to the point of losing consciousness, and a scalpel was used to make incisions all over his body, including his penis, after which a hot stinging liquid was poured into his open wounds. *Id.* ¶¶ 69-71; ER 773. On January 22, 2004, Mr. Mohamed was returned to the custody of U.S. officials. These officials photographed him, stripped him, dressed him in overalls, handcuffed, shackled, and blindfolded him, and then put him on board an aircraft and flew him to Afghanistan. The flight planning and logistical support to the aircraft – a Boeing 737 business jet, then registered with the FAA as N313P – were provided by Jeppesen. *Id.* ¶¶ 73-75, 239-40; ER 774, 814-815.

Immediately after arriving in Afghanistan, Mr. Mohamed was taken to a CIA-run prison outside Kabul commonly known as the "Dark Prison." He was held there for the next four months. He was physically beaten, had his head repeatedly slammed against a wall, and was suspended by his arms from a pole. He was deprived of sleep by being subjected to excruciatingly loud noises, including the screams of women and children, thunder, and loud rock music 24 hours a day. *Id.* ¶¶ 76-80; ER 774-75. Deprived of adequate food, Mr. Mohamed lost between 40 and 60 pounds. He was permitted outside once during this time and then only for five minutes – the only time he had seen the sun in two years. *Id.* ¶¶ 78, 80, 83; ER 775-76. In September 2004, Mr. Mohamed was transferred to Guantánamo. *Id.* ¶ 88; ER 777. Mr. Mohamed

was released from Guantánamo during the pendency of this litigation, and he now resides in the United Kingdom.

Mr. Mohamed's allegations have been extensively investigated and his account corroborated by the Council of Europe, the European Parliament, and human rights organizations. In November of 2010, in order to settle litigation that Mr. Mohamed brought against the U.K. government for its role in his unlawful detention and torture, that government reportedly paid Mr. Mohamed and fifteen other current and former Guantánamo detainees several million dollars. John F. Burns & Alan Cowell, *Britain to Compensate Former Guantánamo Detainees*, N.Y. TIMES, Nov. 16, 2010. That settlement followed years of judicial proceedings and official investigations into the circumstances of Mr. Mohamed's detention and interrogation in U.S. and Moroccan custody. For example, inquiries by both the European Parliament and the Council of Europe, through examination of flight records, identified the aircraft used in both Mr. Mohamed's rendition from Pakistan to Morocco in 2002 and his rendition from Morocco to Afghanistan in 2004, determining that the aircraft – respectively, a Gulfstream V jet, registered N379P and a Boeing Business Jet, then registered N313P – had been involved in numerous other rendition flights. Stafford-Smith Decl. ¶¶ 6-7; ER 21-22.

Documentation uncovered in a criminal investigation by a Spanish prosecutor concerning the CIA's use of Spanish airports as a "staging

post" for unlawful rendition flights and by the Council of Europe's similar inquiry substantiates Jeppesen's role in furnishing the flight planning and logistical support to the aircraft and crew used for Mr. Mohamed's second rendition. The Spanish prosecutor obtained a telex from Jeppesen to its agent in Mallorca, Spain, Mallorcair requesting that Mallorcair provide ground handling services and pay airport fees for N313P from January 25-27, 2004. Declaration of Clive Stafford-Smith ("Stafford-Smith Decl.") ¶ 8; ER 22. In a statement to Spanish police, Mallorcair confirmed receipt of instructions for this aircraft from Jeppesen. *Id.* ¶ 9; ER 22-23.

Bisher Al-Rawi

On November 8, 2002, Plaintiff Bisher Al-Rawi, a 42-year-old Iraqi citizen and legal resident of the United Kingdom, was arrested at the international airport in Banjul, Gambia, where he had traveled with several colleagues to commence a business venture. First Amended Compl. ¶¶ 193, 203; ER 800, 803. On the first day of his detention, U.S. officials, who appeared to be in control of the situation, met with and interrogated Mr. Al-Rawi. *Id*. at 204; ER 803-04.

On December 8, 2002, Mr. Al-Rawi was driven to an airport. There, U.S. agents stripped him, dressed him in a diaper and overalls, chained and shackled him, and dragged him on board an awaiting aircraft. The flight planning and logistical support services for this aircraft – a Gulfstream V jet, then registered with the FAA as N379P – were provided by Jeppesen. *Id*. ¶¶ 204,

212, 215, 248-49; ER 803-04, 806, 816-17; *see also* Declaration of Bisher Al-Rawi ("Al-Rawi Decl.") ¶¶ 43-44; ER 116.

Mr. Al-Rawi was flown to Afghanistan and detained at the CIA-run "Dark Prison" where, for two weeks, he was held in isolation in a tiny, pitch-black cell, constantly chained and shackled. Loud noises were blasted into his cell 24 hours a day, making sleep almost impossible. First Amended Compl. ¶¶ 215-17; ER 806-07. Mr. Al-Rawi was later transferred to the U.S.-run Bagram Air Base, where he was beaten, kept shackled with heavy chains for extended periods, and deprived of adequate sleep, water, and clothing. *Id*. at ¶¶ 219-22; ER 807-808. In January 2003, Mr. Al-Rawi was transferred to the Guantánamo Bay Naval Station. On March 20, 2007, after four and a half years in U.S.-controlled detention without charge, he was released back to his home and family in the United Kingdom. *Id*. ¶¶ 223, 227; ER 808, 809.

In November of 2010, in order to settle litigation that Mr. Al-Rawi brought against the U.K. government for its role in his unlawful detention and torture, that government reportedly paid him and fifteen other current and former Guantánamo detainees several million dollars. John F. Burns & Alan Cowell, *Britain to Compensate Former Guantánamo Detainees*, N.Y. TIMES, Nov. 16, 2010. That settlement was preceded by the British government's disclosure of numerous documents corroborating Mr. Al-Rawi's allegations. According to a report published by the U.K. Parliamentary Intelligence

and Security Committee on July 25, 2007, the British Security Service "was informed by the U.S. authorities that they intended to conduct . . . a 'Rendition to Detention' operation, to transfer [Mr. Al-Rawi and others] from The Gambia to Bagram Air Base in Afghanistan. The Service registered strong concerns, both orally and in writing, at this suggestion and alerted the FCO (U.K. Home, Foreign and Commonwealth Office)." British diplomats in both Gambia and the United States raised protests with their counterparts at the U.S. State Department and the National Security Council. Al-Rawi Decl. ¶¶ 44-45; ER 116-17.

Separate inquires by the Council of Europe and the European Parliament identified the aircraft – a Gulfstream V jet, then registered with the FAA, as N379P – used to transport Mr. Al-Rawi to Afghanistan. Al-Rawi Decl. ¶ 42; ER 116. These flight records also confirm that Jeppesen provided flight planning and logistical support to the aircraft and crew used for this rendition flight. The local "data string" for the flight plan filed for this flight contains Jeppesen's originator code, KSFOXLDI. Al-Rawi Decl. ¶¶ 42-43; ER 116.

Mohamed Farag Ahmad Bashmilah

On October 21, 2003, Plaintiff Mohamed Farag Bashmilah, a 42-year-old Yemeni citizen, was apprehended by agents of the Jordanian government while he was visiting Jordan to care for his ailing mother. First Amended Compl. ¶ 152, 154; ER 790-91. After several days of

detention and interrogation under brutal torture, Mr. Bashmilah was coerced into signing a false confession. *Id*. ¶ 156; ER 791. The Jordanians then handed him over to agents of the U.S. government, who beat and kicked him, sliced off his clothes, replaced them with a diaper and a blue outfit, shackled and blindfolded him, then dragged him on board an awaiting aircraft. Declaration of Mohamed Farag Ahmad Bashmilah ("Bashmilah Decl.") ¶¶ 36-41; ER 311-13. The flight planning and logistical support for this aircraft – the same Gulfstream V jet that had been used in the transportation of the other four plaintiffs – were organized by Jeppesen, First Amended Compl. ¶¶ 160, 246-47; ER 792, 816, and used Jeppesen's unique originator code, Bashmilah Decl. ¶ 42; ER 313.

On October 26, 2003, Mr. Bashmilah was flown to Afghanistan, where he spent nearly six months in secret incommunicado detention at a U.S.-run facility. *Id*. ¶ 163; ER 793. For the first three months, he was held in a windowless six-square-meter cell with a bucket as a toilet; during his first 15 days, he was kept in the same diaper that had been forced on him in Jordan, and his hands and legs remained tied. Bashmilah Decl. ¶¶ 56-64; ER 317-19. On three separate occasions during these initial months of detention, Mr. Bashmilah tried to end his life. *Id*. ¶ 66; ER 319-20.

In April 2004, Mr. Bashmilah was "rendered" a second time to a site in an unknown country, where he was subjected to similar physical and psychological abuse. First Amended

Compl. ¶¶ 171-72; ER 794-95. At one point during his detention in this facility, Mr. Bashmilah cut himself and used his own blood to write "I am innocent" and "This is unjust" on his cell walls. Bashmilah Decl. ¶ 116; ER 336. On May 5, 2005, U.S. authorities transferred Mr. Bashmilah to Yemen, his country of birth. Bashmilah Decl. ¶¶ 172-76; ER 352-54. On February 13, 2006 Mr. Bashmilah was tried for the crime of forgery based on his admission that he had used a false identity document while living in Indonesia. Bashmilah Decl. ¶ 178; ER 354. On February 27, 2006, the Yemeni court sentenced him to time served both inside and outside of Yemen – which included the 18 months he was held in U.S. detention facilities. Bashmilah Decl. ¶ 181; ER 354-55.

Flight records detail Mr. Bashmilah's rendition flight from Jordan to Afghanistan on October 26, 2003 on board a CIA-owned Gulfstream V jet, registered N379P. Jeppesen's involvement in providing the flight planning and logistical support services to the aircraft and crew is a matter of public record. Bashmilah Decl. ¶ 42; ER 313.

B. Jeppesen's Role in the Rendition Program

Jeppesen's involvement in the rendition flights described above, as well as many others, is a matter of public record, traceable in flight plans and other documents filed with national and inter-governmental aviation authorities in the United States and across Europe. Jeppesen was

not only providing crucial flight planning and logistical support services to the aircraft and crew – including filing flight plans, planning itineraries, obtaining landing permits, and arranging for fuel and ground handling – it was also using its legitimacy as a well-known aviation services company to enable the CIA to disguise the true nature of these flights. The Council of Europe has revealed that Jeppesen filed "multiple 'dummy' flight plans" for many of the CIA flights it supported, further contributing to the concealment of the flights' unlawful purposes. Watt Decl. ¶ 34, Exh. S(b); ER 274-79.

Jeppesen participated in the rendition program with full knowledge of the consequences of its actions. On August 11, 2006, Sean Belcher, who then worked for Jeppesen, attended a meeting for new employees convened by Bob Overby, director of Jeppesen International Trip Planning Service at Jeppesen's San Jose office. During his presentation, Overby said: "We do all the extraordinary rendition flights." Apparently believing that only a few people present knew what he was referring to, Overby clarified that these were "torture flights," explaining, "let's face it, some of these flights end up this way," or words to that effect. He added that the flights paid very well and that the government spared no expense. He also revealed that two employees, one mentioned by name, handled rendition flights for the company. Declaration of Sean Belcher ("Belcher Decl.") ¶4; ER 16.

C. Proceedings Below

On May 30, 2007, petitioners filed suit against Jeppesen, seeking compensation for its complicity in their unlawful abduction, arbitrary detention, and torture. The complaint alleged violations of the Alien Tort Statute, 28 U.S.C. § 1350. Although not named as a defendant, the United States moved to intervene before Jeppesen had answered the complaint, and before discovery had commenced, for the purpose of seeking dismissal of the suit pursuant to the evidentiary state secrets privilege. The government argued that the subject matter of the suit was a state secret as a matter of law, and that any litigation of petitioners' claims would cause harm to national security. On February 13, 2008, the district court granted the motion to dismiss.

On April 28, 2009, a three-judge panel of the Ninth Circuit reversed. The court held that the government's invocation of the state secrets privilege had been premature and overbroad, and that the privilege must be invoked with respect to specific evidence as opposed to broad categories of information. It remanded the case to permit the government to assert the privilege over discrete evidence and to permit the district court to assess the consequences of the government's proper privilege assertion.

The United State thereafter petitioned for en banc review; the court of appeals granted the petition and held argument on December 15, 2009. On September 8, 2010, the en banc court affirmed the district court's dismissal of the action by a 6-to-5 vote. The court "assume[d]

without deciding that plaintiffs' prima facie case and Jeppesen's defenses m[ight] not inevitably depend on privileged evidence." App. 60a. But the court held that "dismissal [was] nonetheless required . . . because there [was] no feasible way to litigate Jeppesen's alleged liability without creating an unjustifiable risk of divulging state secrets. . . ." *Id.*

Judge Hawkins dissented. Writing for five judges, Judge Hawkins asserted that dismissal of a suit pursuant to the state secrets privilege is "justified if and only if specific privileged evidence is itself indispensable to establishing either the truth of the plaintiffs' allegations or a valid defense that would otherwise be available to the defendant." App. 74a-75a. The dissenting judges "would [have] remand[ed] to the district court to determine whether Plaintiffs can establish the prima facie elements of their claims or whether Jeppesen could defend against those claims without resort to state secrets evidence." App. 93a.

REASONS FOR GRANTING THE PETITION

I. The Government's Increased Reliance on the Evidentiary State Secrets Privilege to Preclude Any Judicial Inquiry Into Serious Allegations of Intentional and Grave Executive Misconduct Presents an Issue of Overriding National Significance.

In *United States v. Reynolds*, 345 U.S. 1 (1953), this Court recognized the government's limited right to prevent disclosure through

discovery of "military and state secrets," cautioning that the privilege was "not to be lightly invoked." Id. at 7-8. *Reynolds* arose out of a damages action brought by the families of civilians who died in the crash of a military aircraft. In response to a discovery request for the flight accident report, the government asserted the state secrets privilege, arguing that the report contained information about secret military equipment that was being tested aboard the aircraft during the fatal flight. 345 U.S. at 3-4. The Court upheld the Executive's authority to assert the state secrets privilege, requiring "a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer." *Id.* at 7-8. Mindful that misuse of the privilege might lead to "intolerable abuses," the Court admonished that "judicial control in a case cannot be abdicated to the caprice of executive officers." Id. at 9-10.[3] The greater the necessity for the allegedly privileged information in presenting the case, the more a "court should probe in satisfying itself that the occasion for invoking the privilege is appropriate." Id. at 11.

[3] The Court's concern was well-founded. In 1996, the accident report at issue was declassified. A review of the report revealed no "details of any secret project the plane was involved in," but "[i]nstead, . . . a horror story of incompetence, bungling, and tragic error." Garry Wills, *Why the Government Can Legally Lie*, 56 N.Y. REV. OF BOOKS 32, 33 (2009).

This Court has not directly addressed the scope and application of the privilege since *Reynolds*. In the intervening years, the privilege has become unmoored from its evidentiary origins. No longer is the privilege invoked solely with respect to discrete evidence; rather, the government now routinely invokes the privilege at the pleading stage, before any evidentiary disputes have arisen. *Reynolds'* instruction that courts are to weigh a plaintiff's showing of need for particular evidence in determining how deeply to probe the government's claim of privilege is rendered wholly meaningless when the privilege is invoked before any request for evidence has been made. Moreover, the government has invoked the privilege with greater frequency;[4] in cases of greater national significance;[5] and in a

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[4] Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 FORDHAM L. REV. 1931, 1939 (2007) ("The Bush Administration has raised the privilege in twenty-eight percent more cases per year than in the previous decade, and has sought dismissal in ninety-two percent more cases per year than in the previous decade."); William G. Weaver & Robert M. Pallitto, *State-secrets and Executive Power*, 120 POL. SCI. Q. 85, 100 (2005) (concluding that the executive is asserting the privilege with increasing frequency, and declaring that the "Bush administration lawyers are using the privilege with offhanded abandon"); *see also* Ryan Devereaux, *Is Obama's Use of State Secrets Privilege the New Normal?,* THE NATION, Sept. 29, 2010 (noting Obama administration's continuation of Bush administration's state secrets policies).

[5] Editorial, *Too Many Secrets*, N.Y. TIMES, Mar. 10, 2007, at A12, available at 2007 WLNR 4552726 ("It is a challenge to keep track of all the ways the Bush administration is eroding constitutional protections, but one that should get more attention is its abuse of the state secrets doctrine.").

manner that seeks effectively to transform it from an evidentiary privilege into an immunity doctrine, thereby "neutraliz[ing] constitutional constraints on executive powers." Note, *The Military and State Secrets Privilege: Protection for the National Security or Immunity for the Executive?*, 91 YALE L.J. 570, 581 (1982). The consequence of this transformation has been that a broad range of official misconduct has been shielded from judicial review after government officials have invoked the privilege to avoid adjudication.

In particular, since September 11, 2001, the government has invoked the privilege frequently in cases that present serious and plausible allegations of grave executive misconduct. For example, it has sought to foreclose judicial review of the National Security Agency's warrantless surveillance of United States citizens in contravention of the Foreign Intelligence Surveillance Act, *ACLU v. NSA*, 438 F. Supp. 2d 754 (E.D. Mich. 2006). And, as here, it has invoked the privilege to seek dismissal of suits challenging the government's seizure, transfer, and torture of innocent foreign citizens. *See Jeppesen, supra*; *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007); *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (E.D.N.Y. 2006) (dismissed on other grounds). Most recently, it has invoked the privilege to seek dismissal of a suit challenging the Executive's authority to use lethal force against a United States citizen outside of armed conflict and without due process, albeit as a "last resort" if other grounds are rejected. *See* Spencer Hsu, *Obama invokes 'state secrets' claim to*

dismiss suit against targeting of U.S. citizen al-Aulaqi, Washington Post, Sept. 25, 2010.[6]

These qualitative and quantitative shifts in the government's use – and the courts' acceptance – of the state secrets privilege warrant Supreme Court review.

II. The Court Should Grant Review to Clarify the Proper Scope and Application of the State Secrets Privilege

A. There is conflict and confusion in the lower courts as to the application and scope of the privilege.

The proliferation of cases in which the government has invoked the state secrets privilege, and the lack of guidance from this Court since its 1953 decision in *Reynolds*, have produced conflict and confusion among the lower

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[6] The Attorney General recently issued a new set of guidelines to regulate the Executive Branch's use of the privilege. *See* Memorandum from Eric Holder, Attorney Gen., to Heads of Executive Dep'ts and Agencies and Heads of Dep't Components (Sept. 23, 2009), *available at* http://www.justice.gov/opa/documents/state-secret-privileges.pdf. Even under the new policy, however, the Executive continues to assert (as it has in this case) that the privilege may be used to dismiss cases at the pleading stage, before the opposing party has a chance to prove its case using non-privileged evidence. In any event, voluntary executive-branch self-policing is no substitute for checks and balances.

courts regarding the proper scope and application of the privilege.

In *Tenet v. Doe*, 544 U.S. 1 (2005), the Court clarified the distinction between the evidentiary state secrets privilege, which may be invoked to prevent disclosure of specific evidence during discovery, and the so-called *Totten* rule, which requires outright dismissal at the pleading stage of cases involving unacknowledged espionage agreements.[7] As the Court explained, *Totten* is a "unique and categorical . . . bar—a rule designed not merely to defeat the asserted claims, but to preclude judicial inquiry." *Tenet*, 544 U.S. at 6. By contrast, the Court noted, the state secrets privilege deals with evidence, not justiciability. *Id.* at 9-10. Nevertheless, some courts—including the court of appeals below—have permitted the government to invoke the evidentiary state secrets privilege to terminate litigation even before there is any evidence at issue.

Because the state secrets privilege was discussed in *Tenet* only to contrast it with the *Totten* rule, the *Tenet* Court had no occasion to clarify the proper scope and use of the state secrets privilege. This Court should accept review in the present case to resolve conflicting decisions and widespread confusion in the lower courts about when a case may be dismissed on the basis of the privilege.

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[7] In *Totten v. United States*, 92 U.S. 105 (1875), the Court dismissed at the pleading stage an action to enforce an alleged secret espionage contract, because the government could neither confirm nor deny the contract's existence.

The greatest source of confusion in the lower courts with respect to the privilege is whether a case may properly be dismissed at the pleading stage on the basis of the state secrets privilege – a stage at which the invocation must be asserted over abstract or predictive categories of information, and must be assessed in a vacuum without actual contested evidence. Decisions permitting pleading-stage dismissal of entire actions or claims on state secrets grounds often stem from an erroneous conflation of the *Totten/Tenet* doctrine and the evidentiary state secrets privilege.

A number of courts have held that a case may be dismissed at the pleading stage pursuant to the state secrets privilege if the "very subject matter" of the suit is a state secret. *See, e.g., El-Masri*, 479 F.3d at 306, 311 (affirming pleading-stage dismissal of suit alleging arbitrary detention and torture at CIA-run prison on ground that the suit's very subject matter was a state secret); *Zuckerbraun v. Gen.-Dynamics Corp.*, 935 F.2d 544, 547 (2d Cir. 1991) (dismissing wrongful death claim implicating ship's weapons system at the pleading stage because the very subject matter was a state secret). This application of the state secrets privilege, which effectively imports *Totten's* justiciability regime into the evidentiary doctrine of Reynolds, has not been accepted by other courts. *See In re Sealed Case*, 494 F.3d 139, 158 (D.C. Cir. 2007) (Brown, J., concurring and dissenting) (observing that D.C. Circuit, which hears numerous state secrets cases, "has had no occasion to apply the 'very subject matter'

ground"); *Jeppesen*, App. 35a (distinguishing "very subject matter" rule of *Totten* from evidentiary rule of *Reynolds*).

Still other courts, like the en banc Ninth Circuit below, have dismissed suits at the pleading stage not because the "very subject matter" was a state secret, but because the court accepted the government's wholly predictive judgment that state secrets would be so central to proving the parties' claims or defenses that the litigation could not conceivably reach resolution. *See, e.g.*, *Jeppesen*, App. 60a (assuming that privilege would not interfere with plaintiffs' claims or defendants' defenses but affirming dismissal on ground that there was "no feasible way to litigate Jeppesen's alleged liability without creating an unjustifiable risk of divulging state secrets" (emphasis omitted)); *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268, 281 (4th Cir. 1980) (en banc) (dismissing contract suit between defense contractors at pleading stage because any trial would "inevitably" reveal state secrets); *Bareford v. Gen. Dynamics Corp.*, 973 F.2d 1138 (5th Cir. 1992) (dismissing case because trial "would inevitably lead to a significant risk" that state secrets would be disclosed).

A third set of cases, however, have properly refused to dismiss suits at the pleading stage, rejecting the government's invitation to assess the effect of a privilege claim in the absence of actual evidence, and recognizing the impossibility of determining at the pleading stage what evidence would be relevant and necessary to the parties' claims and defenses. *See, e.g.*, *In re United States*,

872 F.2d 472, 477 (D.C. Cir. 1989) (refusing to dismiss Federal Tort Claims action merely on basis of the government's "unilateral assertion that privileged information lies at the core of th[e] case."); *DTM Research, L.L.C. v. AT&T Corp.*, 245 F.3d 327, 334-35 (4th Cir. 2001) (upholding claim of privilege but rejecting premature dismissal of trade secret misappropriation suit and remanding for further discovery); *Monarch Assurance P.L.C. v. United States*, 244 F.3d 1356, 1364 (Fed. Cir. 2001) (reversing premature dismissal of contract suit on basis of the privilege so that plaintiff could engage in further discovery to support claim with non-privileged evidence); *Spock v. United States*, 464 F. Supp. 510, 519 (S.D.N.Y. 1978) (rejecting pre-discovery motion to dismiss Federal Tort Claims Act suit on state secrets grounds as premature); *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 994 (N.D. Cal. 2006) (refusing to evaluate whether parties could prove claims and defenses without state secrets—and to dismiss on that basis—at pleading stage).

This confusion among lower courts as to when dismissal of complaints may be permissible reflects uncertainty about the proper balance between robust judicial review and deference to the Executive. *Compare Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998) (holding that government's privilege claim is owed "utmost deference"), with *In re United States*, 872 F.2d at 475 ("[A] court must not merely unthinkingly ratify the Executive's assertion of absolute privilege, lest it inappropriately abandon its important judicial role."). The court of appeals below applied a degree of deference that is

difficult to reconcile with ordinary pleading-stage practice. As this Court has made clear, "[w]hen a federal court reviews the sufficiency of a complaint, before the reception of any evidence . . ., its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

The court of appeals abandoned that well-settled practice, opting instead for predictive judgments about a nascent litigation and concluding that "the facts underlying plaintiffs' claims are so infused with . . . secrets, [that] *any* plausible effort by Jeppesen to defend against them would create an unjustifiable risk of revealing state secrets, even if plaintiffs could make a prima facie case on one or more claims with nonprivileged evidence." *Jeppesen*, App. 61a-62a. The court denied the petitioners any opportunity to attempt a prima facie showing based on evidence already assembled and on nonprivileged discovery. Nor did it require the defendant to demonstrate any actual defense that it might be precluded from advancing by the elimination of evidence. In so doing it "abandon[ed] the practice of deciding cases on the basis of evidence . . . in favor of a system of conjecture." *In re Sealed Case*, 494 F.3d at 150.

This Court should clarify that dismissal of a suit on the basis of the state secrets privilege is appropriate solely when the removal of privileged evidence renders it impossible for the plaintiff to put forth a prima facie case, or for the defendant

to assert a valid defense—a determination that cannot be made at the pleading stage. And it should permit the plaintiff to submit all non-privileged evidence before the court evaluates the consequences of the government's invocation of the privilege.

B. This case is illustrative of the lower courts' departure from the privilege's evidentiary roots and from the principles of *Reynolds*.

This case provides a compelling example of the lower courts' acquiescence in the government's expansion of the privilege beyond its evidentiary foundation. In this case, the government sought outright dismissal of all claims by invoking an evidentiary privilege before any evidence had even been requested. Relying entirely on the CIA Director's speculative assessment of what evidence might be required to adjudicate petitioners' claims, the court of appeals acceded to the government's demand that petitioners be denied any judicial remedy for the unconscionable and unlawful treatment to which they were subjected.

As the court of appeals acknowledged, the CIA's extraordinary rendition program is not a state secret. App. 66a. Moreover, Jeppesen's involvement in that program, as petitioners have amply demonstrated, is a matter of public record, confirmed through sworn testimony, public flight records, and other documentary evidence. As a matter of law and common sense, the government cannot legitimately keep secret what is already

widely known. *See, e.g.*, *Ellsberg v. Mitchell*, 709 F.2d 51, 61 (D.C. Cir. 1983) (rejecting portion of privilege claim on ground that so much relevant information was already public); see also *Snepp v. United States*, 444 U.S. 507, 513 n.8 (1980) (suggesting that the government would have no interest in censoring information already "in the public domain")

Indeed, the volume of publicly confirmed information about the CIA's rendition program, Jeppesen's role in that program, and the participation of other nations in the rendition, detention, and interrogation of the petitioners is vast and growing. Britain and Sweden have provided compensation to three of the petitioners, as noted earlier, and the British government has recently announced an independent inquiry, headed by a retired appeals court judge, into the accusations of the British Intelligence agencies collusion with the CIA and other foreign organizations in the torture of terrorism suspects. *See* Ian Cobain, *David Cameron Announces Torture Inquiry*, THE GUARDIAN (LONDON), July 6, 2010. It would be a remarkable irony if U.S. courts were persuaded to affirm the dismissal of this suit in order to protect from disclosure the roles played by other nations -- when those very nations have been engaged in proceedings that continue to expose precisely the relationships and information that the United States here characterizes as "state secrets."

Furthermore, in other contexts, U.S. courts have already taken note of the facts underlying this litigation and assessed their legal

significance. In a habeas corpus case in the District of Columbia brought by a Guantánamo Bay detainee named Farhi Saeed Bin Mohammed, the government sought to rely on statements obtained from Binyam Mohamed, a petitioner in this case, in an attempt to establish that the habeas petitioner had trained in al-Qaeda camps. *Mohammed v. Obama*, 704 F. Supp. 2d 1 (D.D.C. 2009). The government contended that the statements, obtained after Binyam Mohamed's transfer to Guantánamo, were uncoerced and therefore reliable. *Id.* at 18. However, Judge Kessler made clear that the "Government's claims of reliability [were] undermined by the sworn declaration of Binyam Mohamed that he was brutalized for years while in United States custody overseas at foreign facilities." *Id.* at 20.

Judge Kessler summarized Binyam Mohamed's "harrowing story" of detention and torture in Pakistan, Morocco, and Afghanistan, noting that the government did "not challenge or deny the accuracy of Binyam Mohamed's story of brutal treatment," *id.* at 24. Notwithstanding the government's position, Judge Kessler found that Mohamed's account of rendition and torture was credible, explaining that it was "extraordinarily detailed," it "provide[d] approximate dates at multiple points in the narrative, describe[d] the physical features and conduct of guards and interrogators, and [wa]s consistent throughout several accounts." *Id.* at 25. Moreover, "the fact that Binyam Mohamed . . . vigorously and very publicly pursued his claims in British courts subsequent to his release from Guantánamo Bay

suggests that the horrific accounts of his torture were not simply stories created solely to exculpate himself. . . . His persistence in telling his story demonstrates his willingness to test the truth of his version of events in both the courts of law as well as the court of public opinion." *Id.* at 25-26.

Having deemed Mohamed's allegations credible, Judge Kessler assessed their significance:

> Binyam Mohamed's trauma lasted for two long years. During that time, he was physically and psychologically tortured. His genitals were mutilated. He was deprived of sleep and food. He was summarily transported from one foreign prison to another. Captors held him in stress positions for days at a time. He was forced to listen to piercingly loud music and the screams of other prisoners while locked in a pitch-black cell. All the while, he was forced to inculpate himself and others in various plots to imperil Americans.
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> * * * * *
>
> [T]here is no question that throughout his ordeal Binyam Mohamed was being held at the behest of the United States. Captors changed the sites of his detention, and frequently changed his location within each detention facility. He was shuttled from country to country, and interrogated and beaten without having access to counsel until arriving at Guantánamo Bay. . . .

Id. at 26-28. Accordingly, "based on the factors discussed above," Judge Kessler held that "Binyam Mohamed's will was overborne by his lengthy prior torture, and therefore his confessions to Special Agent [Redacted] do not represent reliable evidence to detain Petitioner." *Id.* at 29. Judge Kessler ordered the government to release the petitioner.[8]

That Binyam Mohamed's credible account of rendition and torture could form the basis for another detainee's successful habeas corpus petition, but may not be put forward in support of his own petition for redress, demonstrates that the state secrets doctrine has been stretched beyond coherence. The abundant documentary, testimonial, and physical evidence submitted by petitioners below and collated by the dissenting judges of the court of appeals into an appendix of publicly available information corroborating petitioners' claims demonstrate that this case could be litigated without recourse to state secrets.

[8] In the habeas corpus litigation, as in the courts below, the government refused to confirm or deny Binyam Mohamed's allegations of torture. However, Judge Kessler did not permit the government's refusal to confirm or deny the allegations to prevent her from evaluating their credibility and assessing their legal consequences.

II. If The Court Believes that *Reynolds* Requires Dismissal of Petitioners' Claims, then This Case Presents an Appropriate Vehicle for Partial Reexamination of *Reynolds*.

This Court has not revisited its holding in *Reynolds* in more than half a century.[9] *Reynolds* was a wrongful death suit in which the privilege was invoked during discovery to block disclosure of a single document. The Executive Branch's assertion of the state secrets privilege in such a case is quite unlike a sweeping assertion of the privilege to foreclose judicial review of entire categories of executive misconduct. Experience has shown that a set of rules devised to govern the former situation may be inadequate as a check on the latter.

Two developments since *Reynolds* further undermine any reliance on that decision to support pleading-stage dismissals. First, the privilege is now routinely invoked to block adjudication of disputes that raise profound constitutional questions about the enumerated powers of the three branches and, more

[9] The Court has granted certiorari in consolidated cases involving the government's invocation of the state secrets privilege to prevent military contractors from obtaining evidence to defend against a government breach-of-contract claim. *See Gen. Dynamics Corp. v. United States; Boeing Co. v. United States*, Nos. 09-1298 & 09-1302. Those cases, however, raise a question distinct from the question presented here and in the lion's share of state secrets cases; that is, whether the government may maintain a claim *against* a party when it has invoked the state secrets privilege to deny that party a defense to the claim.

specifically, the role of courts in safeguarding individual rights against serious abuses of government power. (See Point I, supra). Second, courts have become more accustomed to assessing claims regarding access to sensitive information than they were in 1953. Under the Freedom of Information Act (FOIA), for instance, Congress authorized courts to determine whether the government has properly classified information. See 5 U.S.C. § 552(a)(4)(B) & (b)(1) (2002); *Ray v. Turner*, 587 F.2d 1187, 1191-95 (D.C. Cir. 1978) (describing de novo review procedures required by FOIA). Similarly, under the Foreign Intelligence Surveillance Act ("FISA"), Article III judges must independently review the government's assertion that electronic surveillance is needed for foreign intelligence purposes. *See* 50 U.S.C. § 1805 (2006). FISA empowers all federal district courts, not just the special FISA court, to review highly sensitive information in camera and ex parte to determine whether the surveillance was authorized and conducted in accordance with FISA. *See* 50 U.S.C. § 1806(f) (2006).

Finally, the Classified Information Procedures Act (CIPA), 18 U.S.C. App. 3, empowers federal judges to craft special procedures to determine whether and to what extent classified information may be used at trial. *See generally United States v. Pappas*, 94 F.3d 795, 799 (2d Cir. 1996). Section 4 of CIPA, which allows for defense discovery of classified information, explicitly provides courts with discretion to deny government requests to delete specific data from classified materials or substitute summaries or stipulations of facts. 18

U.S.C. App. 3 § 4. When section 4 of CIPA is invoked, a judge must determine the relevance of the information in light of the asserted need for information and any claimed government privilege.

Most recently, courts have weighed classified and other highly sensitive evidence in the habeas corpus proceedings of petitioners detained in Guantánamo Bay. *See Boumediene v. Bush*, 553 U.S. 723 (2008). Notwithstanding the government's objections to the adversarial testing of that evidence, courts have employed security clearances and protective orders to fashion proceedings that safeguard both the government's legitimate security interests and the rule of law.

These developments call for the reexamination of Reynolds, if *Reynolds* is deemed to support the pleading stage dismissal that occurred in this case. At a minimum, the Court should require in all instances that the government produce the evidence as to which it has invoked the privilege for in camera inspection by the district court. Courts are plainly equipped to evaluate such evidence, and requiring in camera inspection would avoid the doctrinal confusion attendant to adjudicating the effects of an evidentiary privilege in the absence of actual evidence. And, in cases in which the government (or its agents) is a party and plaintiffs raise serious allegations of grave executive misconduct – such as the kidnapping and torture claims at the heart of this suit – the evidentiary consequences of the government's invocation of the state secrets privilege should not be borne by

the plaintiffs alone. In such cases, even if the privilege is validly invoked to prevent disclosure of sensitive evidence, compensatory action – such as construing facts in favor of deprived litigants or shifting burdens against the government or defendant – may be the only means for the courts to enforce constraints on executive power. Finally, this Court should consider adopting the "proportionality" analysis routinely employed by foreign courts applying parallel secrecy privileges,[10] and by U.S. courts in analogous circumstances,[11] to permit lower courts to weigh the competing public, private, and constitutional interests that have been wholly overridden by the "absolute" nature of the *Reynolds* privilege.

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[10] *See, e.g.*, *Khadr v. Attorney Gen. of Can.*, [2008] F.C. 807 para. 27 (Can.) (noting that the disclosure of records is required, but it is "subject to the balancing of national security and other considerations"); *Mohamed v. Sec'y of State for Foreign and Commonwealth Affairs*, [2008] EWHC (Admin) 2048, [2008] All E.R. (D) 123, [148] (Q.B.) (Eng.) (weighing the government's interest in national security against plaintiff's interest in document disclosure and finding in favor of the plaintiff); *Conway v. Rimmer*, [1968] A.C. 910, 918, 951-52 (H.L.) (Eng.); *People's Union for Civil Liberties v. Union of India*, (1998) 1 S.C.C. 301; *Adalah Legal Ctr. for Arab Minority Rights in Isr. v. Minister of Interior*, 2006 Isr. HCJ 7052/03 443, 692-93; *Glasgow Corp. v. Cent. Land Bd.*, [1956] S.C. (H.L.) 1 (Scot.).

[11] *See, e.g.*, *Halpern v. FBI*, 181 F.3d 279, 297 (2d Cir. 1999) (weighing public interest in FOIA disclosure against governmental interest in non-disclosure); *United States v. Sarkissian*, 841 F.2d 959 (9th Cir. 1988) (holding that, in deciding whether to disclose confidential material submitted by the government in criminal prosecution pursuant to CIPA, judge was free to balance defendant's need for documents against national security concerns).

This Court allocated the evidentiary burdens in *Reynolds*, and it has both the authority and the obligation to amend those burdens if they interfere with the judiciary's constitutional role in reviewing the legality of executive actions. Otherwise, the government may engage in torture, declare it a state secret, and by virtue of that designation avoid any judicial accountability for conduct that even the government purports to condemn as unlawful under all circumstances. Under a system predicated on respect for the rule of law, the government has no privilege to violate our most fundamental legal norms, and it should not be able to do so with impunity based on a state secrets privilege that was developed to achieve very different ends.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF CALIFORNIA
SAN JOSE DIVISION

Binyam Mohamed, et al., Plaintiffs, v. Jeppesen Dataplan, Inc., Defendant.	NO. C 07-02798 JW **ORDER GRANTING THE UNITED STATES' MOTION TO INTERVENE AND GRANTING THE UNITED STATES' MOTION TO DISMISS WITH PREJUDICE**

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I. INTRODUCTION

This lawsuit was filed by Plaintiffs, who are foreign nationals, for damages inflicted upon them in a so-called "rendition" program operated under the auspices of the United States Government. Plaintiffs allege that under the program they were unlawfully apprehended, transported, imprisoned, interrogated and in some instances tortured—all under the direction of the United States. Defendant, Jeppesen Dataplan, Inc., is a domestic corporation with its headquarters in San Jose, California. Defendant

is being sued for its alleged participation in the program. Plaintiffs are proceeding under the Alien Tort Statute, 28 U.S.C. § 1350, which gives the District Courts original jurisdiction to hear actions that allege tortious conduct committed against aliens in violation of the law of nations or a treaty of the United States. The United States seeks to intervene in the action, to assert the "state secrets" privilege, and on that basis, to move the Court for dismissal of the action or alternatively for summary judgment.

The Court conducted a hearing on February 5, 2008. The Court finds good cause to allow the United States to intervene. Having reviewed the allegations of the Complaint and the showing made by the United States, including a classified declaration, the Motion to Dismiss is GRANTED.

II. BACKGROUND

In a First Amended Complaint filed on August 1, 2007, Plaintiffs[1] make the following allegations against Defendant Jeppesen:

> Plaintiffs Mohamed, Britel, Agiza, Bashmilah, and al-Rawi were victims of an unlawful program devised and developed by the Central Intelligence Agency. Commonly known as "extraordinary rendition," the program involves the

[1] Plaintiffs are Binyam Mohamed, Abou Elkassim Britel, Ahmed Agiza, Mohamed Farag Ahmad Bashmilah, and Bisher al-Rawi.

clandestine apprehension and transfer of persons suspected of involvement in terrorist activities to secret detention and interrogation facilities in countries outside the United States, utilizing methods impermissible under United States and international law. (First Amended Complaint ¶ 13, hereafter, "FAC," Docket Item No. 27.) Each Plaintiff's experience is as follows:

Binyam Mohamed is an Ethiopian citizen. At the time of his unlawful rendition, Mohamed was a legal resident of the United Kingdom. (FAC ¶ 22.) On April 10, 2002, Mohamed was arrested in Karachi, Pakistan and turned over to agents of the U.S. Federal Bureau of Investigation and the CIA. After four months of interrogation, during which time he was refused access to a lawyer, CIA agents blindfolded him, strapped him to the seat of a plane, and flew him to Rabat, Morocco. (FAC ¶ 3.) For the next eighteen months, Mohamed was secretly detained, interrogated, and tortured by agents of the Moroccan intelligence services. On January 21, 2004, he was taken by agents of the CIA and flown to the secret U.S. detention facility known as the "Dark Prison," in Kabul, Afghanistan. There, Mohamed was subjected to several more months of detention, interrogation, and torture by U.S. intelligence agents before being transferred to Bagram Air Base outside

Kabul. In September 2004, Mohamed was transferred to the Naval Station at Guantánamo Bay, Cuba where he remains. (FAC ¶ 4.)

Abou Elkassim Britel is an Italian citizen. At the time of his unlawful rendition, he was an Italian citizen working in Pakistan. (FAC ¶ 23.) On March 10, 2002, Bristel was apprehended by Pakistani police in Lahore, Pakistan. After two months of interrogation, during which time his repeated requests to speak with the Italian consulate were denied, he was turned over to CIA agents who blindfolded him, strapped him to the seat of a plane, and flew him to Rabat, Morocco. (FAC ¶ 5.) For more than eight months, Britel was secretly detained, interrogated, and tortured by agents of the Moroccan intelligence services until he was released without charges in February 2003. In May 2003, he was arrested by Moroccan authorities while attempting to return to Italy. In the same month, Britel was sentenced to fifteen years in prison for his alleged involvement in terrorist-related activities. His sentence was subsequently reduced to nine years on appeal. (FAC ¶ 6.) Britel is currently imprisoned at the Ain Bourja prison in Morocco. (FAC ¶ 23.)

Ahmed Agiza is an Egyptian citizen. At the time of his unlawful rendition, Agiza, together with his wife and five

young children, was living in Sweden, where the family had applied for political asylum and permanent residence. (FAC ¶ 24.) On December 18, 2001, Agiza was secretly apprehended by Swedish security police, handed over to agents of the CIA who blindfolded him, strapped him to the seat of a plane, and flew him to Cairo. There, he was turned over to agents of the Egyptian intelligence services who detained, interrogated, and tortured him. (FAC ¶ 7.) For the first five weeks after his arrival in Egypt, Agiza was detained incommunicado. During this time and for about ten weeks, he was repeatedly and severely tortured and denied meaningful access to consular officials, family members, and

lawyers. In April 2004, following trial before a military tribunal, Agiza was convicted and sentenced to twenty-five years in prison for membership in an organization banned under Egyptian law. The sentence has since been reduced to fifteen years. (FAC ¶ 8.) Agiza is currently imprisoned in the Tora prison complex in Egypt. (FAC ¶ 24.)

Mohamed Farag Ahmad Bashmilah is a Yemeni citizen. At the time of his unlawful rendition, Bashmilah, together with his wife, was visiting Jordan to assist his mother in obtaining medical care. (FAC ¶ 25.) On or about October 21, 2003,

Bashmilah was taken into custody by the Jordanian General Intelligence Department while he was visiting Jordan. After being interrogated under torture for many days, Bashmilah was handed over, by the Jordanian government, to CIA agents who blindfolded him, strapped him to the seat of a plane, and flew him to Kabul, Afghanistan. (FAC ¶ 9.) For the next nineteen months, Bashmilah was held incommunicado by the U.S. government. For about six months, Bashmilah was secretly detained, interrogated, and tortured by U.S. intelligence agents at Bagram Air Base in Afghanistan. Toward the end of April 2004, Bashmilah was again transferred to another detention facility in an unknown country. In this CIA "black site," Bashmilah was subjected to more than a year of interrogation, torture, and detention. On May 5, 2005, he was again "prepared" for flight by a CIA team. This time he was returned to Yemen, where he was detained for about nine months before being released. (FAC ¶ 10.) Bashmilah currently resides in Yemen. (FAC ¶ 25.)

Bisher al-Rawi is an Iraqi citizen and a British permanent resident. At the time of his unlawful rendition, al-Rawi, together with his elder brother and his business associates, was traveling to the Republic of the Gambia, Africa, to establish a peanut processing business. (FAC ¶ 26.) On November 8, 2002, al-Rawi was

apprehended by Gambian intelligence agents at the Banjul airport in the Republic of The Gambia. He was detained and questioned for two weeks by Gambian officials and agents of the CIA. CIA agents then blindfolded him, strapped him to the seat of a plane, and flew him to Kabul, Afghanistan. (FAC ¶ 11.) In Afghanistan, al-Rawi was detained for two weeks at the secret U.S.–run detention facility known as the "Dark Prison" before being transferred to the Bagram Air Base for two more months of detention and interrogation. While in U.S. custody, al-Rawi was physically and psychologically tortured and otherwise abused before he was flown to Guantánamo on February 7, 2003. On March 30, 2007, al-Rawi was released from Guantánamo and returned to his home in England, were he currently resides. No charges have ever been brought against him. (FAC ¶ 12.)

The program described above has been carried out by the CIA, with the assistance of U.S.-based corporations, such as Jeppesen, who have provided the aircraft, flight crews, and the flight and logistical support necessary for hundreds of international flights. (FAC ¶ 13.)

Jeppesen is a corporation with headquarters in San Jose, California. Jeppesen provides an aviation and logistical and travel service operating

> under the trade name Jeppesen International Trip Planning. Jeppesen is a wholly owned subsidiary of Jeppesen Sanderson, a corporation with headquarters in Englewood, Colorado. Jeppesen Sanderson, in turn, is a wholly owned subsidiary of Boeing Company. (FAC ¶ 27.)
>
> Jeppesen has provided direct and substantial services to the United States for its "extraordinary rendition." (FAC ¶ 2.) In providing its services to the CIA, Jeppesen knew or reasonably should have known that Plaintiffs would be subjected to forced disappearance, detention, and torture in countries where such practices are routine. According to published reports, Jeppesen had actual knowledge of the consequences of its activities. A former Jeppesen employee informed The New Yorker magazine that at an internal company meeting, a senior Jeppesen official stated: "We do all of the extraordinary rendition flights - you know, the torture flights. Let's face it, some of these flights end up that way." Jane Mayer, *Outsourced: The CIA's Travel Agent,* The New Yorker, Oct. 30, 2006. (FAC ¶ 16.)

On the basis of the allegations outlined above, Plaintiffs allege two causes of action: (1) Alien Tort Statute: Forced Disappearance; and (2) Alien Tort Statute: Torture and Other Cruel, Inhuman, or Degrading Treatment.

Presently before the Court are the United States' Motion to Intervene[2] and the United States' Motion to Dismiss, or in the Alternative, for Summary Judgment.[3]

III. DISCUSSION

The United States seeks to intervene in this case and to assert state secrets privilege on behalf of itself and Jeppesen, filing separate motions as to each issue. In support of its motions, the United States filed a public declaration of General Michael V. Hayden, USAF, who is currently serving as director of the CIA.[4] The Court has also reviewed, *in camera* and *ex parte*, a classified declaration of General Hayden. Upon review of the public and classified declarations, the Court proceeds to address each of the United States' motions in turn.[5]

A. The United States' Motion to Intervene

The United States moves to intervene as a matter of right pursuant to Federal Rule of Civil Procedure 24(a). (Motion to Intervene at 3.)

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[2] (hereafter, "Motion to Intervene," Docket Item No. 42.)

[3] (hereafter, "Motion Re State Secrets," Docket Item No. 43.)

[4] (Motion Re State Secrets, Formal Claim of State Secrets and Statutory Privileges by General Michael V. Hayden, USAF, Director of the Central Intelligence Agency, hereafter, "Public Hayden Decl.")

[5] In this Order, the Court refers only to the contents of General Hayden's publicly filed declaration.

Rule 24(a) provides:

> On timely motion, the court must permit anyone to intervene who:
>
> > (1) is given an unconditional right to intervene by a federal statute; or (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

To intervene as a matter of right, a non-party must satisfy four requirements: "(1) the application for intervention must be timely; (2) the applicant must have a 'significantly protectable' interest relating to the property or transaction that is the subject of the action; (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect that interest; and (4) the applicant's interest must not be adequately represented by the existing parties in the lawsuit." Southwest Center for Biological Diversity v. Berg, 268 F.3d 810, 817 (9th Cir. 2001). The Ninth Circuit has liberally construed Rule 24(a) in favor of potential intervenors. Id. at 818.

The United States has satisfied all of the requirements for intervention. First, the motion by the United States is timely. Second, the motion was filed early in the litigation, and was earlier

preceded by a Statement of Interest, informing the Court that the United States was considering whether to intervene. (See Docket Item No. 34.) Third, the United States has an important interest in this action because it involves activities allegedly overseen by the CIA; it is the nature and extent of these activities over which the United States seeks to assert state secrets privilege. (See Motion Re State Secrets.) If the United States were not allowed to intervene, its interest in maintaining state secrets could be harmed. Finally, the United States is not adequately represented by Jeppesen because Jeppesen cannot assert state secrets privilege on behalf of the government. The privilege belongs to the government alone and cannot be asserted by private citizens. United States v. Reynolds, 345 U.S. 1, 7-8 (1953).

In addition, neither party opposes the intervention of the United States in this action. (See Docket Item Nos. 48, 51.) Accordingly, the Court GRANTS the United States' Motion to Intervene.

B. The United States' Invocation of State Secrets Privilege and Motion to Dismiss

The United States has interposed a claim of state secrets privilege and moves to dismiss the lawsuit on that ground. (Motion Re State Secrets at 6, 9, 16.)

State secrets privilege is a common law evidentiary privilege of constitutional significance that the government may assert when "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." Reynolds, 345 U.S. at 10. Invocation of state secrets privilege requires a court to undertake a threestep analysis:[6] (1) the court must "ascertain that the procedural requirements for invoking the state secrets privilege have been satisfied," El-Masri v. U.S., 479 F.3d 296, 304 (4th Cir. 2007); see also Reynolds, 345 U.S. at 7-8; (2) the court must make an independent determination of whether the information is privileged, El-Masri, 479 F.3d at 304; and (3) the court must consider whether or how the case should proceed in light of the privilege claim. Id. The Court proceeds to conduct the above analysis in this case.

1. The Government has complied with the procedures for invoking the privilege.

To assert state secrets privilege, the government must make "a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer." Reynolds, 345 U.S. at 7-8.

General Hayden is the head of the CIA, which is the department that Plaintiffs allege has

[6] The Ninth Circuit's recent decision in Al-Haramain Islamic Foundation, Inc. v. Bush, 507 F.3d 1190, 1202 (9th Cir. 2007), adopted this three-step analysis, which was first articulated in El-Masri, 479 F.3d at 304.

control over the "extraordinary rendition" program. (Public Hayden Decl. ¶ 1; FAC ¶¶ 3-13.) In his public declaration, General Hayden states, "The purpose of this declaration is to formally assert, in my capacity as the Director of the Central Intelligence Agency, the military and state secrets privilege." (Public Hayden Decl. ¶ 3.) The Court finds that the public declaration satisfies all of the procedural requirements for invocation of the state secrets privilege.

2. State secrets privilege applies to the information which the government seeks to protect from disclosure.

After state secrets privilege has been properly asserted, a court must determine whether the privilege applies to the information the government seeks to prevent from being disclosed. See Reynolds, 345 U.S. at 7-8.

Without reaching the merits of Plaintiffs' allegations, in the First Amended Complaint, Plaintiffs make allegations against Defendant concerning the operations of the CIA overseas. (FAC ¶¶ 1-13.) Litigation over "allegations" about the operations of the CIA overseas implicates national security interests of the United States, entitling the United States to invoke state secrets privilege. The court defers "to the Executive [Branch] on matters of foreign policy and national security." Al-Haramain, 507 F.3d at 1203. Moreover, the Court has read the classified Declaration of General Hayden. In light of the Supreme Court's warning not to disclose "the very

thing the privilege is designed to protect," the Court does not give an analysis of the classified document. Reynolds, 345 U.S. at 7-8. The Court finds that inasmuch as the case involves "allegations" about the conduct by the CIA, the privilege is invoked to protect information which is properly the subject of state secrets privilege.

3. Whether this case may proceed in the face of the invocation of state secrets privilege.

Once state secrets privilege is invoked, the Court should consider whether the case may proceed under that circumstance. The invocation of states secret privilege is a categorical bar to a lawsuit under the following circumstances: (1) if the very subject matter of the action is a state secret; (2) if the invocation of the privilege deprives a plaintiff of evidence necessary to prove a *prima facie* case; and (3) if the invocation of the privilege deprives a defendant of information necessary to raise a valid defense. Since the Court finds that the very subject matter of this case is a state secret, the Court does not reach the other circumstances.

The issue of whether "subject matter" of a case is a state secret is a threshold determination. Al-Haramain, 507 F.3d at 1201. If the "very subject matter of the action" is a state secret, then the action is non-justiciable and "the court should dismiss the plaintiff's action based solely on the invocation of state secrets privilege." Kasza v. Browner, 133 F.3d 1159, 1166 (9th Cir. 1998); Al-Haramain, 507 F.3d at 1200.

The "subject matter" of an action is not the same as the "facts necessary to litigate the case." Al-Haramain, 507 F.3d at 1201; but see El-Masri, 479 F.3d at 308. Courts have found the "very subject matter" of a case to be a state secret when the case involved classified weapons or other devices, or when the case involved covert operations by agencies of the United States in foreign countries. See Hepting v. AT & T Corp., 439 F. Supp. 2d 974, 993 (N.D. Cal. 2006) (citing exemplary cases). For example, in Kasza, the Ninth Circuit found that the "subject matter" of a case was a state secret because the information was at the core of the plaintiff's claim such that any further proceeding in the case jeopardized national security. The court reasoned:

> Not only does the state secrets privilege bar Frost from establishing her prima facie case on any of her eleven claims, but any further proceeding in this matter would jeopardize national security. No protective procedure can salvage Frost's suit. Therefore, as the very subject matter of Frost's action is a state secret, we agree with the district court that her action must be dismissed.

Kasza, 133 F.3d at 1170.

The government contends that the very "subject matter" of this case is a state secret because the disclosure of the information covered by its privilege assertions reasonably could be expected to cause serious damage to the national security and foreign relations of this country. (Motion Re State Secrets at 16.) For example, in

his publicly filed declaration, General Hayden states:

> First, this lawsuit puts at issue whether or not Jeppesen assisted the CIA with any of the alleged detention and interrogation . . . Disclosure of information that would tend to confirm or deny whether or not Jeppesen provided such assistance – even if such confirmations or denial come from a private party alleged to have cooperated with the United States and not the United States itself – would cause exponentially grave damage to the national security by disclosing whether or not the CIA utilizes particular sources and methods and, thus, revealing to foreign adversaries information about the CIA's intelligence capabilities or lack thereof.
>
> . . .
>
> Second, this lawsuit puts at issues whether or not the CIA cooperated with particular foreign governments in the conduct of alleged clandestine intelligence activities. Adducing evidence that would tend to confirm or deny such allegations would result in extremely grave damage to the foreign relations and foreign activities of the United States.

(Public Hayden Decl. ¶¶ 22, 23.) The Court's review of General Hayden's public and classified declarations confirm that proceeding with this case would jeopardize national security and

foreign relations and that no protective procedure can salvage this case. Thus, the Court finds that the issues involved in this case are non-justiciable because the very subject matter of the case is a state secret.

Plaintiffs contend that the very "subject matter" of this case is not a state secret because publically made statements about the United States' detention and interrogation program show an intention to engage in a public discourse about the program. (Plaintiffs' Opposition to the United States' Motion to Dismiss at 25, 28.) Plaintiffs further contend that these public statements mean the program is not a "black box" program, the very existence of which is secret. (Id.) Plaintiffs rely on Al-Haramain[7], where the Ninth Circuit found that the "subject matter" of a case involving a National Security Agency wiretapping program was not a state secret because elements of the program had been disclosed to the public. 507 F.3d at 1201. Al-Haramain is distinguishable from the facts alleged in this case. The Court's review of General Hayden's public and classified declarations cause it to have concern that any

[7] Plaintiffs also rely on Hepting, 439 F. Supp. 2d 974. In Hepting, the Court conducted an analysis as to whether an asserted state secret was actually "secret" in the sense that it had not been publically disclosed by any reliable source. Id. at 990. However, this approach is not fully supported by the Ninth Circuit's later decision in Al-Haramain, where the Court focused on disclosures made by the holder of the privilege, which is the government, as opposed disclosures made by any reliable source. See 507 F.3d at 1197-1200.

further proceedings in this case would elicit facts which might tend to confirm or refute as of yet undisclosed state secrets.

In sum, at the core of Plaintiffs' case against Defendant Jeppesen are "allegations" of covert U.S. military or CIA operations in foreign countries against foreign nationals—clearly a subject matter which is a state secret. Accordingly, pursuant to 28 U.S.C. § 1331 and Federal Rule of Civil Procedure 12(b)(1), the United States' Motion to Dismiss is GRANTED with prejudice on the ground that the Court lacks subject matter jurisdiction.

IV. CONCLUSION

This non-justiciable dismissal is limited to the legal effect of the United States' invocation of state secrets privilege; it is not an indication as to whether Plaintiffs have standing or whether they are entitled to recover under the Alien Tort Statute.

The Court GRANTS the United States' Motion to Intervene and GRANTS the United States' Motion to Dismiss on the ground that the very subject matter of the case is a state secret. The Court

DISMISSES this case with prejudice.

Dated: February 13, 2008 /s/_____

JAMES WARE
United States
District Judge

THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:

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Dated: February 13, 2008

Richard W. Wieking, Clerk

By: /s/ JW Chambers
Elizabeth Garcia
Courtroom Deputy

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BINYAM MOHAMED; ABOU ELKASSIM BRITEL; AHMED AGIZA; MOHAMED FARAG AHMAD BASHMILAH; BISHER AL-RAWI,

Plaintiffs-Appellants,

JEPPESEN DATAPLAN, INC.,

Defendant-Appellee,

UNITED STATES OF AMERICA,

Intervenor-Appellee.

No. 08-15693

D.C. No. 5:07-CV-02798 JW

OPINION

Appeal from the United States District Court
for the Northern District of California
James Ware, District Judge, Presiding

Argued and Submitted En Banc

December 15, 2009—San Francisco, California

Filed September 8, 2010

Before: Alex Kozinski, Chief Judge, Mary M. Schroeder,
William C. Canby, Michael Daly Hawkins,
Sidney R. Thomas, Raymond C. Fisher,
Richard A. Paez, Richard C. Tallman,
Johnnie B. Rawlinson, Consuelo M. Callahan and

Carlos T. Bea, Circuit Judges.
Opinion by Judge Fisher;
Concurrence by Judge Bea;
Dissent by Judge Hawkins

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OPINION

FISHER, Circuit Judge:

This case requires us to address the difficult balance the state secrets doctrine strikes between fundamental principles of our liberty, including justice, transparency, accountability and national security. Although as judges we strive to honor *all* of these principles, there are times when exceptional circumstances create an irreconcilable conflict between them. On those rare occasions, we are bound to follow the Supreme Court's admonition that "even the most compelling necessity cannot overcome the claim of

privilege if the court is ultimately satisfied that [state] secrets are at stake." *United States v. Reynolds*, 345 U.S. 1, 11 (1953). After much deliberation, we reluctantly conclude this is such a case, and the plaintiffs' action must be dismissed. Accordingly, we affirm the judgment of the district court.

I. BACKGROUND

We begin with the factual and procedural history relevant to this appeal. In doing so, we largely draw upon the three-judge panel's language in *Mohamed v. Jeppesen Dataplan, Inc.*, 579 F.3d 943, 949-52 (9th Cir.) (*Jeppesen I*), *rehearing en banc granted*, 586 F.3d 1108 (9th Cir. 2009). We emphasize that this factual background is based only on the *allegations* of plaintiffs' complaint, which at this stage in the litigation we construe "in the light most favorable to the plaintiff[s], taking all [their] allegations as true and drawing all reasonable inferences from the complaint in [their] favor." *Doe v. United States*, 419 F.3d 1058, 1062 (9th Cir. 2005). Whether plaintiffs' allegations are in fact true has not been decided in this litigation, and, given the sensitive nature of the allegations, nothing we say in this opinion should be understood otherwise.

A. Factual Background

1. The Extraordinary Rendition Program

Plaintiffs allege that the Central Intelligence Agency ("CIA"), working in concert with other government agencies and officials of

foreign governments, operated an extraordinary rendition program to gather intelligence by apprehending foreign nationals suspected of involvement in terrorist activities and transferring them in secret to foreign countries for detention and interrogation by United States or foreign officials. According to plaintiffs, this program has allowed agents of the U.S. government "to employ interrogation methods that would [otherwise have been] prohibited under federal or international law." Relying on documents in the public domain, plaintiffs, all foreign nationals, claim they were each processed through the extraordinary rendition program. They also make the following individual allegations.

Plaintiff Ahmed Agiza, an Egyptian national who had been seeking asylum in Sweden, was captured by Swedish authorities, allegedly transferred to American custody and flown to Egypt. In Egypt, he claims he was held for five weeks "in a squalid, windowless, and frigid cell," where he was "severely and repeatedly beaten" and subjected to electric shock through electrodes attached to his ear lobes, nipples and genitals. Agiza was held in detention for two and a half years, after which he was given a six-hour trial before a military court, convicted and sentenced to 15 years in Egyptian prison. According to plaintiffs, "[v]irtually every aspect of Agiza's rendition, including his torture in Egypt, has been publicly acknowledged by the Swedish government."

Plaintiff Abou Elkassim Britel, a 40-year-old Italian citizen of Moroccan origin, was arrested and detained in Pakistan on immigration charges. After several months in Pakistani detention, Britel was allegedly transferred to the custody of American officials. These officials dressed Britel in a diaper and a torn t-shirt and shackled and blindfolded him for a flight to Morocco. Once in Morocco, he says he was detained incommunicado by Moroccan security services at the Temara prison, where he was beaten, deprived of sleep and food and threatened with sexual torture, including sodomy with a bottle and castration. After being released and re-detained, Britel says he was coerced into signing a false confession, convicted of terrorism-related charges and sentenced to 15 years in a Moroccan prison.

Plaintiff Binyam Mohamed, a 28-year-old Ethiopian citizen and legal resident of the United Kingdom, was arrested in Pakistan on immigration charges. Mohamed was allegedly flown to Morocco under conditions similar to those described above, where he claims he was transferred to the custody of Moroccan security agents. These Moroccan authorities allegedly subjected Mohamed to "severe physical and psychological torture," including routinely beating him and breaking his bones. He says they cut him with a scalpel all over his body, including on his penis, and poured "hot stinging liquid" into the open wounds. He was blindfolded and handcuffed while being made "to listen to extremely loud music day and night." After 18 months in

Moroccan custody, Mohamed was allegedly transferred back to American custody and flown to Afghanistan. He claims he was detained there in a CIA "dark prison" where he was kept in "near permanent darkness" and subjected to loud noise, such as the recorded screams of women and children, 24 hours a day. Mohamed was fed sparingly and irregularly and in four months he lost between 40 and 60 pounds. Eventually, Mohamed was transferred to the U.S. military prison at Guantanamo Bay, Cuba, where he remained for nearly five years. He was released and returned to the United Kingdom during the pendency of this appeal.[1]

Plaintiff Bisher al-Rawi, a 39-year-old Iraqi citizen and legal resident of the United Kingdom, was arrested in Gambia while traveling on legitimate business. Like the other plaintiffs, al-Rawi claims he was put in a diaper and shackles and placed on an airplane, where he was flown to Afghanistan. He says he was detained in the same "dark prison" as Mohamed and loud noises were played 24 hours per day to deprive him of sleep. Al-Rawi alleges he was eventually transferred to Bagram Air Base, where he was "subjected to humiliation, degradation, and

[1] Mohamed's allegations have been discussed in other litigation in both the United States and the United Kingdom. *See Mohammed v. Obama*, 689 F. Supp. 2d 38 (D.D.C. 2009); *R (Mohamed) v. Secretary of State for Foreign and Commonwealth Affairs*, [2010] EWCA (Civ) 65 (decision of the United Kingdom Court of Appeal).

physical and psychological torture by U.S. officials," including being beaten, deprived of sleep and threatened with death. Al-Rawi was eventually transferred to Guantanamo; in preparation for the flight, he says he was "shackled and handcuffed in excruciating pain" as a result of his beatings. Al-Rawi was eventually released from Guantanamo and returned to the United Kingdom.

Plaintiff Farag Ahmad Bashmilah, a 38-year-old Yemeni citizen, says he was apprehended by agents of the Jordanian government while he was visiting Jordan to assist his ailing mother. After a brief detention during which he was "subject[ed] to severe physical and psychological abuse," Bashmilah claims he was given over to agents of the U.S. government, who flew him to Afghanistan in similar fashion as the other plaintiffs. Once in Afghanistan, Bashmilah says he was placed in solitary confinement, in 24-hour darkness, where he was deprived of sleep and shackled in painful positions. He was subsequently moved to another cell where he was subjected to 24-hour light and loud noise. Depressed by his conditions, Bashmilah attempted suicide three times. Later, Bashmilah claims he was transferred by airplane to an unknown CIA "black site" prison, where he "suffered sensory manipulation through constant exposure to white noise, alternating with deafeningly loud music" and 24-hour light. Bashmilah alleges he was transferred once more to Yemen, where he was tried and convicted of a

trivial crime, sentenced to time served abroad and released.

2. Jeppesen's Alleged Involvement in the Rendition Program

Plaintiffs contend that publicly available information establishes that defendant Jeppesen Dataplan, Inc., a U.S. corporation, provided flight planning and logistical support services to the aircraft and crew on all of the flights transporting each of the five plaintiffs among the various locations where they were detained and allegedly subjected to torture. The complaint asserts "Jeppesen played an integral role in the forced" abductions and detentions and "provided direct and substantial services to the United States for its so-called 'extraordinary rendition' program," thereby "enabling the clandestine and forcible transportation of terrorism suspects to secret overseas detention facilities." It also alleges that Jeppesen provided this assistance with actual or constructive "knowledge of the objectives of the rendition program," including knowledge that the plaintiffs "would be subjected to forced disappearance, detention, and torture" by U.S. and foreign government officials.[2]

B. Summary of the Claims

[2] Among the materials plaintiffs filed in opposition to the government's motion to dismiss is a former Jeppesen employee's declaration, which plaintiffs assert demonstrates this knowledge. *See* Dissent at 13561 n.3.

Plaintiffs brought suit against Jeppesen under the Alien Tort Statute, 28 U.S.C. § 1350, alleging seven theories of liability marshaled under two claims, one for "forced disappearance" and another for "torture and other cruel, inhuman or degrading treatment." First Am. Compl. ¶¶ 253-66.

With respect to the forced disappearance claim, plaintiffs assert four theories of liability: (1) direct liability for active participation, (2) conspiracy with agents of the United States, (3) aiding and abetting agents of the United States and (4) direct liability "because [Jeppesen] demonstrated a reckless disregard as to whether Plaintiffs would be subjected to forced disappearance through its participation in the extraordinary rendition program and specifically its provision of flight and logistical support services to aircraft and crew that it knew or reasonably should have known would be used to transport them to secret detention and interrogation." *Id.* ¶¶ 254-57.

On the torture and degrading treatment claim, plaintiffs assert three theories of liability: (1) conspiracy with agents of the U.S. in plaintiffs' torture and degrading treatment, (2) aiding and abetting agents of the U.S. in subjecting plaintiffs to torture and degrading treatment and (3) direct liability "because [Jeppesen] demonstrated a reckless disregard as to whether Plaintiffs would be subjected to torture or other cruel, inhuman, or degrading treatment by providing flight and logistical support to aircraft and crew it knew or

reasonably should have known would be used in the extraordinary rendition program to transport them to detention and interrogation." *Id.* ¶¶ 262-64.

Regarding Jeppesen's alleged actual or constructive knowledge that its services were being used to facilitate "forced disappearance," plaintiffs allege that Jeppesen "knew or reasonably should have known that the flights involved the transportation of terror suspects pursuant to the extraordinary rendition program," that their "knowledge of the objectives of the rendition program" may be inferred from the fact that they allegedly "falsified flight plans submitted to European air traffic control authorities to avoid public scrutiny of CIA flights" and that a Jeppesen employee admitted actual knowledge that the company was performing extraordinary rendition flights for the U.S. government. *Id.* ¶¶ 16, 17, 56. Similarly, plaintiffs allege that Jeppesen knew or should have known that that torture would result because it should have known it was carrying terror suspects for the CIA and that "the governments of the destination countries routinely subject detainees to torture and other forms of cruel, inhuman, or degrading treatment." *Id.* ¶¶ 17, 56. They also rely on U.S. State Department country reports describing torture as "routine" in some of the countries to which plaintiffs were allegedly rendered, and note that Jeppesen claims on its website that it "monitors political and security situations" as part of its trip planning services. *Id.* ¶¶ 14, 42, 56.

C. Procedural History

Before Jeppesen answered the complaint, the United States moved to intervene and to dismiss plaintiffs' complaint under the state secrets doctrine. The then-Director of the CIA, General Michael Hayden, filed two declarations in support of the motion to dismiss, one classified, the other redacted and unclassified. The public declaration states that "[d]isclosure of the information covered by this privilege assertion reasonably could be expected to cause serious — and in some instances, exceptionally grave — damage to the national security of the United States and, therefore, the information should be excluded from any use in this case." It further asserts that "because highly classified information is central to the allegations and issues in this case, the risk is great that further litigation will lead to disclosures harmful to U.S. national security and, accordingly, this case should be dismissed."

The district court granted the motions to intervene and dismiss and entered judgment in favor of Jeppesen, stating that "at the core of Plaintiffs' case against Defendant Jeppesen are 'allegations' of covert U.S. military or CIA operations in foreign countries against foreign nationals — clearly a subject matter which is a state secret." Plaintiffs appealed. A three-judge panel of this court reversed and remanded, holding that the government had failed to establish a basis for dismissal under the state secrets doctrine but permitting the government to

reassert the doctrine at subsequent stages of the litigation. *Jeppesen I*, 579 F.3d at 953, 961-62. We took the case en banc to resolve questions of exceptional importance regarding the scope and application of the state secrets doctrine. *See* Fed. R. App. P. 35(a)(2).

The government maintains its assertion of privilege on

appeal, continuing to rely on General Hayden's two declarations. While the appeal was pending Barack Obama succeeded George W. Bush as President of the United States. On September 23, 2009, the Obama administration announced new policies for invoking the state secrets privilege, effective October 1, 2009, in a memorandum from the Attorney General. *See* Memorandum from the Attorney Gen. to the Heads of Executive Dep'ts and Agencies on Policies and Procedures Governing Invocation of the State Secrets Privilege (Sept. 23, 2009) ("Holder Memo"), http://www.justice.gov/opa/ documents/state-secret-privileges.pdf. The government certified both in its briefs and at oral argument before the en banc court that officials at the "highest levels of the Department of Justice" of the new administration had reviewed the assertion of privilege in this case and determined that it was appropriate under the newly announced policies. *See* Redacted, Unclassified Br. for U.S. on Reh'g *En Banc* ("U.S. Br.") 3.

II. STANDARD OF REVIEW

We review de novo the interpretation and application of the state secrets doctrine and review for clear error the district court's underlying factual findings. *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1196 (9th Cir. 2007).

III. THE STATE SECRETS DOCTRINE

[1] The Supreme Court has long recognized that in exceptional circumstances courts must act in the interest of the country's national security to prevent disclosure of state secrets, even to the point of dismissing a case entirely. *See Totten v. United States*, 92 U.S. 105, 107 (1876). The contemporary state secrets doctrine encompasses two applications of this principle. 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.[3] *See United States v. Reynolds*, 345 U.S. 1 (1953). We first address the nature of these applications and then apply them to the facts of this case.

A. The *Totten* Bar

[3] Were this a *criminal* case, the state secrets doctrine would apply more narrowly. *See El-Masri v. United States*, 479 F.3d 296, 313 n.7 (4th Cir. 2007) ("[T]he Executive's authority to protect [state secrets] is much broader in civil matters than in criminal prosecutions."); *see also Reynolds*, 345 U.S. at 12.

In 1876 the Supreme Court stated "as a *general principle*[ ] that public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential." *Totten*, 92 U.S. at 107 (emphasis added). The Court again invoked the principle in 1953, citing *Totten* for the proposition that "where the very subject matter of the action" is "a matter of state secret," an action may be "dismissed on the pleadings without ever reaching the question of evidence" because it is "so obvious that the action should never prevail over the privilege." *Reynolds*, 345 U.S. at 11 n.26. This application of *Totten*'s general principle — which we refer to as the *Totten* bar — is "designed not merely to defeat the asserted claims, but to preclude judicial inquiry" entirely. *Tenet v. Doe*, 544 U.S. 1, 7 n.4 (2005).

The Court first applied this bar in *Totten* itself, where the estate of a Civil War spy sued the United States for breaching an alleged agreement to compensate the spy for his wartime espionage services. Setting forth the "general principle" quoted above, the Court held that the action was barred because it was premised on the existence of a "contract for secret services with the government," which was "a fact not to be disclosed." *Totten*, 92 U.S. at 107.

A century later, the Court applied the *Totten* bar in *Weinberger v. Catholic Action of Hawaii/Peace Education Project*, 454 U.S. 139, 146-47 (1981). There, the plaintiffs sued under

the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.*, to compel the Navy to prepare an environmental impact statement regarding a military facility where the Navy allegedly proposed to store nuclear weapons. The Court held that the allegations were "beyond judicial scrutiny" because, "[d]ue to national security reasons, . . . the Navy can neither admit nor deny that it proposes to store nuclear weapons at [the facility]." *Id.* (citing *Totten*, 92 U.S. at 107).

The Court more recently reaffirmed and explained the *Totten* bar in a case involving two former Cold War spies who accused the CIA of reneging on a commitment to provide financial support in exchange for their espionage services. Relying on "*Totten*'s core concern" of "preventing the existence of the plaintiffs' relationship with the Government from being revealed," the Court held that the action was, like *Totten* and *Weinberger*, incapable of judicial review. *Tenet*, 544 U.S. at 8-10.[4]

[2] Plaintiffs contend that the *Totten* bar applies *only* to a narrow category of cases they

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[4] *Tenet* also made clear that application of the *Totten* bar does not require a formal assertion of the state secrets privilege by the government that meets the procedural requirements explained in *Reynolds* and discussed below. *See Tenet*, 544 U.S. at 8-9 (applying the *Totten* bar); *Doe v. Tenet*, 329 F.3d 1135, 1151-52 (9th Cir. 2003) (underlying appellate decision noting that no formal assertion had yet been filed).

say are not implicated here, namely claims premised on a plaintiff's espionage relationship with the government. We disagree. We read the Court's discussion of *Totten* in *Reynolds* to mean that the *Totten* bar applies to cases in which "the very subject matter of the action" is "a matter of state secret." *Reynolds*, 345 U.S. at 11 n.26. "[A] contract to perform espionage" is only an example. *Id.* This conclusion is confirmed by *Weinberger*, which relied on the *Totten* bar to hold that a case involving nuclear weapons secrets, and having nothing to do with espionage contracts, was "beyond judicial scrutiny." *See Weinberger*, 454 U.S. at 146-47; *see also Tenet*, 544 U.S. at 9 (characterizing *Weinberger* as a case applying the *Totten* bar). Thus, although the claims in both *Totten* and *Tenet* were premised on the existence of espionage agreements, and even though the plaintiffs in both *Totten* and *Tenet* were themselves parties to the espionage agreements, the *Totten* bar rests on a general principle that extends beyond that specific context. We therefore reject plaintiffs' unduly narrow view of the *Totten* bar and reaffirm our holding in *Al-Haramain* that the bar "has evolved into the principle that where the very subject matter of a lawsuit is a matter of state secret, the action must be dismissed without reaching the question of evidence." *Al- Haramain*, 507 F.3d at 1197. As we explain below, the *Totten* bar is a narrow rule, but it is not as narrow as plaintiffs contend.

We also disagree with plaintiffs' related contention that the *Totten* bar cannot apply

unless the *plaintiff* is a party to a secret agreement with the government. The environmental groups and individuals who were the plaintiffs in *Weinberger* were not parties to agreements with the United States, secret or otherwise. The purpose of the bar, moreover, is to prevent the revelation of state secrets harmful to national security, a concern no less pressing when the plaintiffs are strangers to the espionage agreement that their litigation threatens to reveal. Thus, even if plaintiffs were correct that the *Totten* bar is limited to cases premised on espionage agreements with the government, we would reject their contention that the bar is necessarily limited to cases in which the plaintiffs are themselves parties to those agreements.

B. The *Reynolds* Privilege

[3] In addition to the *Totten* bar, the state secrets doctrine encompasses a "privilege against revealing military [or state] secrets, a privilege which is well established in the law of evidence." *Reynolds*, 345 U.S. at 6-7.[5] A successful assertion of privilege under *Reynolds* will remove the privileged evidence from the litigation. Unlike the

[5] The two applications of the doctrine remain distinct; *Reynolds* "in no way signaled [a] retreat from *Totten*'s broader holding." *Tenet*, 544 U.S. at 9.

Totten bar, a valid claim of privilege under *Reynolds* does not automatically require dismissal of the case. In some instances, however, the assertion of privilege will require dismissal because it will become apparent during the *Reynolds* analysis that the case cannot proceed without privileged evidence, or that litigating the case to a judgment on the merits would present an unacceptable risk of disclosing state secrets.

Reynolds involved a military aircraft carrying secret electronic equipment. *Id.* at 3. After the plane crashed, the estates of three civilian observers killed in the accident brought tort claims against the government. In discovery, plaintiffs sought production of the Air Force's official accident investigation report and the statements of three surviving crew members. The Air Force refused to produce the materials, citing the need to protect national security and military secrets. *Id.* at 4- 5. The district court ordered the government to produce the documents in camera so the court could determine whether they contained privileged material. When the government refused, the court sanctioned the government by establishing the facts on the issue of negligence in plaintiffs' favor. *Id.* at 5.

The Supreme Court reversed and sustained the government's claim of privilege because "there was a reasonable danger that the accident investigation report would contain references to the secret electronic equipment which was the primary concern of the mission." *Id.* at 10. The Court also provided guidance on how claims of

privilege should be analyzed and held that, under the circumstances, the district court should have sustained the privilege without even requiring the government to produce the report for in camera review. *Id.* at 10-11. The Court did not, however, dismiss the case outright. Rather, given that the secret electronic equipment was unrelated to the cause of the accident, it remanded to the district court, affording plaintiffs the opportunity to try to establish their claims without the privileged accident report and witness statements. *Id.* at 11.

Analyzing claims under the *Reynolds* privilege involves three steps:

> First, we must "ascertain that the procedural requirements for invoking the state secrets privilege have been satisfied." Second, we must make an independent determination whether the information is privileged. . . . Finally, "the ultimate question to be resolved is how the matter should proceed in light of the successful privilege claim."

Al-Haramain, 507 F.3d at 1202 (citation omitted) (quoting *El- Masri v. United States*, 479 F.3d 296, 304 (4th Cir. 2007)). We discuss these steps in turn.

1. Procedural Requirements

a. Assertion of the privilege. "The privilege belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a

private party." *Reynolds*, 345 U.S. at 7 (footnotes omitted). The privilege "is not to be lightly invoked." *Id.* This is especially true when, as in this case, the government seeks not merely to preclude the production of particular items of evidence (as in *Reynolds*) but to obtain dismissal of the entire action.

[4] To ensure that the privilege is invoked no more often or extensively than necessary, *Reynolds* held that "[t]here must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer." *Id.* at 7-8 (footnote omitted). This certification is fundamental to the government's claim of privilege. As we have observed in a different context, the decision to invoke the privilege must "be a serious, considered judgment, not simply an administrative formality." *United States v. W.R. Grace*, 526 F.3d 499, 507-08 (9th Cir. 2008) (en banc). The formal claim must reflect the certifying official's *personal* judgment; responsibility for this task may not be delegated to lesser-ranked officials. The claim also must be presented in sufficient detail for the court to make an independent determination of the validity of the claim of privilege and the scope of the evidence subject to the privilege.

In the present case, General Michael Hayden, then-Director of the CIA, asserted the initial, formal claim of privilege and submitted detailed public and classified declarations. We were informed at oral argument that the current

Attorney General, Eric Holder, has also reviewed and approved the ongoing claim of privilege. Although *Reynolds* does not require review and approval by the Attorney General when a different agency head has control of the matter, such additional review by the executive branch's chief lawyer is appropriate and to be encouraged.

[5] *b. Timing*. Plaintiffs contend that the government's assertion of privilege was premature, urging that the *Reynolds* privilege cannot be raised before an obligation to produce specific evidence subject to a claim of privilege has actually arisen. We disagree. The privilege may be asserted at any time, even at the pleading stage.

The privilege indisputably may be raised with respect to discovery requests seeking information the government contends is privileged. Courts have repeatedly sustained claims of privilege under those circumstances. *See, e.g.*, *Reynolds*, 345 U.S. at 3 (document production requests); *Kasza v. Browner*, 133 F.3d 1159, 1170 (9th Cir. 1998) (various discovery requests); *Halkin v. Helms*, 690 F.2d 977, 985-87 (D.C. Cir. 1982) (interrogatories, document production requests and oral depositions). In addition, the government may raise the privilege to prevent the disclosure of privileged information in a responsive pleading, as it did in *Ellsberg v. Mitchell*, 709 F.2d 51, 54 & n.6 (D.C. Cir. 1983), and *Black v. United States*, 62 F.3d 1115, 1117-19 (8th Cir. 1995). *See Huey v. Honeywell, Inc.*, 82 F.3d 327, 333 (9th Cir. 1996) (explaining that the contents of an answer may be

evidentiary); *Lockwood v. Wolf Corp.*, 629 F.2d 603, 611 (9th Cir. 1980) (holding that admissions in opposing parties' pleadings are admissible as evidence).

We also conclude that the government may assert a *Reynolds* privilege claim prospectively, even at the pleading stage, rather than waiting for an evidentiary dispute to arise during discovery or trial. *See, e.g.*, *El-Masri*, 479 F.3d at 308 ("[D]ismissal at the pleading stage is appropriate if state secrets are so central to a proceeding that it cannot be litigated without threatening their disclosure."); *Black*, 62 F.3d at 1117-19 (dismissing the action at the pleading stage based on the government's assertion of privilege over certain categories of information concerning U.S. intelligence operations); *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268, 281 (4th Cir. 1980) (en banc) (per curiam); *see also Al-Haramain*, 507 F.3d at 1201 (recognizing that *Reynolds* may result in dismissal even without "await[ing] preliminary discovery"). In some cases, the court may be able to determine with certainty from the nature of the allegations and the government's declarations in support of its claim of secrecy that litigation must be limited or cut off in order to protect state secrets, even before any discovery or evidentiary requests have been made. In such cases, waiting for specific evidentiary disputes to arise would be both unnecessary and potentially dangerous. *See Sterling v. Tenet*, 416 F.3d 338, 344 (4th Cir. 2005) ("Courts are not required to play with fire and chance further disclosure — inadvertent,

mistaken, or even intentional — that would defeat the very purpose for which the privilege exists."). The showing the government must make to prevail on a claim of state secrets privilege may be especially difficult when attempted before any request for specific information or evidence has actually been made, but foreclosing the government from even trying to make that showing would be inconsistent with the need to protect state secrets.

2. The Court's Independent Evaluation of the Claim of Privilege

When the privilege has been properly invoked, "we must make an independent determination whether the information is privileged." *Al-Haramain*, 507 F.3d at 1202. The court must sustain a claim of privilege when it is satisfied, "from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose . . . matters which, in the interest of national security, should not be divulged." *Reynolds*, 345 U.S. at 10. If this standard is met, the evidence is absolutely privileged, irrespective of the plaintiffs' countervailing need for it. *See id.* at 11 ("[E]ven the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that [state] secrets are at stake."); *Halkin*, 690 F.2d at 990.

This step in the *Reynolds* analysis "places on the court a special burden to assure itself that an appropriate balance is struck between protecting

national security matters and preserving an open court system." *Al-Haramain*, 507 F.3d at 1203. In evaluating the need for secrecy, "we acknowledge the need to defer to the Executive on matters of foreign policy and national security and surely cannot legitimately find ourselves second guessing the Executive in this arena." *Id.* But "the state secrets doctrine does not represent a surrender of judicial control over access to the courts." *El-Masri*, 479 F.3d at 312. Rather, "to ensure that the state secrets privilege is asserted no more frequently and sweepingly than necessary, it is essential that the courts continue critically to examine instances of its invocation." *Ellsberg*, 709 F.2d at 58. "We take very seriously our obligation to review the [government's claims] with a very careful, indeed a skeptical, eye, and not to accept at face value the government's claim or justification of privilege," *Al-Haramain*, 507 F.3d at 1203, though we must "do so without forcing a disclosure of the very thing the privilege is designed to protect . . . . Too much judicial inquiry into the claim of privilege would force disclosure of the thing the privilege was meant to protect, while a complete abandonment of judicial control would lead to intolerable abuses." *Reynolds*, 345 U.S. at 8.

[6] We do not offer a detailed definition of what constitutes a state secret. The Supreme Court in *Reynolds* found it sufficient to say that the privilege covers "matters which, in the interest of national security, should not be divulged." *Id.* at 10. We do note, however, that an executive decision to *classify* information is

insufficient to establish that the information is privileged. *See Ellsberg*, 709 F.2d at 57 ("[T]he privilege may not be used to shield any material not strictly necessary to prevent injury to national security."). Although classification may be an indication of the need for secrecy, treating it as conclusive would trivialize the court's role, which the Supreme Court has clearly admonished "cannot be abdicated to the caprice of executive officers." *Reynolds*, 345 U.S. at 9-10.

3. How Should the Matter Proceed?

When a court sustains a claim of privilege, it must then resolve " 'how the matter should proceed in light of the successful privilege claim.' " *Al-Haramain*, 507 F.3d at 1202 (quoting *El-Masri*, 479 F.3d at 304). The court must assess whether it is feasible for the litigation to proceed without the protected evidence and, if so, how.

When the government successfully invokes the state secrets privilege, "the evidence is completely removed from the case." *Kasza*, 133 F.3d at 1166. " '[W]henever possible, sensitive information must be disentangled from nonsensitive information to allow for the release of the latter.' " *Id.* (quoting *Ellsberg*, 709 F.2d at 57). However, there will be occasions when, as a practical matter, secret and nonsecret information cannot be separated. In some cases, therefore, "it is appropriate that the courts restrict the parties' access not only to evidence which itself risks the disclosure of a state secret, but also those pieces of evidence or areas of questioning which press so closely upon

highly sensitive material that they create a high risk of inadvertent or indirect disclosures." *Bareford v. Gen. Dynamics Corp.*, 973 F.2d 1138, 1143-44 (5th Cir. 1992); *see also Kasza*, 133 F.3d at 1166 ("[I]f seemingly innocuous information is part of a . . . mosaic, the state secrets privilege may be invoked to bar its disclosure and the court cannot order the government to disentangle this information from other [i.e., secret] information.").

Ordinarily, simply excluding or otherwise walling off the privileged information may suffice to protect the state secrets and " 'the case will proceed accordingly, with no consequences save those resulting from the loss of evidence.' " *Al-Haramain*, 507 F.3d at 1204 (quoting *Ellsberg*, 709 F.2d at 64); *see, e.g.*, *Webster v. Doe*, 486 U.S. 592, 604-05 (1988) (permitting case to continue without privileged evidence); *Reynolds*, 345 U.S. at 11-12 (same).

In some instances, however, application of the privilege may require dismissal of the action. When this point is reached, the *Reynolds* privilege converges with the *Totten* bar, because both require dismissal. There are three circumstances when the *Reynolds* privilege would justify terminating a case. First, if "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." *Kasza*, 133 F.3d at 1166; *see also Ellsberg*, 709 F.2d at 65. Second," 'if the privilege deprives the defendant of

information that would otherwise give the defendant a valid defense to the claim, then the court may grant summary judgment to the defendant.' " *Kasza*, 133 F.3d at 1166 (quoting *Bareford*, 973 F.2d at 1141); *accord In re Sealed Case*, 494 F.3d 139, 153 (D.C. Cir. 2007); *see also, e.g.*, *Tenenbaum v. Simonini,* 372 F.3d 776, 777 (6th Cir. 2004).

[7] Third, and relevant here, even if the claims and defenses might theoretically be established without relying on privileged evidence, it may be impossible to proceed with the litigation because — privileged evidence being inseparable from nonprivileged information that will be necessary to the claims or defenses — litigating the case to a judgment on the merits would present an unacceptable risk of disclosing state secrets. *See, e.g.*, *In re Sealed Case*, 494 F.3d at 153 ("If the district court determines that the subject matter of a case is so sensitive that there is no way it can be litigated without risking national secrets, then the case must be dismissed."); *El- Masri*, 479 F.3d at 308 ("[A] proceeding in which the state secrets privilege is successfully interposed must be dismissed if the circumstances make clear that privileged information will be so central to the litigation that any attempt to proceed will threaten that information's disclosure."); *Bareford*, 973 F.2d at 1144 ("We are compelled to conclude that the trial of this case would inevitably lead to a significant risk that highly sensitive information concerning this defense system would be disclosed."); *Fitzgerald v. Penthouse Int'l, Ltd.*, 776 F.2d 1236, 1241-42 (4th

Cir. 1985) ("[I]n some circumstances sensitive military secrets will be so central to the subject matter of the litigation that any attempt to proceed will threaten disclosure of the privileged matters."); *Farnsworth Cannon*, 635 F.2d at 281 (dismissing the action at the outset because "any 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 precludes any further attempt to pursue this litigation"); *id.* at 279-80 (Phillips, J., specially concurring and dissenting from the three-judge panel decision) (concluding that "litigation should be entirely foreclosed at the outset by dismissal of the action" if it appears that "the danger of inadvertent compromise of the protected state secrets outweighs the public and private interests in attempting formally to resolve the dispute while honoring the privilege"). As we shall explain, this circumstance exists here and requires dismissal.

IV. APPLICATION

We therefore turn to the application of the state secrets doctrine in this case. The government contends that plaintiffs' lawsuit should be dismissed, whether under the *Totten* bar or the *Reynolds* privilege, because "state secrets are so central to this case that permitting further proceeding[s] would create an intolerable risk of disclosure that would jeopardize national

security." U.S. Br. 13.[6] Plaintiffs argue that the *Totten* bar does not apply and that, even if the government is entitled to some protection under the *Reynolds* privilege, at least some claims survive. The district court appears to have dismissed the action under the *Totten* bar, making a "threshold determination" that "the very subject matter of the case is a state secret." Having dismissed on that basis, the district court did not address whether application of the *Reynolds* privilege would require dismissal.

We do not find it quite so clear that the very subject matter of this case is a state secret. Nonetheless, having conducted our own detailed analysis, we conclude that the district court reached the correct result because dismissal is warranted even under *Reynolds*. Recognizing the serious consequences to plaintiffs of dismissal, we explain our ruling so far as possible within the considerable constraints imposed on us by the state secrets doctrine itself.

A. The *Totten* Bar

The categorical, "absolute protection [the Court] found necessary in enunciating the *Totten* rule" is appropriate only in narrow circumstances. *Tenet*, 544 U.S. at 11. The *Totten* bar

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[6] The government's classified briefing and supporting declarations provide more specific support for the government's state secrets contentions. This information is crucial to our decision. *See El-Masri*, 479 F.3d at 312.

applies only when the "very subject matter" of the action is a state secret — i.e., when it is "obvious" without conducting the detailed analysis required by *Reynolds* "that the action [c]ould never prevail over the privilege." *Reynolds*, 345 U.S. at 11 n.26. The Court has applied the *Totten* bar on just three occasions, involving two different kinds of state secrets: In *Tenet* and *Totten* the Court applied the *Totten* bar to "the distinct class of cases that depend upon clandestine spy relationships," *see Tenet*, 544 U.S. at 9-10; *Totten*, 92 U.S. at 107, and in *Weinberger* the Court applied the *Totten* bar to a case that depended on whether the Navy proposed to store nuclear weapons at a particular facility, *see Weinberger*, 454 U.S. at 146-47. Although the Court has not limited the *Totten* bar to cases premised on secret espionage agreements or the location of nuclear weapons, neither has it offered much guidance on when the *Totten* bar applies beyond these limited circumstances. Because the *Totten* bar is rarely applied and not clearly defined, because it is a judge-made doctrine with extremely harsh consequences and because conducting a more detailed analysis will tend to improve the accuracy, transparency and legitimacy of the proceedings, district courts presented with disputes about state secrets should ordinarily undertake a detailed *Reynolds* analysis before deciding whether dismissal on the pleadings is justified.

Here, some of plaintiffs' claims *might well fall within the Totten* bar. In particular, their allegations that Jeppesen conspired with agents

of the United States in plaintiffs' forced disappearance, torture and degrading treatment are premised on the existence of an alleged covert relationship between Jeppesen and the government — a matter that the Fourth Circuit has concluded is "practically indistinguishable from that categorically barred by *Totten* and *Tenet*." *El-Masri*, 479 F.3d at 309.[7] On the other hand, allegations based on plaintiffs' theory that Jeppesen should be liable simply for what it

[7] We do not decide whether any of plaintiffs' claims are cognizable under the Alien Tort Statute ("ATS"). But assuming that the conspiracy claims are cognizable, they require proof of an agreement. *See, e.g.*, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 260 (2d Cir. 2009) (holding that conspiracy liability under the ATS would require either an "agreement" or " 'a criminal intention to participate in a common criminal design' ") (quoting *Prosecutor v. Tadic*, Case No. IT-94-1-A, Appeal Judgment, ¶ 206 (July 15, 1999)); *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1159 (11th Cir. 2005) (holding that conspiracy liability under the ATS requires proof that "two or more persons agreed to commit a wrongful act"). Plaintiffs' allegations confirm that their conspiracy claims depend on proof of a covert relationship. *See, e.g.*, First Am. Compl. ¶ 255 ("Jeppesen entered into an agreement with agents of the United States to unlawfully render Plaintiffs to secret detention in Morocco, Egypt, and Afghanistan."); *id.* ¶ 262 ("Defendant entered into an agreement with agents of the United States to provide flight and logistical support services to aircraft and crew used in the extraordinary rendition program to unlawfully render Plaintiffs to detention and interrogation in Morocco, Egypt, and Afghanistan, where they would be subjected to acts of torture and other cruel, inhuman or degrading treatment.").

"should have known" about the alleged unlawful extraordinary rendition program while participating in it are not so obviously tied to proof of a secret agreement between Jeppesen and the government.

[8] We do not resolve the difficult question of precisely which claims may be barred under *Totten* because application of the *Reynolds* privilege leads us to conclude that this litigation cannot proceed further. We rely on the *Reynolds* privilege rather than the *Totten* bar for several reasons. First, the government has asserted the *Reynolds* privilege along with the *Totten* bar, inviting the further inquiry *Reynolds* requires and presenting a record that compels dismissal even on this alternate ground. Second, we have discretion to affirm on any basis supported by the record. *See Thigpen v. Roberts*, 468 U.S. 27, 29-30 (1984); *Shanks v. Dressel*, 540 F.3d 1082, 1086 (9th Cir. 2008). Third, resolving this case under *Reynolds* avoids difficult questions about the precise scope of the *Totten* bar and permits us to conduct a searching judicial review, fulfilling our obligation under *Reynolds* "to review the [government's claim] with a very careful, indeed a skeptical, eye, and not to accept at face value the government's claim or justification of privilege." *Al-Haramain*, 507 F.3d at 1203.[8]

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[8] This skepticism is all the more justified in cases that allege serious government wrongdoing. Such allegations heighten the risk that government officials may be motivated to invoke the state secrets doctrine not only by their obligation to protect national security but also by a

B. The *Reynolds* Privilege

[9] There is no dispute that the government has complied with *Reynolds*' procedural requirements for invoking the state secrets privilege by filing General Hayden's formal claim of privilege in his public declaration.[9] We therefore focus on the second and third steps in the *Reynolds* analysis: *First*, whether and to what extent the matters the government contends must be kept secret are in fact matters of state secret; and *second*, if they are, whether the action can be litigated without relying on evidence that would necessarily reveal those secrets or press so closely upon them as to create an unjustifiable risk that they would be revealed. In doing so, we explain our decision as much as we can without compromising the secrets we are required to protect.

1. Whether and to What Extent the Evidence Is Privileged

[10] The government asserts the state secrets privilege over four categories of evidence. In particular, the government contends that

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desire to protect themselves or their associates from scrutiny.

[9] As previously noted, the government filed declarations meeting the procedural requirements for the *Reynolds* privilege even though such declarations are not strictly necessary to support a *Totten* claim. *See Tenet*, 544 U.S. at 11.

neither it nor Jeppesen should be compelled, through a responsive pleading, discovery responses or otherwise, to disclose: "[1] information that would tend to confirm or deny whether Jeppesen or any other private entity assisted the CIA with clandestine intelligence activities; [2] information about whether any foreign government cooperated with the CIA in clandestine intelligence activities; [3] information about the scope or operation of the CIA terrorist detention and interrogation program; [or 4] any other information concerning CIA clandestine intelligence operations that would tend to reveal intelligence activities, sources, or methods." U.S. Br. 7-8. These indisputably are matters that the state secrets privilege may cover. *See, e.g.*, *Tenet*, 544 U.S. at 11 (emphasizing the "absolute protection" the state secrets doctrine affords against revealing espionage relationships); *CIA v. Sims*, 471 U.S. 159, 175 (1985) ("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.' "); *In re Sealed Case*, 494 F.3d at 152 (prohibiting "all discussion of intelligence sources, capabilities, and the like"); *Al-Haramain*, 507 F.3d at 1204 (applying the privilege to "the means, sources and methods of intelligence gathering"); *Ellsberg*, 709 F.2d at 57 (applying the privilege to the "disclosure of intelligence-gathering methods or capabilities").

[11] We have thoroughly and critically reviewed the government's public and classified declarations and are convinced that at least some

of the matters it seeks to protect from disclosure in this litigation are valid state secrets, "which, in the interest of national security, should not be divulged." *Reynolds*, 345 U.S. at 10. The government's classified disclosures to the court are persuasive that compelled or inadvertent disclosure of such information in the course of litigation would seriously harm legitimate national security interests. In fact, every judge who has reviewed the government's formal, classified claim of privilege in this case agrees that in this sense the claim of privilege is proper, although we have different views as to the scope of the privilege and its impact on plaintiffs' case. The plaintiffs themselves "do not dispute that, during the course of litigation, there may well be relevant evidence that may be properly withheld pursuant to the privilege." Br. of Plaintiffs-Appellants 26. *See El-Masri*, 479 F.3d at 308-13 (affirming the dismissal of a case involving essentially the same types of claims on the basis of the states secrets doctrine).

[12] We are precluded from explaining precisely which matters the privilege covers lest we jeopardize the secrets we are bound to protect. *See Black*, 62 F.3d at 1119 ("Care in protecting state secrets is necessary not only during a court's review of the evidence, but in its subsequent treatment of the question in any holding; a properly phrased opinion should not strip the veil from state secrets even if ambiguity results in a loss of focus and clarity."). We can say, however, that the secrets fall within one or more of the four categories identified by the government and that

we have independently and critically confirmed that their disclosure could be expected to cause significant harm to national security.

2. Effect on the Proceedings

Having determined that the privilege applies, we next determine whether the case must be dismissed under the *Reynolds* privilege.[10] We have thoroughly considered plaintiffs' claims, several possible defenses and the prospective path of this litigation. We also have carefully and skeptically reviewed the government's classified submissions, which include supplemental

[10] As noted earlier, the district court did not conduct a detailed analysis of plaintiffs' several claims because it concluded that the subject matter of the entire case is a state secret and therefore dismissed under the *Totten* bar. One option, vigorously urged by the dissent, would be to remand to the district court for that court to conduct a more detailed analysis in the first instance. As the case has developed during these en banc proceedings, however, we find remand unnecessary because our own *Reynolds* analysis persuades us that the litigation cannot proceed. Although it would have been preferable for the district court to conduct this analysis first, we now have had to do it ourselves and it makes no sense to suspend our own judgment that — given the record before us and the nature of plaintiffs' claims — this case realistically cannot be litigated against Jeppesen without compromising state secrets. There is thus no point, and much risk, in remanding to the district court to go through the *Reynolds* analysis as the dissent would prefer. We accept and respect the principles that motivate the dissent, but those principles do not justify prolonging the process here.

information not presented to the district court. We rely heavily on these submissions, which describe the state secrets implicated here, the harm to national security that the government believes would result from explicit or implicit disclosure and the reasons why, in the government's view, further litigation would risk that disclosure.

[13] Given plaintiffs' extensive submission of public documents and the stage of the litigation, we do not rely on the first two circumstances in which the *Reynolds* privilege requires dismissal — that is, whether plaintiffs could prove a prima facie case without privileged evidence, or whether the privilege deprives Jeppesen of evidence that would otherwise give it a valid defense to plaintiffs' claims. *See Kasza*, 133 F.3d at 1166; *supra* Part III.B.3.[11] Instead,

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[11] As noted before, *see supra* n. 7 and related text, at least some of plaintiffs' claims would require proof of an agreement or covert relationship between the government and Jeppesen. These claims might well be barred under *Totten* and certainly would fall even under a *Reynolds* analysis. The dissent, however, suggests that plaintiffs could establish a prima facie case for at least two of their claims without relying on privileged evidence and perhaps without any discovery at all — namely, that Jeppesen recklessly provided flight and logistical support for rendition flights while it knew or should have known its support was being used for forced disappearance and torture. See Dissent Appendix. Although our holding does not require us to resolve this question, we are not so sure. Plaintiffs' reliance on information set forth in the dissent's Appendix would have to overcome evidentiary and other obstacles, such as hearsay problems and the fact that the vast majority of the media reports cited as putting Jeppesen

we assume without deciding that plaintiffs' prima facie case and Jeppesen's defenses may not inevitably depend on privileged evidence. Proceeding on that assumption, we hold that dismissal is nonetheless required under *Reynolds* because there is no feasible way to litigate Jeppesen's alleged liability *without creating an unjustifiable risk of divulging state secrets*. *See El-*Masri, 479 F.3d at 312 (coming to the same conclusion in a related and comparable case), *cert. denied*, 552 U.S. 947 (2007).[12]

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on notice were published *after* Jeppesen's services were alleged to have occurred. In any event, our own analysis under the third aspect of *Reynolds* persuades us these "knew or should have known" claims must be dismissed as well.

[12] In *El-Masri*, the Supreme Court declined to review the Fourth Circuit's dismissal of similar claims against the various United States government and corporate actors alleged to be more directly responsible for the rendition and interrogation programs at issue here. Nothing in the Supreme Court's state secrets jurisprudence suggests that plaintiffs' claims here, against an alleged provider of logistical support to those programs, should proceed where claims against the government and corporate actors who plaintiffs allege were primarily responsible failed.

As the dissent correctly notes, we have previously disapproved of *El- Masri* for conflating the *Totten* bar's "very subject matter" inquiry with the *Reynolds* privilege. *See Al-Haramain*, 507 F.3d at 1201. We adhere to that approach today by maintaining a distinction between the *Totten* bar on the one hand and the *Reynolds* privilege on the other. *See Tenet*, 544 U.S. at 9 (explaining that Reynolds "in no way signaled our retreat from *Totten*'s broader holding that lawsuits premised on alleged

[14] We reach this conclusion because all seven of plaintiffs' claims, even if taken as true, describe Jeppesen as providing logistical support in a broad, complex process, certain aspects of which, the government has persuaded us, are absolutely protected by the state secrets privilege. Notwithstanding that some information about that process has become public, Jeppesen's alleged role and its attendant liability cannot be isolated from aspects that are secret and protected. Because the facts underlying plaintiffs' claims are so infused with these secrets, *any* plausible effort by Jeppesen to defend against

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espionage agreements are altogether forbidden"). Maintaining that distinction, however, does not mean that the *Reynolds* privilege can never be raised prospectively or result in a dismissal at the pleading stage. As we explained in *Al-Haramain* (as do we in the text), the *Totten* bar and the *Reynolds* privilege form a "continuum of analysis." 507 F.3d at 1201. A case may fall outside the *Totten* bar because its "very subject matter" is not a state secret, and yet it may become clear in conducting a *Reynolds* analysis that plaintiffs cannot establish a prima facie case, that defendants are deprived of a valid defense or that the case cannot be litigated without presenting either a certainty or an unacceptable risk of revealing state secrets. When that point is reached, including, if applicable, at the pleading stage, dismissal is appropriate under the *Reynolds* privilege. Notwithstanding its erroneous conflation of the *Totten* bar and the *Reynolds* privilege, we rely on *El-Masri* because it properly concluded — with respect to allegations comparable to those here — that "virtually any conceivable response to [plaintiffs'] allegations would disclose privileged information," and, therefore, that the action could not be litigated "without threatening the disclosure" of state secrets. *El-Masri*, 479 F.3d at 308, 310.

them would create an unjustifiable risk of revealing state secrets, even if plaintiffs could make a prima facie case on one or more claims with nonprivileged evidence. *See Kasza*, 133 F.3d at 1170; *Black*, 62 F.3d at 1118 ("[P]roof of 'the factual allegations in the Amended Complaint are so tied to the privileged information that further litigation will constitute an undue threat that privileged information will be disclosed.'") (quoting and affirming the district court); *Bareford*, 973 F.2d at 1144 ("[T]he danger that witnesses might divulge some privileged material during cross-examination is great because the privileged and non-privileged material are inextricably linked. We are compelled to conclude that the trial of this case would inevitably lead to a significant risk that highly sensitive information concerning this defense system would be disclosed."); *Fitzgerald*, 776 F.2d at 1243 ("In examining witnesses with personal knowledge of relevant military secrets, the parties would have every incentive to probe dangerously close to the state secrets themselves. In these circumstances, state secrets could be compromised even without direct disclosure by a witness."); *Farnsworth Cannon*, 635 F.2d at 281 ("[T]he plaintiff and its lawyers would have every incentive to probe as close to the core secrets as the trial judge would permit. Such probing in open court would inevitably be revealing. It is evident that any 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 precludes any further attempt to pursue this litigation."); *see also In re Sealed Case*, 494 F.3d at 152-54 (acknowledging the appropriateness of dismissal when unprivileged and privileged matters are so entwined that the risk of disclosure of privileged material is unacceptably high, although concluding that the case before the court did not fall within that category).

Here, further litigation presents an unacceptable risk of disclosure of state secrets no matter what legal or factual theories Jeppesen would choose to advance during a defense. Whether or not Jeppesen provided logistical support in connection with the extraordinary rendition and interrogation programs, there is precious little Jeppesen could say about its relevant conduct and knowledge without revealing information about how the United States government does *or does not* conduct covert operations. Our conclusion holds no matter what protective procedures the district court might employ. Adversarial litigation, including pretrial discovery of documents and witnesses and the presentation of documents and testimony at trial, is inherently complex and unpredictable. Although district courts are well equipped to wall off isolated secrets from disclosure, the challenge is exponentially greater in exceptional cases like this one, where the relevant secrets are difficult or impossible to isolate and even efforts to define a boundary between privileged and unprivileged evidence would risk disclosure by implication. In these rare circumstances, the risk of disclosure

that further proceedings would create cannot be averted through the use of devices such as protective orders or restrictions on testimony.

[15] Dismissal at the pleading stage under *Reynolds* is a drastic result and should not be readily granted. We are not persuaded, however, by the dissent's views that the state secrets privilege can never be "asserted during the pleading stage to excise entire allegations," or that the government must be required "to make its claims of state secrets with regard to specific items of evidence or groups of such items as their use is sought in the lawsuit." Dissent 13560, 13565. A case may fall outside the *Totten* bar and yet it may become clear during the *Reynolds* analysis that dismissal is required at the outset. *See Al-Haramain*, 507 F.3d at 1201 (explaining that the *Totten* bar and the *Reynolds* privilege form a "continuum of analysis," and that in some cases "the suit itself may not be barred because of its subject matter and yet ultimately, the state secrets privilege may nonetheless preclude the case from proceeding to the merits," even without "await[ing] preliminary discovery"). Here, our detailed *Reynolds* analysis reveals that the claims and possible defenses are so infused with state secrets that the risk of disclosing them is both apparent and inevitable. Dismissal under these circumstances, like dismissal under the *Totten* bar, reflects the 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." *Totten*, 92 U.S. at 107.

* * *

Although we are necessarily precluded from explaining precisely why this case cannot be litigated without risking disclosure of state secrets, or the nature of the harm to national security that we are convinced would result from further litigation, we are able to offer a few observations.

[16] *First*, we recognize that plaintiffs have proffered hundreds of pages of publicly available documents, many catalogued in the dissent's Appendix, that they say corroborate some of their allegations concerning Jeppesen's alleged participation in aspects of the extraordinary rendition program. As the government has acknowledged, its claim of privilege does not extend to public documents. Accordingly, we do not hold that any of the documents plaintiffs have submitted are subject to the privilege; rather, we conclude that even assuming plaintiffs could establish their entire case *solely* through nonprivileged evidence — unlikely as that may be — any effort by Jeppesen to defend would unjustifiably risk disclosure of state secrets. *Cf. El-Masri*, 479 F.3d at 309 (concluding that "virtually any conceivable response [by government defendants to claims based on factual allegations materially identical to this case's] . . . would disclose privileged

information").

[17] *Second*, we do not hold that the existence of the extraordinary rendition program is itself a state secret. The program has been publicly acknowledged by numerous government officials including the President of the United States. Even if its mere existence may once have been a "matter[ ] which, in the interest of national security, should not be divulged," it is not a state secret now. *Reynolds*, 345 U.S. at 10; *cf. Al-Haramain*, 507 F.3d at 1193 (concluding "[i]n light of extensive government disclosures" that a warrantless wiretapping program was not a matter of state secret). Nonetheless, partial disclosure of the existence and even some aspects of the extraordinary rendition program does not preclude other details from remaining state secrets if *their* disclosure would risk grave harm to national security. *See Al- Haramain*, 507 F.3d at 1203 (concluding that some undisclosed details of the wiretapping program were entitled to protection under the state secrets privilege); *Halkin*, 690 F.2d at 994 ("We reject, as we have previously, the theory that 'because some information about the project ostensibly is now in the public domain, nothing about the project in which the appellants have expressed an interest can properly remain classified' or otherwise privileged from disclosure." (quoting *Military Audit Project v. Casey*, 656 F.2d 724, 752 (D.C. Cir. 1981))*; see also Bareford*, 973 F.2d at 1144 (explaining that in some circumstances, "disclosure of information by government officials can be prejudicial to government interests, even if

the information has already been divulged from nongovernment sources").

Third, we acknowledge the government's certification at oral argument that its assertion of the state secrets privilege comports with the revised standards set forth in the current administration's September 23, 2009 memorandum, adopted several years after the government first invoked the privilege in this case. Those standards require the responsible agency to show that "assertion of the privilege is necessary to protect information the unauthorized disclosure of which reasonably could be expected to cause significant harm to the national defense or foreign relations." *Holder Memo, supra*, at 1. They also mandate that the Department of Justice "will not defend an invocation of the privilege in order to: (i) conceal violations of the law, inefficiency, or administrative error; (ii) prevent embarrassment to a person, organization, or agency of the United States government; (iii) restrain competition; or (iv) prevent or delay the release of information the release of which would not reasonably be expected to cause significant harm to national security." *Id.* at 2. That certification here is consistent with our independent conclusion, having reviewed the government's public and classified declarations, that the government is not invoking the privilege to avoid embarrassment or to escape scrutiny of its recent controversial transfer and interrogation policies, rather than to protect legitimate national security concerns.

V. OTHER REMEDIES

Our holding today is not intended to foreclose — or to prejudge — possible *nonjudicial* relief, should it be warranted for any of the plaintiffs. Denial of a judicial forum based on the state secrets doctrine poses concerns at both individual and structural levels. For the individual plaintiffs in this action, our decision forecloses at least one set of judicial remedies, and deprives them of the opportunity to prove their alleged mistreatment and obtain damages. At a structural level, terminating the case eliminates further judicial review in this civil litigation, one important check on alleged abuse by government officials and putative contractors. Other remedies may partially mitigate these concerns, however, although we recognize each of these options brings with it its own set of concerns and uncertainties.

First, that the judicial branch may have deferred to the executive branch's claim of privilege in the interest of national security does not preclude the government from honoring the fundamental principles of justice. The government, having access to the secret information, can determine whether plaintiffs' claims have merit and whether misjudgments or mistakes were made that violated plaintiffs' human rights. Should that be the case, the government may be able to find ways to remedy such alleged harms while still maintaining the secrecy national security demands. For instance, the government made reparations to Japanese

Latin Americans abducted from Latin America for internment in the United States during World War II. *See Mochizuki v. United States*, 43 Fed. Cl. 97 (1999).[13]

Second, Congress has the authority to investigate alleged wrongdoing and restrain excesses by the executive branch.[14] "The power of the Congress to conduct investigations is inherent in the legislative process." *Watkins v. United States*, 354 U.S. 178, 187 (1957); *accord Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 504 (1975). "Congress unquestionably has . . . broad authority to investigate, to inform the public, and, ultimately, to legislate against suspected

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[13] Other governments have committed to doing this. *See, e.g.*, Prime Minister David Cameron, A Statement Given by the Prime Minister to the House of Commons on the Treatment of Terror Suspects (July 6, 2010), http://www.number10.gov.uk/news/statements-and articles/2010/07/ statement-on-detainees-52943 ("[W]e are committed to mediation with those who have brought civil claims about their detention in Guantanamo. And wherever appropriate, we will offer compensation.").

[14] In addition, Congress has constituted independent investigatory bodies within the executive branch. *See, e.g.*, 50 U.S.C. § 403q (establishing the Office of Inspector General in the Central Intelligence Agency "to initiate and conduct independently inspections, investigations, and audits relating to programs and operations of the Agency"); *see also* Office of Inspector General, Central Intelligence Agency, Special Review: Counterterrorism Detention and Interrogation Activities (September 2001 — October 2003), May 7, 2004 (partially redacted), *available at* http://graphics8.nytimes.com/packages/pdf/politics/20090825 DETAIN/2004CIAIG.pdf.

corruption and abuse of power in the Executive Branch." *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 498 (1977) (Powell, J., concurring); *see also Branzburg v. Hayes*, 408 U.S. 665, 741 (1972) (Stewart, J., dissenting) ("We have long recognized the value of the role played by legislative investigations . . . .").

Third, Congress also has the power to enact private bills. *See Nixon v. Fitzgerald*, 457 U.S. 731, 762 n.5 (1982) (Burger, C.J., concurring) ("For uncompensated injuries Congress may in its discretion provide separate nonjudicial remedies such as private bills."); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 n.9 (1995) ("Private bills in Congress are still common, and were even more so in the days before establishment of the Claims Court."); *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 431 (1990) ("Congress continues to employ private legislation to provide remedies in individual cases of hardship."). Because as a general matter the federal courts are better equipped to handle claims, *see Kosak v. United States*, 465 U.S. 848, 867-69 (1984) (Stevens, J., dissenting), Congress can refer the case to the Court of Federal Claims to make a recommendation before deciding whether to enact a private bill, *see* 28 U.S.C. § 1492; *see also Banfi Prods. Corp. v. United States*, 40 Fed. Cl. 107, 109 (1997), although Congress alone will make the ultimate decision. When national security interests deny alleged victims of wrongful governmental action meaningful access to a

judicial forum, private bills may be an appropriate alternative remedy.[15]

Fourth, Congress has the authority to enact remedial legislation authorizing appropriate causes of action and procedures to address claims like those presented here. When the state secrets doctrine "compels the subordination of appellants' interest in the pursuit of their claims to the executive's duty to preserve our national security, this means that remedies for . . . violations that cannot be proven under existing legal standards, if there are to be such remedies, must be provided by Congress. That is where the government's power to remedy

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[15] Proceedings in the Court of Federal Claims following congressional referral may pose some of the same problems that require dismissal here — the Court of Federal Claims must avoid disclosure of state secrets too. The referral proceedings might be less problematic than this lawsuit, however, because, for example, the question of third-party liability would not be the focus: a private bill addresses compensation by the government, not by third parties. In addition, Congress might tailor its referral to protect state secrets, by, for example, requiring the Court of Federal Claims to make its recommendation based solely on the plaintiffs' own testimony and nonprivileged documents in the public domain. Moreover, Congress presumably possesses the power to restrict application of the state secrets privilege in the referral proceedings. *Cf. Al-Haramain*, 507 F.3d at 1205- 06 (remanding to the district court to consider whether the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1806(f), preempts the state secrets privilege).

wrongs is ultimately reposed." *Halkin v. Helms*, 690 F.2d at 1001 (footnote omitted).

VI. CONCLUSION

We, like the dissent, emphasize that it should be a rare case when the state secrets doctrine leads to dismissal at the outset of a case. Nonetheless, there are such cases — not just those subject to *Totten*'s per se rule, but those where the mandate for dismissal is apparent even under the more searching examination required by *Reynolds*. This is one of those rare cases.

For all the reasons the dissent articulates — including the impact on human rights, the importance of constitutional protections and the constraints of a judge-made doctrine — we do not reach our decision lightly or without close and skeptical scrutiny of the record and the government's case for secrecy and dismissal. We expect our decision today to inform district courts that *Totten* has its limits, that every effort should be made to parse claims to salvage a case like this using the *Reynolds* approach, that the standards for peremptory dismissal are very high and it is the district court's role to use its fact-finding and other tools to full advantage before it concludes that the rare step of dismissal is justified. We also acknowledge that this case presents a painful conflict between human rights and national security. As judges, we have tried our best to evaluate the competing claims of plaintiffs and the government and resolve that conflict according to the principles governing the state

secrets doctrine set forth by the United States Supreme Court.

[18] For the reasons stated, we hold that the government's valid assertion of the state secrets privilege warrants dismissal of the litigation, and affirm the judgment of the district court.[16] The government shall bear all parties' costs on appeal.

AFFIRMED.

BEA, Circuit Judge, concurring:

I concur with Judge Fisher's well-reasoned opinion and join fully in his result. I also concur with Judge Fisher's analysis with respect to *United States v. Reynolds*, 345 U.S. 1 (1953). I write separately only because I would decide this case under *Totten v. United States*, 92 U.S. 105, 107 (1876).

The *Totten* bar requires our courts to dismiss cases "where the very subject matter of the action" is "a matter of state secret." *Reynolds*, 345 U.S. at 11 n.26. In this case, every claim in

[16] We do not share the dissent's confidence that the present proceedings come within Federal Rule of Civil Procedure 12(b)(6). Dissent 13559-60, 13565. *Reynolds* necessarily entails consideration of materials outside the pleadings: at minimum, the *Reynolds* analysis requires the court to review the government's formal claim of privilege. That fact alone calls into question reliance on Rule 12(b)(6). *See Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001).

the Plaintiffs' complaint is based on the allegation that officials of the United States government arrested and detained Plaintiffs and subjected them to specific interrogation techniques. Those alleged facts, not merely Jeppesen's role in such activities, are a matter of state secret.

HAWKINS, Circuit Judge, with whom Judges SCHROEDER, CANBY, THOMAS, and PAEZ, Circuit Judges, join, dissenting:

A Flawed Procedure

I agree with my colleagues in the majority that *United States v. Reynolds*, 345 U.S. 1 (1953), is a rule of evidence, requiring courts to undertake a careful review of evidence that might support a claim or defense to determine whether either could be made without resort to legitimate state secrets. I part company concerning when and where that review should take place.

The majority dismisses the case in its entirety before Jeppesen has even filed an answer to Plaintiffs' complaint. Outside of the narrow *Totten* context, the state secrets privilege has never applied to prevent parties from litigating the truth or falsity of allegations, or facts, or information simply because the government regards the truth or falsity of the allegations to be secret. Within the *Reynolds* framework, dismissal is justified if and only if specific privileged evidence is itself indispensable to establishing either the truth of the plaintiffs' allegations or a valid defense that would otherwise be available to

the defendant. *See, e.g.*, *Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998).

This is important, because an approach that focuses on specific evidence after issues are joined has the benefit of confining the operation of the state secrets doctrine so that it will sweep no more broadly than clearly necessary. The state secrets doctrine is a judicial construct without foundation in the Constitution, yet its application often trumps what we ordinarily consider to be due process of law. This case now presents a classic illustration. Plaintiffs have alleged facts, which must be taken as true for purposes of a motion to dismiss, that any reasonable person would agree to be gross violations of the norms of international law, remediable under the Alien Tort Statute. They have alleged in detail Jeppesen's complicity or recklessness in participating in these violations. The government intervened, and asserted that the suit would endanger state secrets. The majority opinion here accepts that threshold objection by the government, so Plaintiffs' attempt to prove their case in court is simply cut off. They are not even allowed to attempt to prove their case by the use of nonsecret evidence in their own hands or in the hands of third parties.

It is true that, judicial construct though it is, the state secrets doctrine has become embedded in our controlling decisional law. Government claims of state secrets therefore must be entertained by the judiciary. But the doctrine is so dangerous as a means of hiding

governmental misbehavior under the guise of national security, and so violative of common rights to due process, that courts should confine its application to the narrowest circumstances that still protect the government's essential secrets.[1] When, as here, the doctrine is

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[1] Abuse of the Nation's information classification system is not unheard of. Former U.S. Solicitor General Erwin Griswold, who argued the government's case in the Pentagon Papers matter, later explained in a *Washington Post* editorial that "[i]t quickly becomes apparent to any person who has considerable experience with classified material that there is massive overclassification, and that the principal concern of the classifiers is not with national security, but rather with governmental embarrassment of one sort or another." Erwin N. Griswold, *Secrets Not Worth Keeping: the Courts and Classified Information*, Wash. Post, Feb. 15, 1989, at A25.

Former Attorney General Herbert Brownell similarly complained in a 1953 letter to President Eisenhower that classification procedures were then "so broadly drawn and loosely administered as to make it possible for government officials to cover up their own mistakes and even their wrongdoing under the guise of protecting national security." Letter from Attorney General Herbert Brownell to President Dwight Eisenhower (June 15,1953) (quoted in Kenneth R. Mayer, *With the Stroke of a Pen: Executive Orders and Presidential Power* 145 (2001)).

Even in *Reynolds*, avoidance of embarrassment—not preservation of state secrets—appears to have motivated the Executive's invocation of the privilege. There the Court credited the government's assertion that "this accident occurred to a military plane which had gone aloft to test secret electronic equipment," and that "there was a reasonable danger that the accident investigation report would contain references to the secret electronic equipment which was the primary concern of the mission." 345 U.S. at 10. In 1996, however, the "secret" accident report involved

successfully invoked at the threshold of litigation, the claims of secret are necessarily broad and hypothetical. The result is a maximum interference with the due processes of the courts, on the most general claims of state secret privilege. It is far better to require the government to make its claims of state secrets with regard to specific items of evidence or groups of such items as their use is sought in the lawsuit. An official certification that evidence is truly a state secret will be more focused if the head of a department must certify that specific evidence sought in the course of litigation is truly a secret and cannot be revealed without danger to overriding, essential government interests. And when responsive pleading is complete and discovery under way, judgments as to whether secret material is essential to Plaintiffs' case or Jeppesen's defense can be made more accurately.

By refusing to examine the voluminous public record materials submitted by Plaintiffs in support of their claims,[2] and by failing to

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in that case was declassified. A review of the report revealed, not "details of any secret project the plane was involved in," but "[i]nstead, . . . a horror story of incompetence, bungling, and tragic error." Garry Wills, *Why the Government Can Legally Lie*, 56 N.Y. Rev. of Books 32, 33 (2009). Courts should be concerned to prevent a concentration of unchecked power that would permit such abuses.

[2] A summary of the some 1,800 pages of that information appears as an Appendix to this dissent.

undertake an analysis of Jeppesen's ability to defend against those claims, the district court forced every judge of the court of appeals to undertake that effort. This was no small undertaking. Materials the government considers top secret had to be moved securely back and forth across the country and made available in a "cone of silence" environment to first the three-judge panel assigned the case and then the twenty-seven active judges of this court to evaluate whether the case merited en banc consideration. This quite literally put the cart before the horse, depriving a reviewing court of a record upon which its traditional review function could be carried out.[3] This is more than a matter of convenience. Making factual determinations is the particular province of trial courts and for sound reason: they are good at it. Not directing the district court to do that work sends exactly the wrong message in the handling of these critical and sensitive cases. Finding remand "unnecessary," as the majority does here, [Maj. Op. at 13546, n.10], not only rewards district courts for failing to do their job, but ensures that future appeals courts will have to do that job for them.[4]

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[3] In another context, the Supreme Court has pointed out the structural problems created when appellate courts are presented with undeveloped records. *Johnson v. Jones*, 515 U.S. 304, 309, 316-17 (1998).

[4] I have confidence in the ability of district judges to make such determinations, and in the process of handling information which the government considers secret.

This is an appeal from a Rule 12 dismissal, which means that the district court was required to assume that the wellpleaded allegations of the complaint are *true*, and that we "construe the complaint in the light most favorable to the plaintiff[s]." *Doe v. United States*, 419 F.3d 1058, 1062 (9th Cir. 2005). The majority minimizes the importance of these requirements by gratuitously attaching "allegedly" to nearly each sentence describing what Plaintiffs say happened to them, and by quickly dismissing the voluminous publicly available evidence supporting those allegations, including that Jeppesen knew what was going on when it arranged flights described by one of its own officials as "torture flights."[5] Instead, the majority assumes that even if

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Dismissing this suit out of fear of "compelled or inadvertent disclosure" of secret information during the course of litigation, [Maj. Op. at 13545], assumes that the government might make mistakes in what it produces, or that district courts might compel the disclosure of documents legitimately covered by the state secrets privilege.

[5] According to the sworn declaration of former Jeppesen employee Sean Belcher, the Director of Jeppesen International Trip Planning Services, Bob Overby, told him, " 'We do all the extraordinary rendition flights,' " which he also referred to as " 'the torture flights' " or "spook flights." Belcher stated that "there were some employees who were not comfortable with that aspect of Jeppesen's business" because they knew " 'some of these flights end up' " with the passengers being tortured. He noted that Overby had explained, " 'that's just the way it is, we're doing them' " because "the rendition flights paid very well."

Plaintiffs' prima facie case and Jeppesen's defense did not depend on privileged evidence, dismissal is required "because there is no feasible way to litigate Jeppesen's alleged liability without creating an unjustifiable risk of divulging state secrets." [Maj. Op. at 13548]. But Jeppesen has yet to answer or even to otherwise plead, so we have no idea what those defenses or assertions might be. Making assumptions about the contours of future litigation involves mere speculation, and doing so flies straight in the face of long standing principles of Rule 12 law by extending the inquiry to what *might* be divulged in future litigation.[6]

We should have remanded this matter to district court to do the Reynolds work that should have been done in the first place.

Because of this fundamental defect in the posture of this matter, the remainder of the dissent focuses on the scope of the state secrets

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[6] *See* 5 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1356 (3d ed. 2010) (Rule 12(b)(6) inquiries are "essentially . . . limited to the content of the complaint"); *see also Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322-23 (2007) (listing permissible evidence to consider in a 12(b)(6) motion, with no mention of prospective evidence, and with emphasis on an examination of the "underlying facts"); *Williston Basin Interstate Pipeline Co. v. An Exclusive Gas Storage Leasehold & Easement in the Cloverly Subterranean Geological Formation*, 524 F.3d 1090, 1096 (9th Cir. 2008) (the court may consider in a 12(b)(6) motion "only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice") (citing *Outdoor Media Grp., Inc. v. City of Beaumont*, 506 F.3d 895, 899-900 (9th Cir. 2007)).

privilege rather than its application to speculative facts.

The Totten *Bar*

While it chooses not to apply it, the majority correctly recites the general interpretation of the non-justiciability bar of *Totten v. United States*, 92 U.S. 105 (1876).[7] However, its definition of *Totten*'s scope—applying to "any case in which 'the very subject matter of the action' is 'a matter of state secret' "[Maj. Op. at 13531]—and the concurrence's fullblown embrace of its application here merit response.

Courts have applied the *Totten* bar in one of two scenarios: (1) The plaintiff is party to a secret agreement with the government;[8] or (2) The plaintiff sues to solicit information from the government on a "state secret" matter.[9] *See*

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[7] *See, e.g.*, *Wilson v. Libby*, 535 F.3d 697, 710 (D.C. Cir. 2008) (discussing "the justiciability doctrine of *Totten v. United States*"); *Am. Civil Liberties Union v. Nat'l Sec. Agency*, 493 F.3d 644, 650 n.2 (6th Cir. 2007) (the *Totten* rule is a "rule of non-justiciability"); *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1197 (9th Cir. 2007) (the *Totten* rule is "a rule of non-justiciability, akin to a political question").

[8] *Totten* itself involved the estate of a former Civil War spy seeking compensation. 92 U.S. 105. *See also Tenet v. Doe*, 544 U.S. 1, 10 (2005) (suit against CIA director for failure to provide financial compensation for Cold War services).

[9] This category of *Totten*-bar cases is distinct from those involving a plaintiff's attempt to solicit information from the government via the Freedom of Information Act (FOIA).

Weinberger v. Catholic Action of Hawaii/Peace Educ. Project, 454 U.S. 139, 146 (1981) (*Totten* bar applies to suit against the United States Navy for failure to file an environmental impact statement regarding a "nuclear capable" facility where Navy would have to admit or deny proposed storage of nuclear weapons at the facility). More generally, the *Totten* bar has been applied to suits against the government, and never to a plaintiff's suit against a third-party/non-governmental entity.

Here, the "very subject matter" of this lawsuit is Jeppesen's involvement in an overseas detention program. Plaintiffs are neither parties

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Weinberger, which has a FOIA element, was decided on FOIA grounds and *Totten* grounds, and relevant here is the *Totten*-related decision. *See Weinberger v. Catholic Action of Hawaii/Peace Educ. Project*, 454 U.S. 139, 146 (1981). The FOIA cases are easily distinguishable. The FOIA cases entail litigation for the sole and independent purpose of obtaining disclosure of classified information. *See* 5 U.S.C. § 552(a)(4)(B); *see also, e.g.*, *Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362, 1370 (4th Cir. 1975) (addressing the court's authority under FOIA to order the disclosure of classified information for publication in a book). While "an informed citizenry [is] vital to the functioning of a democratic society," *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 16 (2001) (internal quotations omitted), the balance of interests will more often tilt in favor of the Executive when disclosure is the primary end in and of itself. FOIA therefore predictably entails greater deference to the national classification system than does the state secrets doctrine.

to a secret agreement with the government, nor are they attempting, as the result of this lawsuit, to solicit information from the government on a "state secret" matter. Rather, they are attempting to remedy "widespread violations of individual constitutional rights" occurring in a program whose existence has been made public. *See Hepting v. AT&T*, 439 F. Supp. 2d 974, 993 (N.D. Cal. 2006).

Totten's logic simply cannot be stretched to encompass the claims here, as they are brought by third-party plaintiffs against non-government defendant actors for their involvement in tortious activities.[10] Nothing Plaintiffs have done supports a conclusion that their "lips [are] to be for ever sealed respecting" the claim on which they sue, such that filing this lawsuit would in itself defeat recovery. *See Totten*, 92 U.S. at 106.

Instead of "avoid[ing] difficult questions about the precise scope of the *Totten* bar" [Maj. Op. at 13543], the majority ought to have found the *Totten* bar inapplicable, and rejected the

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[10] *See Terkel v. AT&T Corp.*, 441 F. Supp. 2d 899, 907 (N.D. III. 2006) (refusing to apply *Totten* because "the plaintiffs in this case were not parties to the alleged contract nor did they agree to its terms; rather, they claim that the performance of an alleged contract entered into by others would violate their statutory rights"); *Am. Civil Liberties Union v. Nat'l Sec. Agency*, 438 F. Supp. 2d 754, 763 (E.D. Mich. 2006) (refusing to apply *Totten* because it "applies [only] to actions where there is a secret espionage relationship between the Plaintiff and the Government"), *vacated on other grounds*, 493 F.3d 644 (6th Cir. 2007).

district court's analysis.[11] *Totten* cannot and does not apply to Plaintiffs' claims.

The Reynolds *Evidentiary Privilege*

The majority correctly describes *Reynolds* as a rule of evidence, which only the government may assert. [Maj. At 13534-35]. However, *Reynolds* cannot, as the majority contends, be asserted during the pleading stage to excise entire allegations.

The majority argues that because pleadings can serve as evidence, *see Huey v. Honeywell, Inc.*, 82 F.3d 327, 333 (9th Cir. 1996); *Lockwood v. Wolf Corp.*, 629 F.2d 603, 611 (9th Cir. 1980), the state secrets privilege "may be asserted at any time, even at the pleading stage." [Maj. Op. at 13535-36]. Thus, the majority argues, this court would be incorrect to conclude that neither the Federal Rules nor *Reynolds* would permit us to dismiss this case at the *pleadings stage* on the basis of an evidentiary privilege that must be invoked *during discovery* or *at trial*. In the majority's view, the privilege applies at the pleadings stage in such a manner that permits it to remove from a complaint any allegations where "secret and nonsecret information cannot be separated." [Maj. Op. at 13538].

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[11] Nor can the choice to affirm the district court under *Reynolds* be justified as an affirmance on "any basis supported by the record." [Maj. Op. at 13543]. The result the majority seeks here, a dismissal of Plaintiffs' case in its entirety, is not supported by the case law.

Whatever validity there may be to the idea that evidentiary privileges can apply at the pleadings stage, it is wrong to suggest that such an application would permit the removal of *entire allegations* resulting in out-and-out dismissal of the entire suit. Instead, the state secrets privilege operates at the pleadings stage to except from the implications of Rule 8(b)(6) the refusal to answer certain allegations, not, as the government contends, to permit the government or Jeppesen to avoid filing a responsive pleading at all. [Maj. Op. at 13544-45]. In the Fifth Amendment context, the Fourth Circuit has explained that the privilege against self-incrimination "protects an individual . . . from answering specific allegations in a complaint or filing responses to interrogatories in a civil action where the answers" would violate his rights under the privilege. *N. River Ins. Co., Inc. v. Stefanou*, 831 F.2d 484, 486-87 (4th Cir. 1987). Accordingly, "when properly invoked, the fifth amendment privilege against self-incrimination . . . can avoid the operation of Rule [8(b)(6)]." *Id.* at 487.

But a proper invocation of the privilege does not excuse a defendant from the requirement to file a responsive pleading; the obligation is to answer those allegations that can be answered and to make a specific claim of the privilege as to the rest, so the suit can move forward. *Id.* (citing 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1280, at 360 (1969)).

According to this rationale, Plaintiffs are correct that the government moving forward may

assert the state secrets privilege to prevent Jeppesen from answering any allegations, where the answer would constitute evidence properly protected by the privilege. But, recognizing that the privilege may apply at the pleadings stage to prevent defendants from answering certain allegations vis-a-vis operation of Rule 8(b)(6) does not mean the privilege can be used to remove altogether certain subject matters from a lawsuit. Observing that pleadings may constitute evidence, in other words, does not transform an evidentiary privilege into an immunity doctrine.[12]

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[12] It is not at all clear that the *Reynold*s privilege can be asserted at the pleading stage, as the majority claims. [*See* Maj. Op. at 13535]. *Ellsberg v. Mitchell*, 709 F.2d 51, 52 (D.C. Cir. 1983), on which the majority relies, involved the formal claim of state secrets privilege entered by the United States *in opposition to the plaintiffs' motion to compel discovery* and, while the opinion references the government's amended answer to the complaint in a footnote, it focuses centrally on the refusal of the defendants "to respond to any of the plaintiffs' remaining allegations or questions" as presented in the plaintiffs' submitted interrogatories. *Id.* at 53-54 & n.6. In *Black v. United States*, 62 F.3d 1115, 1117 (8th Cir. 1995), on which the majority also relies, the Eighth Circuit dismissed a suit against the CIA by an electrical engineer with government security clearances at the pleading stage because the main information Black sought in his complaint, which would "confirm or deny Black's alleged contacts with government officers," was the basis of Black's claim. Without it, his suit could not go forward. Here, where Plaintiffs arguably have ample public information to proceed with their suit, we do not have such a cut-and-dried case of privilege. **[***See* Dissent App'x].

Moreover, pleadings are not considered evidence. *See United States v. Zermeno*, 66 F.3d 1058, 1062 (9th Cir.

The state secrets privilege, as an evidentiary privilege, is relevant not to the sufficiency of the *complaint*, but only to the sufficiency of evidence available to later *substantiate* the complaint.

Because the *Reynolds* privilege, like any other evidentiary privilege, " 'extends only to [evidence] and not to facts,' " *Upjohn Co. v. United States*, 449 U.S. 383, 395-96 (1981) (quoting *Philadelphia v. Westinghouse Elec. Corp.*, 205 F. Supp. 830, 831 (E.D. Pa. 1962)), it cannot be

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1995) ("The government's assertions in its pleadings are not evidence."); *S. Pac. Co. v. Conway*, 115 F.2d 746, 750 (9th Cir. 1940) ("[T]he office of a pleading is to state ultimate facts and not evidence of such facts."). If the government is seeking to excise entire allegations with the invocation of the privilege at the pleading stage, such an invocation would require an assertion that the *very subject matter* of the lawsuit is a state secret, and not the assertion of an evidentiary privilege. *See Moliero v. FBI*, 749 F.2d 815, 821 (D.C. Cir. 1984) (where "the whole object of the suit and of the discovery is to establish a fact that is a state secret," compliance with discovery as a whole can be "excused in gross, without the necessity of examining individual documents"); *cf. Al-Haramain*, 507 F.3d at 1197 (applying *Reynolds* directly to evidence—a sealed document—where privilege was asserted in response to government's accidental disclosure of documents to the plaintiffs, and declining to find "the very subject matter" of the suit to be a state secret). Here, while the majority declines to reach the *Totten* bar question, the "very subject matter" of this lawsuit—Jeppesen's involvement in an overseas detention program—has been publicly acknowledged and is not a state secret.

invoked to prevent a litigant from persuading a jury of the truth or falsity of an allegation by reference to non-privileged evidence, regardless whether privileged evidence might also be probative of the truth or falsity of the allegation.[13]

Reynolds *and Rule 12(b)(6)*

The majority claims there is "no feasible way to litigate Jeppesen's alleged liability *without creating an unjustifiable risk of divulging state secrets*,"[14] [Maj. Op. at 13548], ignoring well-

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[13] Contrary to the majority's assertion, the *Reynolds* privilege cannot be asserted prospectively, without an examination of the evidence on an item-by-item basis. To conclude that *Reynolds*, like *Totten*, applies to prevent the litigation of allegations, rather than simply discovery of evidence, would be to erode the distinction between the two versions of the doctrine. Moreover, the Eighth Circuit case on which the majority relies, *Black*, 62 F.3d at 1117, was ultimately not a prospective assertion of the *Reynolds* privilege. While the government asserted the privilege in response to the plaintiff's amended complaint, ultimately, the privilege was asserted as to one piece of information, without which the plaintiff could not proceed; he could not bring an intentional infliction of emotional distress claim against the CIA without information about any existing contacts with government officers. *Id*. The information on his contacts, which the plaintiff attempted to solicit via his complaint, was privileged. *Id*. To say *Black* permits the assertion of the *Reynolds* privilege in the pleading stage is to misstate its holding.

[14] The majority cites *El-Masri v. United States*, 479 F.3d 296, 308-13 (4th Cir. 2007), as a comparable case wherein the court found further litigation risked disclosure of state secrets and threatened grave harm to American national security. [Maj. Op. at 13548, citing *El-Masri*, 479 F.3d at

established principles of civil procedure which, at this stage of the litigation, do not permit the prospective evaluation of hypothetical claims of privilege that the government has yet to raise and the district court has yet to consider.

Our task in reviewing the grant of a Rule 12 motion to dismiss "is necessarily a limited one." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). We are not to determine whether a particular party will ultimately prevail, but instead only whether the complaint "state[s] a claim upon which relief can be granted," Fed. R. Civ. Pro. 12(b)(6). If Plaintiffs here have stated a claim on which relief can be granted, they should have an opportunity to present evidence in support of their allegations, without regard for the likelihood of ultimate success. *See Scheuer*, 416 U.S. at 236 (a district court acts "prematurely" and "erroneously" when it dismisses a well-pleaded complaint, thereby "preclud[ing] any opportunity for the plaintiffs" to establish their case "by subsequent proof"); *see also Bell Atl. Corp. v.*

312]. However, noting that the Fourth Circuit appears to have "merged the concept of 'subject matter' with the notion of proof of a prima facie case," this court in *Al-Haramain* expressly rejected *El-Masri*'s logic. 507 F.3d at 1201. In the Ninth Circuit, "the 'subject matter' of a lawsuit [is not necessarily] one and the same [as] the facts necessary to litigate the case." *Id.* Accordingly, "[b]ecause the Fourth Circuit has accorded an expansive meaning to the 'subject matter' of an action, one that we have not adopted, *El-Masri* does not support dismissal based on the subject matter of the suit." *Id.*

Twombly, 550 U.S. 544, 556 (2007) ("[A] wellpleaded complaint may proceed even if it appears 'that a recovery is very remote and unlikely.' " (quoting *Scheuer*, 416 U.S. at 236)).

This limited inquiry—a long-standing feature of the Rules of Civil Procedure—serves a sensible judicial purpose. We simply cannot resolve whether the *Reynolds* evidentiary privilege applies without (1) an actual request for discovery of specific evidence, (2) an explanation from Plaintiffs of their need for the evidence, and (3) a formal invocation of the privilege by the government with respect to that evidence, explaining why it must remain confidential. *See Reynolds*, 345 U.S. at 8-9 ("the principles which control the application of the privilege" require a "formal claim of privilege" by the government with respect to the challenged evidence); *id.* at 10-11 (the court must consider the litigants' "showing of necessity" for the requested evidence in determining whether "the occasion for invoking the privilege is appropriate"). Nor can we determine whether the parties will be able to establish their cases without use of privileged evidence without also knowing what non-privileged evidence they will marshal. *See Crater Corp. v. Lucent Techs., Inc.*, 423 F.3d 1260, 1267-68 (Fed. Cir. 2005) ("deciding the impact of the government's assertion of the state secrets privilege" before the record is "adequately developed" puts "the cart before the horse"). Thus neither the Federal Rules nor *Reynolds* would permit us to dismiss this case for "failure to state a claim upon which relief can be granted," Fed. R.

Civ. Pro. 12(b)(6), on the basis of an evidentiary privilege relevant, not to the sufficiency of the complaint, but only to the sufficiency of evidence available to later substantiate the complaint.[15]

A decision to remand would have the additional benefit of conforming with "the general rule . . . that a federal appellate court does not consider an issue not passed on below," and will allow the district court to apply *Reynolds* in the first instance. *See Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *see also Johnson v. California*, 543 U.S. 499, 515 (2005) (citing *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 557-58 (1994)

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[15] While the government styled its motion below as a "Motion to Dismiss or, in the Alternative, for Summary Judgment," the district court did not grant summary judgment, but rather dismissal—and it could not have done otherwise. A party is entitled to summary judgment only if "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact." Fed. R. Civ. Pro. 56(c). Here, because Jeppesen has not even answered the complaint, it is uncertain which allegations are in dispute, much less which disputes might raise genuine issues of material fact.

The procedural posture of this case thus differs fundamentally from that in *Kasza*, which involved a grant of summary judgment. *See Frost v. Perry*, 191 F. Supp. 1459, 1465-67 (D. Nev. 1996), *aff'd sub nom Kasza*, 133 F.3d 1159 (granting summary judgment because "the privilege, as invoked, covered various items of discovery requested by Plaintiffs," including "various photographic exhibits" and "under seal . . . affidavits," and therefore "Plaintiffs have failed to establish a genuine issue as to any material fact without running afoul of the military and state secrets privilege").

(reversing and remanding for the lower court to apply the correct legal standard in the first instance)).

The majority's analysis here is premature. This court should not determine that there is no feasible way to litigate Jeppesen's liability without disclosing state secrets; such a determination is the district court's to make once a responsive pleading has been filed, or discovery requests made. We should remand for the government to assert the privilege with respect to secret evidence, and for the district court to determine what evidence is privileged and whether any such evidence is indispensable either to Plaintiffs' prima facie case or to a valid defense otherwise available to Jeppesen. Only if privileged evidence is indispensable to either party should it dismiss the complaint.

Conclusion

The majority concludes its opinion with a recommendation of alternative remedies. Not only are these remedies insufficient, but their suggestion understates the severity of the consequences to Plaintiffs from the denial of judicial relief. Suggesting, for example, that the Executive could "honor[ ] the fundamental principles of justice" by determining "whether plaintiffs' claims have merit," [*see* Maj. Op. at 13554] disregards the concept of checks and balances. Permitting the executive to police its own errors and determine the remedy dispensed would not only deprive the judiciary of its role,

but also deprive Plaintiffs of a fair assessment of their claims by a neutral arbiter. The majority's suggestion of payment of reparations to the victims of extraordinary rendition, such as those paid to Japanese Latin Americans for the injustices suffered under Internment during World War II, over fifty years after those injustices were suffered [Maj. Op. at 13554], elevates the impractical to the point of absurdity. Similarly, a congressional investigation, private bill, or enacting of "remedial legislation," [Maj. Op. at 13556], leaves to the legislative branch claims which the federal courts are better equipped to handle. *See Kosak v. United States*, 465 U.S. 848, 867 (1984) (Stevens, J., dissenting).

Arbitrary imprisonment and torture under any circumstance is a " 'gross and notorious . . . act of despotism.' " *Hamdi v. Rumsfeld*, 542 U.S. 507, 556 (2004) (Scalia, J., dissenting) (quoting 1 *Blackstone* 131-33 (1765)). But "'confinement [and abuse] of the person, by secretly hurrying him to [prison], where his sufferings are unknown or forgotten; is a less public, a less striking, and therefore a more dangerous engine of arbitrary government.' " *Id.* (Scalia, J., dissenting) (quoting 1 *Blackstone* 131-33 (1765)) (emphasis added). I would remand to the district court to determine whether Plaintiffs can establish the prima facie elements of their claims or whether Jeppesen could defend against those claims without resort to state secrets evidence.