Federal Civil Procedure—Government May Intervene and Invoke State Secrets Privilege For Defendant Company That Allegedly Assisted CIA—*Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010) (en banc), *cert. denied*, 131 S. Ct. 2442 (2011)

The United States judiciary will defer to the executive branch on matters of foreign policy and national security when evaluating the need for secrecy.[1] The state secrets doctrine, a common-law evidentiary privilege, permits the government to bar the disclosure of information that poses a reasonable danger of exposing military matters that should not be divulged in the interest of national security.[2] In *Mohamed v. Jeppesen Dataplan, Inc.*,[3] the Court of Appeals for the Ninth Circuit considered the government's motions to intervene in and dismiss—on state secrets grounds—an action brought by foreign nationals against a company that purportedly assisted in the Central Intelligence Agency's (CIA) "extraordinary rendition" program.[4] On rehearing en banc, the court of appeals affirmed the district court's judgment and held that the plaintiffs' action must be dismissed at the pleadings stage, in the interest of national security.[5]

Binyam Mohamed and four co-plaintiffs alleged that CIA agents kidnapped them as part of its extraordinary rendition program.[6] According to the plaintiffs, the program allowed the United States government and its agents to employ prohibited interrogation methods by transferring suspected terrorists to secret detention facilities in Europe and the Middle East.[7] Although differing

1. *See* Al-Haramain Islamic Found., Inc. v. Bush, 507 F.3d 1190, 1203 (9th Cir. 2007) (highlighting established judicial policy); *see also* Michael H. Page, Note, *Judging Without the Facts: A Schematic for Reviewing State Secrets Privilege Claims*, 93 CORNELL L. REV. 1243, 1244 (2008) (describing judicial rationale for deferring to executive claims of state secrets privilege). Page notes that judges presume they are expected to defer to the executive branch, but explains that the presumption is based on the theory that the executive branch is better positioned to assess threats to national security. Page, *supra*, at 1244. *See generally* Erin M. Stilp, Comment, *The Military and State-Secrets Privilege: The Quietly Expanding Power*, 55 CATH. U. L. REV. 831 (2006) (discussing government power under state secrets privilege).

2. *See* Al-Haramain Islamic Found., Inc. v. Bush, 507 F.3d 1190, 1196 (9th Cir. 2007) (citing United States v. Reynolds, 345 U.S. 1, 10 (1953)) (outlining state secrets privilege and government involvement).

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

4. *See id.* at 1073, 1076-77 (identifying issue considered by court).

5. *See id.* at 1073, 1092 (concluding privilege claim must be upheld despite irreconcilable conflicts with liberty and justice). The court noted the "painful conflict between human rights and national security" in making its decision. *Id.* at 1093.

6. *See id.* at 1073-1074 (providing background information regarding extraordinary rendition program). Plaintiffs included Binyam Mohamed, Abou Elkassim Britel, Ahmed Agiza, Bisher Al-Rawi, and Mohamed Farag Ahmad Bashmilah. *Id.* at 1074-75.

7. *See* Mohamed v. Jeppesen Dataplan, Inc., 539 F. Supp. 2d 1128, 1129-32 (N.D. Cal. 2008) (explaining goals of extraordinary rendition program), *aff'd*, 614 F.3d 1070 (9th Cir. 2010) (en banc), *cert. denied*, 131 S. Ct. 2442 (2011). Plaintiffs indicated that they were transferred and held at detention facilities in

in detail, the individual circumstances underlying the plaintiffs' claims all involved forced disappearance for months or years, detainment in abject conditions, and both physical and psychological torture.[8] Using publicly available information, the plaintiffs contended that Jeppesen Dataplan (Jeppesen) provided aid to the CIA in the form of flight planning, logistics, and other services on all flights that had transported them to their detention and torture sites.[9] The plaintiffs' complaint asserted that Jeppesen played an integral role in the extraordinary rendition program by providing the CIA both knowledge of the program's objectives and information regarding the intended purpose of the transportation—namely, forced disappearance and torture.[10]

Mohamed sued under the Alien Tort Statute,[11] with one claim for forced disappearance and another for torture or other cruel, inhuman, or degrading treatment.[12] Before Jeppesen had filed an answer to the complaint, or any other pleading, the government filed motions to intervene and dismiss under the state secrets doctrine.[13] In support of the motion to dismiss, the Director of the CIA

Pakistan, Morocco, and Jordan—countries suspected of utilizing torture during the course of interrogation—in addition to Bagram Air Force Base and a site known as the "Dark Prison" in Afghanistan. *Id.*; *see also* 614 F.3d at 1102-31 (listing factual materials produced by plaintiffs). According to a Council of Europe Parliamentary Assembly Report, included in the plaintiffs' factual materials, more than one hundred extraordinary renditions had taken place as of 2006. *See* 614 F.3d at 1104.

8. *See* Mohamed v. Jeppesen Dataplan, Inc., 539 F. Supp. 2d 1128, 1129-32 (N.D. Cal. 2008) (detailing results of extraordinary rendition program and alleged treatment of plaintiffs), *aff'd*, 614 F.3d 1070 (9th Cir. 2010) (en banc), *cert. denied*, 131 S. Ct. 2442 (2011). The plaintiffs' experiences differed in some regard—namely the locations of their original acquisition and eventual detention—but each involved being kidnapped or arrested, forced to travel to a foreign country by plane, and extensive interrogation and torture. *See id.* Agiza and Britel remain in Egyptian and Moroccan prisons, respectively, while Mohamed, al-Rawi, and Bashmilah have been released from Guantanamo Bay and an unknown CIA "black site" prison. *See* 614 F.3d at 1074-75.

9. *See* 614 F.3d at 1075-76 (describing Jeppesen's alleged involvement in extraordinary rendition program). The plaintiffs referenced statements by President George W. Bush regarding the program at a number of official press conferences. *Id.* at 1118. Additionally, the plaintiffs referred to comments made by a Jeppesen employee with actual knowledge of the program, that the company performed extraordinary rendition flights. *See id.* at 1076. Moreover, the plaintiffs referenced an investigational report produced by the Council of Europe, which identified Jeppesen Dataplan as the entity responsible for filing specific flight plans, as well as a number of published books, articles, and television programs on the rendition flights. *See id.* at 1108.

10. *See id.* at 1102-31 (outlining evidentiary basis for complaint and knowledge of Jeppesen's involvement in extraordinary rendition program).

11. 28 U.S.C. § 1350 (2006).

12. *See* 614 F.3d at 1075-76 (describing first amended complaint allegations). Under the Alien Tort Statute, "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." 28 U.S.C. § 1350 (2006). The plaintiffs' forced disappearance claim asserted theories of liability for Jeppesen's active participation in conspiring with, and aiding and abetting, U.S. agents, as well as a reckless disregard that the transport was for secret detention. *See* 614 F.3d at 1076. On the torture claim, Mohamed and his co-plaintiffs asserted conspiracy, aiding and abetting, and direct liability theories, alleging that Jeppesen knew or should have known that its support would be used in the extraordinary rendition program. *Id.*

13. *See* 614 F.3d at 1076 (detailing government reaction to issue of complaint). The government argued that neither it nor Jeppesen could be compelled to disclose information that would confirm or deny assistance with the CIA's programs, information about foreign government cooperation with said programs, or information about the scope of CIA programs. *See id.* at 1085.

submitted two declarations explaining the necessity of the doctrine's use.[14]

The district court granted the government's motions to intervene and dismiss, and the plaintiffs appealed.[15] On appeal, a three-judge panel of the court of appeals reversed and remanded, holding that the government had failed to establish a basis for dismissal and that the state secrets privilege may only be asserted with respect to secret information, as opposed to a categorical bar that forecloses litigation at the outset.[16] The Ninth Circuit reviewed the case en banc and determined the state secrets doctrine had been properly applied at the district court level.[17] Thus, the court of appeals affirmed the district court's judgment and dismissed the plaintiffs' case.[18]

Since its first use following the United States Civil War in *Totten v. United States*,[19] the state secrets privilege has served as a common-law evidentiary privilege that permits the government to deny the discovery of military secrets.[20] The *Totten* bar provides that cases falling within a certain class—

14. *Id.* at 1076 (stating government justification for invocation of state secrets doctrine). General Michael Hayden, CIA Director, filed a classified declaration along with a public redacted version asserting that disclosure of the information at issue could result in grave damage to national security. *See id.* The public declaration stated that the risk of harm was great because highly classified information was central to the underlying issues in the case. *See id.*

15. *See* Mohamed v. Jeppesen Dataplan, Inc., 539 F. Supp. 2d 1128, 1130-31 (N.D. Cal. 2008) (providing procedural history and district court's acceptance of state secrets privilege), *aff'd*, 614 F.3d 1070 (9th Cir. 2010) (en banc), *cert. denied*, 131 S. Ct. 2442 (2011). After determining that the procedures for invoking the privilege were met, the district court opined that the state secrets privilege did apply to the information at issue and concluded that the very subject matter of the case was, in fact, a state secret. *See id.* at 1134.

16. Mohamed v. Jeppesen Dataplan, Inc., 579 F.3d 943, 961-62 (9th Cir.) (refusing to apply categorical bar to Mohamed's claim without further development), *reh'g en banc granted*, 586 F.3d 1108 (9th Cir. 2009). The three-judge panel of the appeals court criticized the government's sweeping characterization of secrecy and indicated that such a bar would have no logical limit if implemented in the judiciary. *See id.* at 955. Additionally, the appeals court found fault in the application of case law to the facts at hand, reasoning that no secret agreement with the government had been alleged and not all theories of liability required proof of a relationship between the defendant and the government. *Id.* at 953-54.

17. *See* 614 F.3d at 1084 (concluding dismissal warranted under any established test for applicability of state secrets doctrine). The court reviewed a number of theories of the privilege's application and held that dismissal would be warranted under any of the government's propositions. *See id.* at 1084-86. Additionally, the court considered a set of stringent and newly announced guidelines for asserting the state secrets privilege, set forth by the Obama administration, along with the government's certification that assertion of the privilege was proper under this new policy. *See id.* at 1077.

18. *Id.* at 1084 (holding district court reached proper result). The court recognized the consequences of a dismissal at the pleading stage and attempted to offer an explanation of such a result, while noting limitations stemming from state secrets implications. *Id.* Additionally, the court referenced government certification of compliance with a memorandum from Attorney General Eric Holder (the Holder Memo), filed while the appeal was pending—Barack Obama succeeded George W. Bush as President during this time—that governed new policies regarding the use of the state secrets privilege. *Id.* at 1077.

19. 92 U.S. 105 (1876).

20. *See* Totten v. United States, 92 U.S. 105, 105-06 (1876) (discussing origin of evidentiary privilege). In what is now known as the "*Totten* bar," the Court stated that one who enters into secret dealings or a contract for secret services with the government may not seek redress in a court, as a trial on the suit would lead to the disclosure of confidential matters, both breaching the contract and endangering the public. *Id.* at 107; *see also* Tenet v. Doe, 544 U.S. 1, 8 (2005) (barring suit against government based on covert espionage agreement). *See generally* Jeffrey L. Vagle, Note, *A Kind of Hydraulic Pressure: Extraordinary Rendition, State Secrets,*

specifically those involving a contract for a secret service—are entirely nonjusticiable.[21] While this core proposition of *Totten* is still relevant and active, the state secrets privilege has adopted a contemporary form that has been applied beyond contractual disputes or secret agreements.[22]

In 1953, the Supreme Court held in *United States v. Reynolds* that certain government evidence may be subject to a state secrets privilege, but the use of such a privilege would not constitute an outright bar to the case's justiciability.[23] With the *Reynolds* decision, the Court established a standard set of procedures for invoking the privilege, beginning with a formal claim of privilege filed by the head of the department controlling the material at issue, followed by the court determining whether circumstances are appropriate for the claim, and lastly, a final decision on how to proceed further in light of the change.[24] This judicial discretion, severely hampered by the *Reynolds*

and the Limits of Executive Power, 22 TEMP. INT'L & COMP. L.J. 523 (2008) (evaluating historical impact and improper application of *Totten* bar).

21. *See* Totten v. United States, 92 U.S. 105, 107 (1876) (reasoning disclosure of confidential government contract bars litigation). The Court focused on the existence of a secret agreement and reasoned that, as a general principle, disclosure of such an agreement would violate public policy. *See id.* The Court succinctly opined that "[t]he secrecy which such contracts impose precludes any action for their enforcement." *Id.*; *see also* Tenet v. Doe, 544 U.S. 1, 3 (2005) (barring plaintiffs' suit against government based on covert agreements for espionage service).

22. *See* United States v. Reynolds, 345 U.S. 1, 9-12 (1953) (establishing new evidentiary privilege for use by executive branch). The Court acknowledged *Totten* and held that an action may be dismissed on the pleadings when the very subject matter of the action is a state secret. *Id.* at 11. However, Chief Justice Vinson's opinion instituted a new, more inclusive privilege that may be applied by the court when it is satisfied "that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged." *Id.* at 10; *see also* Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 FORDHAM L. REV. 1931, 1936 (2007) (discussing historical importance of *Reynolds* decision); Holly Wells, Note, *The State Secrets Privilege: Overuse Causing Unintended Consequences*, 50 ARIZ. L. REV. 967, 973 (2008) (classifying *Reynolds* as Supreme Court's first explicit recognition of state secrets privilege).

23. *See* United States v. Reynolds, 345 U.S. 1, 11 (1953) (holding alternatives exist to "showdown" on privilege claim). The Court indicated that privilege claims must be evaluated against the alternative methods available to the parties to establish their case; if a party demonstrates a compelling need, the courts will be hesitant to allow the privilege. *See* Kasza v. Browner, 133 F.3d 1159, 1166 (9th Cir. 1998) (citing U.S. v. Reynolds, 345 U.S. 1, 11 (1953)) (explaining consequence of privilege exercise). When the government exercises the privilege, the specified evidence is completely removed from the case, and the plaintiff continues with evidence that the privilege does not cover. *Id.*; *see also* Ellsberg v. Mitchell, 709 F.2d 51, 65 (D.C. Cir. 1983) (stating invocation of privilege, by rule, results in removal of questioned material).

24. *See* United States v. Reynolds, 345 U.S. 1, 7-9 (1953) (outlining three-step process for government invocation of state secrets privilege). Chief Justice Vinson left considerable room for judicial discretion in this process and expressed a desire to avoid abdicating control over evidence to executive officers. *See id.* at 10. Justice Vinson's opinion also indicated that a court may, depending on the significance of the plaintiffs' need for the material, choose to allow use of the privilege without performing an in camera review by a judge. *Id.*; *see also, e.g.*, Doe v. CIA, 576 F.3d 95, 103-04 (2d Cir. 2009) (citing Zuckerbraun v. Gen. Dynamics Corp., 935 F.2d 544 (2d Cir. 1991)) (evaluating proper use of state secrets privilege and resulting dismissal); El-Masri v. United States, 479 F.3d 296, 304 (4th Cir. 2007) (rephrasing *Reynolds* process in concise three-part analysis); Kasza v. Browner, 133 F.3d 1159, 1165-66 (9th Cir. 1998) (delineating steps to invoke privilege and explaining consequences of use); Ellsberg v. Mitchell, 709 F.2d 51, 68-69 (D.C. Cir. 1983) (holding in camera review of materials necessary where plaintiff strongly needed materials for case).

instruction that a court should not over examine the source of the claimed privilege to avoid the risk of exposing privileged material, has led to further expansion of the state secrets privilege.[25] In a number of decisions, courts across the country have held dismissal appropriate based on the pleadings alone where the court opined that plaintiffs either could not make out prima facie cases without the use of privileged information, or because the very subject matter and object of the claim were state secrets.[26]

In its most modern form, the Fourth Circuit demonstrated the government's reliance on the state secrets privilege as part of its legal response to the war on terror in the 2007 *El-Masri v. United States* decision.[27] In *El-Masri*, the court rejected the plaintiff's arguments and held that the existence of public information related to the extraordinary rendition program, the essence of the

25. *See* Kasza v. Browner, 133 F.3d 1159, 1166 (9th Cir. 1998) (recognizing inherent limitations in separating classified and unclassified information). The court noted that seemingly innocuous information may play a part in a larger, classified whole, and thus be properly excluded by the privilege. *See id.*; *see also* Ellsberg v. Mitchell, 709 F.2d 51, 57 (D.C. Cir. 1983) (describing privilege as expansive and malleable). The *Ellsberg* court noted a wide variety of situations where the privilege may be appropriate, including where evidence may cause impairment of national defense capabilities, disclosure of intelligence sources or methods, and interference with foreign relations. *See* Ellsberg v. Mitchell, 709 F.2d 51, 57 (D.C. Cir. 1983); Steven D. Schwinn, *The State Secrets Privilege in the Post-9/11 Era*, 30 PACE L. REV. 778, 801-02 (2010) (addressing development of *Totten*-type holdings). Schwinn observed an increased push for the use of the privilege in post-9/11 cases and a new government argument that courts should accord the executive the utmost deference in its assertions. Schwinn, *supra*, at 809. *But see generally* Rita Glasionov, Note, *In Furtherance of Transparency and Litigants' Rights: Reforming the State Secrets Privilege*, 77 GEO. WASH. L. REV. 458 (2009) (discussing need for transparency in state secrets privilege).

26. *See, e.g.*, *In re* Sealed Case, 494 F.3d 139, 141 (D.C. Cir. 2007) (holding dismissal appropriate where plaintiff failed to establish prima facie case with other materials); *In re* United States, 872 F.2d 472, 476-77 (D.C. Cir. 1989) (stating effect of privilege claim depends on purpose privileged information intended to serve); Molerio v. FBI, 749 F.2d 815, 823 (D.C. Cir. 1984) (holding dismissal appropriate when plaintiff's prima facie case or defendant's defenses excluded through privilege); *see also* Sterling v. Tenet, 416 F.3d 338, 347-48 (4th Cir. 2005) (holding dismissal appropriate where object of suit is state secret); Fitzgerald v. Penthouse Int'l, Ltd., 776 F.2d 1236, 1241-42 (4th Cir. 1985) (holding dismissal appropriate where exposing military secrets is unavoidable); Farnsworth Cannon, Inc. v. Grimes, 635 F.2d 268, 271-72 (4th Cir. 1980) (outlining effects on plaintiff with insufficient evidence). The court in *Farnsworth* did indicate that where a plaintiff may establish a case without the privileged evidence, dismissal is not appropriate. *See* Farnsworth Cannon, Inc. v. Grimes, 634 F.2d 268, 271-72 (4th Cir. 1980). *But see* Mohamed v. Jeppesen Dataplan, Inc., 579 F.3d 943, 955 (9th Cir.), *reh'g en banc granted*, 586 F.3d 1108 (9th Cir. 2009) (rejecting interpretation of "very subject matter" concept in its entirety). In *Mohamed*, Circuit Judge Hawkins opposed this view because it is unsupported by case law and forces a zero-sum decision between the judiciary's obligation to say what the law is and the executive's duty to preserve security. *See id.* Judge Hawkins opined that the *Reynolds* decision demands the evidence in question be excised on an item-by-item basis. *See id.*

27. *See* El-Masri v. United States, 479 F.3d 296, 311-13 (4th Cir. 2007) (describing new application of state secrets privilege to war on terror). Affirming a dismissal before discovery, Justice King indicated that even though the facts essential to the complaint—the government's use of extraordinary rendition—had largely been made public, the action could not be litigated without the threat of state secrets being disclosed. *Id.* at 308; *see also* Stephanie A. Fichera, Note, *Compromising Liberty for National Security: The Need to Rein in the Executive's Use of the State-Secrets Privilege in Post-September 11 Litigation*, 62 U. MIAMI L. REV. 625, 628 (2008) (analyzing modern application of state secrets privilege). Fichera indicates that the state secrets privilege has been used to forestall litigation, criticism, and public debate regarding its response to terrorism. Fichera, *supra*, at 628.

plaintiff's claim, could not prevent dismissal on state secrets grounds.[28] In a separate suit involving the same plaintiff, the court implied, but did not decide, that an expansion of the *Totten* bar was warranted because the extraordinary rendition claim concerned allegations of secret espionage relationships between the United States, foreign governments, and corporate defendants.[29]

In *Mohamed v. Jeppesen Dataplan, Inc.*, the Ninth Circuit applied the *Reynolds* test and affirmed dismissal of the case at the pleadings stage without resolving the question of which claims may be barred under *Totten*.[30] The court indicated that the procedural requirements established in *Reynolds* had been met, and held that the government's classified brief accurately stated that disclosure of the information at issue could cause grievous harm to legitimate national security interests with an appropriate exercise of the privilege.[31] The court assumed, but did not decide, that the plaintiffs' prima facie case—along with Jeppesen's defenses—may not depend upon the evidence at issue, but held dismissal was required because there would be no way to litigate liability without risking exposure of state secrets.[32] In applying the state secrets

28. *See* El-Masri v. United States, 479 F.3d 296, 311 (4th Cir. 2007) (holding central facts to claim remain state secrets despite public knowledge of topic). The court held that public information was included in the privilege, despite its availability through news media, because litigation would reveal aspects of the information that needed to remain secret. *See id. But see* Hepting v. AT&T Corp., 439 F. Supp. 2d 974, 986-87 (N.D. Cal. 2006) (examining scope through definition of state secrets). The court in *Hepting* took the initial step of determining what was actually "secret" and what had already been disclosed publicly with regard to National Security Agency surveillance programs. *Id.* at 986.

29. *See* El-Masri v. Tenet, 437 F. Supp. 2d 530, 540 (E.D. Va. 2006) (refusing to decide issue of *Totten*'s applicability due to dismissal on *Reynolds* grounds), *aff'd*, 479 F.3d 296 (4th Cir. 2007). The opinion bordered on expanding the *Totten* bar, when analyzing contracts for espionage that were entirely unrelated to the plaintiff's actions, but stated "in the end [a decision on the question] need not be reached." *Id.*; *see also* Daniel J. Huyck, Comment, *Fade to Black:* El-Masri v. United States *Validates the Use of the State Secrets Privilege to Dismiss "Extraordinary Rendition" Claims*, 17 MINN. J. INTL. L. 435, 460 (2008) (addressing distinction between two privileges). Huyck opines that the court's failure to clarify the differences between the two distinct privileges "endangers the blurring of the two distinct privileges." Huyck, *supra*, at 460; *see also supra* note 21 and accompanying text (explaining applicability of *Totten*'s rules regarding contract actions).

30. *See* 614 F.3d at 1084-85 (explaining court's application of precedent to dismiss case). Justice Fisher indicated that the court resolved the case under *Reynolds* in order to avoid questions regarding the *Totten* bar's scope, but also because the *Reynolds* decision requires a searching review of the government's justification of the privilege with a skeptical eye on the claim. *Id.* Justice Fisher did imply that some of the plaintiffs' claims may fall within the *Totten* bar, but the application of *Reynolds* led to the independent conclusion that the litigation could not proceed. *See id.*

31. *See id.* at 1086 (justifying exercise of privilege for legitimate national security reasons). There was unanimous agreement among the judges who had reviewed the government's classified privilege claim that the claim of privilege was proper. *Id.* However, there was a split regarding the privilege's scope and its resulting impact on the plaintiffs' case. *See id.*

32. *See id.* at 1086-87 (clarifying type of dismissal court chose under *Reynolds*). Despite the wealth and variety of public documents the plaintiffs offered to prove their case, the court refused to dismiss under *Reynolds*'s alternative scenarios—namely, where removal of privileged evidence would prevent establishment of a prima facie case or deprive Jeppesen of a valid defense and result in a dismissal. *See id.* Instead, the court opined that any effort to defend the plaintiffs' claims would create an unjustifiable risk of revealing state secrets, even if the plaintiffs could make out a prima facie case with the nonprivileged evidence, because the facts of the plaintiffs' claims were so infused with state secrets. *Id.* at 1087 (citing Kasza v. Browner, 133 F.3d

privilege, the court acknowledged that the extraordinary rendition program, in general, is no longer a secret, yet aspects of the program remain state secrets because their disclosure could greatly harm national security.[33] The court reasoned that the government invoked the privilege for legitimate concerns and not to avoid embarrassment or escape publicity, controversy, or other scrutiny with regard to the controversial program, as mandated by the Attorney General's policy memorandum.[34] The court maintained that its dismissal did not bar plaintiffs from seeking relief from the government in a nonjudicial forum.[35]

The court in *Mohamed v. Jeppesen Dataplan, Inc.* expanded the state secrets privilege by dismissing the plaintiffs' suit before an answer to the complaint was filed, improperly utilizing the *Totten* bar's standards through the form of a *Reynolds* test.[36] The logic of *Totten*—applied in the name of the *Reynolds* test—should not have been extended to the claims at bar, where the plaintiffs were not involved in a secret contract with the government, were not suing the government itself, and offered alternative public evidence that did not rely on privileged or confidential information to prove their case.[37] By failing to hold that *Totten*'s justiciability rule is not applicable to a claim of plaintiffs against nongovernmental defendants, the court opens the door for future government use of the *Totten* bar in cases beyond the scope of the bar's traditional application.[38]

1159, 1170 (9th Cir. 1998)).

33. *See id.* at 1089-90 (applying privilege despite public knowledge and existing evidence of extraordinary rendition program).

34. *See* 614 F.3d at 1090 (addressing illegitimate reasons for government invocation of privilege). The court held that the government's classified declaration supported its independent conclusion that the privilege was being exercised in line with the Obama administration's guidelines. *See id.*

35. *See id.* at 1091 (outlining other forms of relief). The court stated that the plaintiffs could pursue relief extrajudicially through the government in the form of reparations, a congressional investigation, private bill, or remedial legislation designed to address specific claims like the plaintiffs'. *Id.* The court opined that although it deferred to the executive branch's privilege claim, the government must still honor the fundamental principles of justice and examine the merit of the plaintiffs' claims. *See id.*

36. *See supra* note 30 (explaining court's rationale for dismissal at pleadings stage). Although it is not possible to determine whether the privilege claim was appropriately invoked based on the classified nature of the government's brief, the procedure the court used to justify the dismissal was improper. *See* 614 F.3d at 1095-96 (Hawkins, J., dissenting). The court's reasoning combined elements of *Totten* with *Reynolds*, where the facts lay outside of *Totten*'s proper framework of applicability. *See id.* at 1095-99.

37. *See supra* note 26 (describing application of privilege to cases with state secret subject matter). The dissent pointedly states that the *Totten* bar has been applied in suits against the government, but "never to a plaintiff's suit against a third-party/non-governmental entity." *See* 614 F.3d at 1097 (Hawkins, J., dissenting).

38. *See supra* note 30 (highlighting court's avoidance of settling *Totten*'s applicability). *But see* 614 F.3d at 1078 (arguing *Totten* applicable even if plaintiff not involved in secret agreement with government). The majority opinion, reasoning that the bar applies to all cases where the subject matter of the action is a state secret, cites a Supreme Court case that applied *Totten* to a claim where plaintiffs sought privileged information, despite the lack of a contract with the government. *Id.* at 1078-79 (citing Weinberger v. Catholic Action of Haw./Peace Educ. Project, 454 U.S. 139, 146-47 (1981)). However, such a comparison is not analogous because the plaintiffs in *Mohamed* did not seek to solicit state secrets through their lawsuit. *See id* at 1097 (Hawkins, J., dissenting).

The court's reading of the discussion of *Totten* in *Reynolds* for the posit that *Totten* applies to cases where "the very subject matter of the action" is a state secret is similarly flawed, as the *Reynolds* court itself noted that the very subject matter of the *Totten* case was a contract with the government to perform espionage.[39] Despite its convoluted logic, the crux of the court's opinion rests on established precedent that has allowed for the steady expansion of the state secrets doctrine with near-universal deference to the executive branch on matters of national security.[40] Nevertheless, as the dissent indicates, the court's treatment of the doctrine has led to its improper transformation from an evidentiary privilege into an immunity doctrine under the theory that pleadings can constitute evidence.[41] The court's theory that there is no feasible way to litigate the plaintiffs' claims without an "unjustifiable risk of divulging state secrets" hinges on theoretical future evidence and arguments not yet made.[42]

The majority's refusal to offer a definition of what constitutes a state secret, and acceptance of the Supreme Court's broad description of what could be covered by the privilege from *Reynolds*, falls short of sufficiency in an instance where, as here, plaintiffs have the potential of litigating the case based on publicly available materials.[43] As such, even considering the Attorney General's memorandum stating that the privilege was being properly invoked, such a dismissal at the outset represents a serious threat to due process and a blow to judicial protection established by the separation of powers.[44] The

39. *See* 614 F.3d at 1078 (interpreting Supreme Court discussion of precedent to apply state secret privilege generally); *see also* United States v. Reynolds, 345 U.S. 1, 11 (1953) (evaluating *Totten*). The *Reynolds* Court's interpretation of *Totten* occurs in a two-sentence footnote. *See* United States v. Reynolds, 345 U.S. 1, 11 n.26 (1953); *see also* 614 F.3d at 1084 (concluding dismissal necessary under *Reynolds*). The court confusedly stated it does "not find it quite so clear that the very subject matter of this case is a state secret," yet concluded that a dismissal is warranted under *Reynolds*. *See* 614 F.3d at 1084.

40. *See* 614 F.3d at 1079 (citing Al-Haramain Islamic Found., Inc. v. Bush, 507 F.3d 1190, 1197 (9th Cir. 2007)) (describing evolution of bar). The court synthesizes a number of precedent cases for its conclusion that "litigating the case to a judgment on the merits would present an unacceptable risk of disclosing state secrets." *Id.* at 1083; *see also* Stilp, *supra* note 1, at 837-38 (addressing government use of state secrets privilege to dismiss entire case); *supra* note 1 (explaining policy of judicial deference to executive branch on matters of national security).

41. *See* 614 F.3d at 1098 (Hawkins, J., dissenting) (opining privilege applicable to evidence substantiating claim, not sufficiency).

42. *See id.* at 1100 (describing conflicts in applying *Reynolds* decision before introduction of specific evidence).

43. *See id.* at 1082 (majority opinion) (noting mere "classified" status insufficient to establish privilege, but refusing to provide definition). The court declined to define what a state secret was, but limited the status of "classified" to being indicative of potential coverage under the umbrella of state secrets, opining that such a label is not conclusive. *See id. But see* note 28 (considering effect of public disclosure on secrecy).

44. *See* 614 F.3d at 1094 (Hawkins, J., dissenting) (urging application of doctrine in narrowest circumstances possible due to potential for misuse). The dissent notes that the government should be limited to invoking the privilege for specific items of evidence, and not at the outset of litigation, because of the danger that the doctrine may be used to cover up governmental misbehavior, and because application of the doctrine early in the case stifles due process. *Id.*; *see also* United States v. Reynolds, 345 U.S. 1, 9-10 (1953) (stating judicial control over case evidence cannot be abdicated to "caprice of executive officers"); Glasionov, *supra* note 25, at 480-82 (discussing misapplication of privilege in area of law with strong need for transparency).

Ninth Circuit's holding, tinged with regret, still serves as an indication that courts are willing to sacrifice individual litigants' rights and fundamental principles of liberty, justice, and transparency in the name of hypothetical protection of national security.[45]

In *Mohamed v. Jeppesen Dataplan, Inc.*, the Ninth Circuit Court of Appeals considered the United States government's motion to dismiss—under the state secrets doctrine—plaintiffs' claims against a third-party private government contractor for allegations that it had assisted in their kidnapping and torture. The court affirmed the district court's ruling and dismissed the plaintiffs' complaint before the defendant had filed a responsive pleading, reasoning that there would be no way to advance plaintiffs' case without state secrets arising in the course of litigation. The court construed precedent as appropriate and analogous to warrant such action, though the precise nature and factual orientation of plaintiffs' claims were themselves unique. After an examination of past application of the state secrets doctrine, the court reluctantly opined that dismissal was necessary and plaintiffs must seek extrajudicial relief. As a consequence, the court further complicated the issue of the state secrets privilege at the cost of plaintiffs with legitimate and justiciable actions.

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Glasionov references the need for informed and critical public opinion to protect our government's values in the absence of checks and balances. *See* Glasionov, *supra* note 25, at 481.

45. *See* 614 F.3d at 1073 (striking balance between values). The court displayed some reticence in the doctrine's application by ordering the government to bear all parties' costs on appeal. *See id.* at 1093.