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The Transformation of the State Secrets Doctrine Through Conflation of *Reynolds* and *Totten* : The Problems with *Jeppesen* and *El-Masri*

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### Author

Plunkett, Matthew

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# The Transformation of the State Secrets Doctrine Through Conflation of *Reynolds* and *Totten*: The Problems with *Jeppesen* and *El-Masri*

Matthew Plunkett\*

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\* J.D., University of California, Irvine, School of Law, 2012. I would like to offer my deepest appreciation to Erwin Chemerinsky for his irreplaceable knowledge, support, and guidance.

*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.*

—*Mohamed v. Jeppesen Dataplan*<sup>1</sup>

## INTRODUCTION

Britel's captors hang him from the ceiling of a decrepit cell and beat him with a cricket bat.<sup>2</sup> After a few weeks of sleep deprivation beatings, he confesses to being a terrorist.<sup>3</sup> At one moment Britel is told that his interrogators will kill him if he does not cooperate—soon after they tell him he will get to return home to Italy.<sup>4</sup> Instead, he is flown to Morocco where he is kept in squalid conditions for eight years.<sup>5</sup> Despite having all charges against him dismissed, Britel remains in Ain Bourja Prison in Casablanca.<sup>6</sup> A lawsuit is brought on his behalf in the United States against the corporation that took part in his rendition, for violating his most basic human rights.<sup>7</sup> The case is dismissed.<sup>8</sup> The reason: state secrets.<sup>9</sup>

The state secrets doctrine exists in an area of inherent tension. Victims often bring legitimate claims seeking compensation for wrongs, errors, or mistreatment by government officials. However, when litigation of a claim necessitates the exposure of sensitive, secret, government material, such as documents related to the search for terrorism suspects or the identity of undercover intelligence officers, the government also has a legitimate interest in ensuring that that sensitive material does not become public. This balance is controlled by two different strands of the state secrets doctrine: the *Totten*<sup>10</sup> bar to litigation, which acts as a nonjusticiability doctrine, and the *Reynolds*<sup>11</sup> evidentiary privilege, which excludes evidence that contains state secrets.

The *Totten-Reynolds* dichotomy has generally allowed judges to prevent disclosure of state secrets without dismissing legitimate claims. More recent decisions have dramatically altered this balance. Two cases in particular, *Mohamed v. Jeppesen Dataplan*<sup>12</sup> and *El-Masri v. United States*,<sup>13</sup> exemplify the disturbing alteration of this traditional doctrine. *El-Masri* and *Jeppesen* are uniquely worthy of

1. *Mohamed v. Jeppesen Dataplan*, 614 F.3d 1070, 1071 (9th Cir. 2010).

2. First Amended Complaint at 26, *Mohamed v. Jeppesen Dataplan, Inc.* (*Jeppesen I*), 539 F. Supp. 2d 1128 (N.D. Cal. 2008) (No. 5:07-cv-02798 (JW)).

3. *Id.*

4. *Id.* at 26–27.

5. *Id.* at 27–31.

6. *Id.* at 31.

7. *See* Complaint, *Jeppesen I*, 539 F. Supp. 2d 1128 (No. 07CV02798).

8. *Id.* at 1136.

9. *Id.*

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

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

analysis because even though the courts analyzed them as *Reynolds* cases, they alter the doctrine in a way that privileges facts, rather than evidence. In essence, these cases prevent plaintiffs from pursuing each evidentiary avenue to proving a fact, regardless of whether that avenue is protected by the state secrets privilege. This expands the evidentiary privilege that each court was using into the realm of a nonjusticiability doctrine, similar to *Totten*. *Jeppesen* and *El-Masri* have dangerously broadened the state secrets doctrine through the conflation, both doctrinally and in application, of the *Reynolds* evidentiary privilege and the *Totten* bar. Ironically, the resulting doctrine does not, in fact, increase protection of secret, sensitive material.

*El-Masri* and *Jeppesen* are factually similar in that the plaintiffs' claims in both cases arose from extraordinary rendition and torture. In one case, five plaintiffs were at different times, kidnapped, tortured, and imprisoned in CIA "Black Sites,"<sup>14</sup> including Kabul's infamous "Dark Prison."<sup>15</sup> Several remain incarcerated in foreign countries.<sup>16</sup> Although this similarity does not bear on the application of the doctrine itself, it highlights the highly sensitive nature of the evidence the government seeks to protect in state secrets cases and the importance of the civil rights at stake.

This Note will assume that there is a need for a state secrets doctrine. Because the existence of the doctrine has been so passionately debated for decades, the scope of this Note is limited to recent developments in the doctrine and solutions to the problem of balancing the need for secrecy and government accountability.<sup>17</sup>

Part I of this Note will provide the essential history of the *Reynolds* and *Totten* doctrines. Part II will use the plaintiffs in *Jeppesen* as a case study to illustrate the lifecycle of a modern state secrets case. This is useful for two reasons: first, it demonstrates the very complex nature of state secrets cases; second, it highlights the enormous danger of dismissing such cases. Part III will explain the dysfunctional analysis the *El-Masri* and *Jeppesen* courts used to effectively restructure the state secrets privilege as an immunity or nonjusticiability doctrine.

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

13. *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007).

14. The black sites are CIA interrogation facilities, clandestinely operated throughout the world. For an image of a black site, the story of Mohamed Bashmilah is illustrative. See Mark Benjamin, *Inside the CIA's Notorious "Black Sites,"* SALON (Dec. 15, 2007, 1:00 AM), <http://www.salon.com/2007/12/15/bashmilah/singleton>.

15. The Dark Prison, formally known as the "Salt Pit," is a Black Site located in Kabul and known for keeping its prisoners in complete darkness. See Craig S. Smith & Souad Mekhennet, *Algerian Tells of Dark Term in U.S. Hands*, N.Y. TIMES (Jul. 7, 2006), <http://www.nytimes.com/2006/07/07/world/africa/07algeria.html>.

16. The facts of *Jeppesen* are discussed at length in Part II.

17. For a debate about the need for a state secrets privilege, see LOUIS FISHER, IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE REYNOLDS CASE (2006).

Part V will advocate for an alternative method of analysis for the state secrets privilege and offer several solutions to the problem of litigating matters that involve state secrets. Specifically, this Note advocates for the creation of a subject matter court to handle sensitive state secrets cases, thereby minimizing the dismissal of legitimate claims and disclosure of sensitive information.

## I. THE STATE SECRETS DOCTRINE: ITS BIRTH AND DEVELOPMENT

The state secrets doctrine emerged as a common law rule of evidence, but courts have since expanded it into a rule of constitutional scope. This expansion was primarily caused by the executive branch's persistent and repeated propounding of the argument that authority over military secrets is constitutionally committed to the executive and that it is improper for the judiciary to interfere in this regard.<sup>18</sup>

### A. *The Totten Bar or Nonjusticiability Doctrine*

The first and oldest case, *Totten v. United States*, created the state secrets bar to litigation.<sup>19</sup> In that case, a former Union spy from the Civil War sued the U.S. government alleging that he was never paid under the terms of his contract made with President Abraham Lincoln.<sup>20</sup> The Court dismissed the case because the contract was of a type that required secrecy and precluded judicial enforcement. The Court explained the purpose of the bar:

An action cannot be maintained against the government, in the court of claims, on a contract for secret services during the war, made between the president and the claimant. Conceding the engagement to be valid, it is of a nature requiring secrecy. If upon contracts of such a nature an action against the government could be maintained in the Court of Claims, whenever an agent should deem himself entitled to greater or different compensation than that awarded to him, the whole service in any case, and the manner of its discharge, with the details of dealings with individuals and officers, might be exposed, to the serious detriment of the public.<sup>21</sup>

*Totten* has been interpreted as a justiciability or jurisdictional limitation,<sup>22</sup> although recent interpretations of *Totten* resemble an immunity doctrine.<sup>23</sup> It has

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18. See Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 *FORDHAM L. REV.* 1931, 1935 (2007) (“The state secrets privilege is a common law evidentiary privilege that derives from the President’s authority over national security, and thus is imbued with ‘constitutional overtones.’”); see also U.S. CONST. art. II, § 2, cl. 1 (“The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States.”).

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

20. *Id.* at 105–06.

21. *Id.* at 106.

22. *Tenet v. Doe*, 544 U.S. 1, 12 (2005) (Stevens, J., concurring); see also *id.* at 12 (Scalia, J., concurring); see also, e.g., *Wilson v. Libby*, 535 F.3d 697, 710 (D.C. Cir. 2008) (discussing the

since rarely been invoked. *Totten* has been used in cases where “the very subject matter” of the case was a state secret, in particular cases concerning espionage agreements with the government like the one in *Totten* (the “very subject matter theory” of the state secrets doctrine).<sup>24</sup> Both *Totten* and *Tenet v. Doe*, the Supreme Court’s most recent invocation of *Totten*, were premised on contracts for U.S. government spies. In *Tenet*, two foreign spies defected to assist the United States with espionage activities, with the alleged understanding that they would receive “financial and personal security for life.”<sup>25</sup> When the U.S. government failed to fulfill its end of the bargain, the two former spies sued.<sup>26</sup> The Court dismissed the case using *Totten* and explained the doctrine.<sup>27</sup> It wrote, “*Totten* precludes judicial review in cases such as respondents’ where success depends upon the existence of their secret espionage relationship with the Government.”<sup>28</sup> Although the Supreme Court never explicitly limited *Totten* to espionage agreements, the Court’s language in *Tenet* points in that direction: “When invoking the ‘well established’ state secrets privilege, we indeed looked to *Totten*. But that in no way signaled our

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“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) (stating that the *Totten* rule is a “rule of non-justiciability”); *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1197 (9th Cir. 2007) (explaining that the *Totten* rule is “a rule of nonjusticiability, akin to a political question”).

23. There are important similarities and differences between nonjusticiability and immunity. Traditional nonjusticiability doctrines direct courts to refrain “from the exercise of judicial power in situations that might overly infringe on the prerogatives of another branch of government,” or where a case does not constitute a “case or controversy” under Article III of the Constitution due to standing, ripeness or mootness problems. *Nat’l Ass’n of Gov’t Emp. v. White*, 418 F.2d 1126, 1130 (D.C. Cir. 1969) (regarding separation of powers); *Flast v. Cohen*, 392 U.S. 83, 94–96 (1968) (regarding “case or controversy” requirements). Consequently, nonjusticiability must be addressed, like jurisdiction, before “a federal court may proceed to any other question.” *Galvan v. Fed. Prison Indus., Inc.*, 199 F.3d 461, 462–63 (D.C. Cir. 1999) (citing *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94–95 (1998)). Immunity, while technically a defense, is similar to a nonjusticiability doctrine in that it has also been characterized as “jurisdictional.” *FDIC v. Meyer*, 510 U.S. 471, 475 (1994). In fact, some courts have chosen to address immunity defenses before nonjusticiability doctrines. *See, e.g., In re Papandreou*, 139 F.3d 247, 255 (D.C. Cir. 1998). However, unlike nonjusticiability, immunity does not completely prevent a court from hearing a case. Immunity does prevent a court from enjoining the defendant’s conduct or ordering the defendant to compensate the plaintiff, but in some cases a court might still rule on the underlying constitutional claim. *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009) (holding that courts may use their discretion to decide constitutional claims before qualified immunity). As a practical matter, *Totten*’s characterization as one or the other is largely unimportant because both doctrines prevent the plaintiff from recovering. However, as more and more cases are dismissed as nonjusticiable and the trend begins to resemble an immunity doctrine, it sends a strong message to plaintiffs and defendants that government entities will not be held responsible for such conduct.

24. *See, e.g., Terkel v. AT&T Corp.*, 441 F. Supp. 2d 899 (N.D. Ill. 2006) (evaluating an agreement between AT&T and the National Security Agency to disclose telephone records under the *Totten* standard).

25. *Tenet*, 544 U.S. at 3–4.

26. *Id.*

27. *Id.*

28. *Id.* at 8.

retreat from *Totten's* broader holding that lawsuits premised on alleged espionage agreements are altogether forbidden.<sup>29</sup>

One colorful description of *Totten* comes from Ben Wizner, counsel for the plaintiffs in *Jeppesen*, who described *Totten* as a “buyer-beware” rule, rather than a “victim-beware” rule.<sup>30</sup> In other words, *Totten* only bars litigation by “buyers”—plaintiffs who have consciously entered into an agreement or relationship with the government. The burden is on the “buyers” to recognize that they may have to keep the relationship hidden and assume that risk as an implicit condition of the agreement. In comparison, *Totten* is less likely to bar litigation from “victims”—plaintiffs who interacted with the government against their will. Courts have even described *Totten* as a contract doctrine,<sup>31</sup> which bars enforceability of government contracts that were secret at the time of their formation.<sup>32</sup> The invocation of *Totten* is thus premised on the notion that the plaintiff knowingly entered into a secret agreement with the government.<sup>33</sup>

### B. *The Reynolds Evidentiary Privilege*

The other line of cases comes from *Reynolds*, which created the state secrets evidentiary privilege used in *Jeppesen* and *El-Masri*.<sup>34</sup> Although there is no exact definition of what type of evidence is privileged, *Reynolds* generally applies to evidence concerning national security or military matters. In *Reynolds*, families filed

29. *Id.* at 9 (internal citations omitted).

30. Oral Argument at 3:55, *Jeppesen III*, 614 F.3d 1070 (9th Cir. 2010) (No. 08-15693EB), available at [http://www.ca9.uscourts.gov/media/view\\_subpage.php?pk\\_id=0000004702](http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000004702).

31. *See, e.g.*, *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 991 (N.D. Cal. 2006) (“The implicit notion in *Totten* was one of equitable estoppel: one who agrees to conduct covert operations impliedly agrees not to reveal the agreement even if the agreement is breached. But AT & T, the alleged spy, is not the plaintiff here. In this case, plaintiffs made no agreement with the government and are not bound by any implied covenant of secrecy.”); *see also* *Air-Sea Forwarders, Inc. v. United States*, 39 Fed. Cl. 434, 440 (1997) (“Under *Totten v. United States*, contracts to perform ‘secret services’ for the United States are unenforceable in court.”) (internal citation omitted).

32. *Guong v. United States*, 860 F.2d 1063, 1065 (Fed. Cir. 1988) (“The words of the Supreme Court are clear and unambiguous that ‘[b]oth employer and agent must have understood that the lips of the other were to be for ever [sic] sealed respecting the relation of either to the matter.’ Hence, it cannot be doubted that *Totten* stands for the proposition that no action can be brought to enforce an alleged contract with the government when, at the time of its creation, the contract was secret or covert”) (internal citations omitted).

33. *See, e.g.*, *Mohamed v. Jeppesen Dataplan (Jeppesen II)*, 579 F.3d 943, 952 (9th Cir. 2009) (Under the *Totten* principle, “a suit predicated on the existence and content of a secret agreement between a plaintiff and the government must be dismissed on the pleadings because the ‘very subject matter’ of the suit is secret.”).

34. *United States v. Reynolds*, 345 U.S. 1, 10 (1953) (“It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.”).

a wrongful death action after a government plane crashed, killing three civilians.<sup>35</sup> The plaintiffs moved for the Air Force's official accident investigation report during discovery proceedings.<sup>36</sup> The government, using a letter from the secretary of the Air Force, claimed that the documents were privileged under Federal Rule of Civil Procedure Rule 34 and that it would best serve the public interest if they were not produced.<sup>37</sup> Despite this, the district court ordered the government to produce the documents so that the court could determine whether the claim of privilege was valid.<sup>38</sup> When the government still refused, the district court sanctioned the government by deciding the issue of negligence in the plaintiffs' favor.<sup>39</sup> The Third Circuit Court of Appeals affirmed.<sup>40</sup>

The Supreme Court sided with the government, writing,

We think it should be clear that the term "not privileged" as used in [Federal Rule of Civil Procedure] Rule 34, refers to "privileges" as that term is understood in the law of evidence. When the Secretary of the Air Force lodged his formal "Claim of Privilege," he attempted therein to invoke the privilege against revealing military secrets, a privilege which is well established in the law of evidence.<sup>41</sup>

Thus, the *Reynolds* evidentiary privilege was born as a derivative of Federal Rule of Civil Procedure 34.

The Court then laid out the procedure for the proper invocation of the privilege:

There must be formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer. The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect.<sup>42</sup>

Although the court must normally examine the evidence to ensure that the invocation of the privilege is legitimate, there are times when "the court should not jeopardize the security which the privilege is meant to protect by insisting

35. *Id.* at 2–3.

36. *Id.*

37. *Id.*

38. *Id.* at 5.

39. *Id.*

40. *Id.*

41. *Id.* at 6–7 (citing *Totten v. United States*, 92 U.S. 105, 107 (1876), *Cresmer v. United States*, 9 F.R.D. 203 (E.D.N.Y. 1949), *Pollen v. Ford Instrument Co.*, 26 F. Supp. 583 (E.D.N.Y. 1939), *Firth Sterling Steel Co. v. Bethlehem Steel Co.*, 199 F. 353 (E.D. Pa. 1912), *Bank Line v. United States*, 163 F.2d 133 (2d Cir. 1947), *Bank Line v. United States*, 68 F. Supp. 587 (S.D.N.Y. 1946), 8 WIGMORE ON EVIDENCE § 2212(a), at 161, and 2378(g)(5), at 785 (3d ed. 1940), 1 GREENLEAF ON EVIDENCE §§ 250–51 (16th ed. 1899), and Sanford, *Evidentiary Privileges Against the Production of Data Within the Control of Executive Departments*, 3 VAND. L. REV. 73, 74–75 (1950)).

42. *Id.* at 7–8 (internal citations omitted).



upon an examination of the evidence, even by the judge alone, in chambers.”<sup>43</sup> In these cases, the judge should decide whether or not to deem the evidence privileged without examination.<sup>44</sup> *Reynolds* gives the court a balancing test to use to evaluate whether or not evidence should be excluded. Assuming that the government satisfies the procedures for invocation, the court should consider “the circumstances of the case” and weigh the interests of the plaintiff against “the danger that compulsion of the evidence will expose military matters which, in the interests of national security, should not be divulged.”<sup>45</sup> Once the court has deemed the evidence privileged, the privilege absolutely makes the evidence unavailable.<sup>46</sup> Although cases have been dismissed after the invocation of the privilege,<sup>47</sup> typically, litigation can proceed as long as the “plaintiffs can prove the essential facts of their claims without resort to [privileged evidence].”<sup>48</sup>

### C. *Reynolds and Totten as Distinct Doctrines*

During the course of the development of the doctrines, litigants and courts have, at times, erroneously considered *Reynolds* and *Totten* to be one and the same.<sup>49</sup> However, the Supreme Court made clear in *Tenet* that they are, in fact, distinct doctrines. *Tenet v. Doe*, decided in 2005, is the Supreme Court’s most recent state secrets case. In that case, two former CIA spies sued the CIA for financial assistance when they fell on hard times.<sup>50</sup> They alleged violations of both substantive and procedural due process, among other claims.<sup>51</sup> The Supreme Court unanimously dismissed the case, finding that the case fell into the realm of *Totten*: “*Totten* precludes judicial review in cases such as respondents’ where success depends upon the existence of their secret espionage relationship with the Government.”<sup>52</sup> In dismissing the case, the Court specifically linked *Totten* to espionage agreements,<sup>53</sup> although the Court never explicitly excluded the use of *Totten* in other cases.

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43. *Id.* at 10.

44. *Id.*

45. *Id.* at 9–10.

46. *Id.* at 11.

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

48. *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1204 (9th Cir. 2007) (quoting *Reynolds*, 345 U.S. at 11) (internal quotation marks omitted).

49. *Tenet v. Doe*, 544 U.S. 1, 8 (2005) (responding to and rejecting the Court of Appeals’ argument that “*Totten* has been recast simply as an early expression of the evidentiary “state secrets” privilege, rather than a categorical bar to their claims”); *see also* *Kinoy v. Mitchell*, 67 F.R.D. 1, 8–9 (S.D.N.Y. 1975) (using *Totten* and *Reynolds* interchangeably).

50. *Tenet*, 544 U.S. at 3–4 (2005).

51. *Id.*

52. *Id.* at 8.

53. *Id.* at 9 (describing “*Totten*’s broader holding that lawsuits premised on alleged espionage agreements are altogether forbidden”).

The Court did, nonetheless, draw a line between the two doctrines:

*Reynolds* therefore cannot plausibly be read to have replaced the categorical *Totten* bar with the balancing of the state secrets evidentiary privilege in the distinct class of cases that depend upon clandestine spy relationships. . . . There is, in short, no basis for respondents' and the Court of Appeals' view that the *Totten* bar has been reduced to an example of the state secrets privilege.<sup>54</sup>

Despite this clarification, before and after *Tenet*, courts have confused *Totten* and *Reynolds* as closely overlapping. The expansion or overlapping of *Totten* presents a very real danger. The *Reynolds* privilege is broad enough to apply to a diverse and large number of cases. *Totten*, which requires dismissal of the entire case, was designed to be narrowly confined to the small subset of cases where the plaintiffs more than likely chose to form a relationship with the government.<sup>55</sup> Expanding *Totten* into the realm of *Reynolds* means that dismissal will become more frequent, thereby limiting government transparency and eliminating some legitimate claims. Further, *Totten* cases exist in a zone of purely presidential authority. By widening the boundaries of this zone, presidential authority becomes more difficult to monitor.

## II. A CASE STUDY: THE EXTRAORDINARY RENDITION AND TORTURE OF THE JEPPESEN PLAINTIFFS

In order to understand the implications of *Jeppesen* and *El-Masri*, it is important to examine the context in which these cases have developed. Both the recent history of extraordinary rendition in the United States and the individual history of the *Jeppesen* and *El-Masri* plaintiffs shed light on the holdings of these cases.

### A. *A Brief History of Extraordinary Rendition in the United States*

Courts have defined extraordinary rendition as “the clandestine abduction and detention outside the United States of persons suspected of involvement in terrorist activities, and their subsequent interrogation using methods

54. *Id.* at 9–10.

55. *Cf.* *Weinberger v. Catholic Action of Haw. Peace Educ. Project*, 454 U.S. 139, 146–47 (1981). In *Weinberger*, the Supreme Court applied *Totten* to a case where environmentalists sued the Department of Defense for compliance with environmental laws, which would have led the government to disclose the locations of nuclear weapons facilities. This is the one *Totten* case that did not involve a voluntary relationship between the plaintiff and the government. In fact, *Jeppesen* relied on *Weinberger* in holding that *Totten* applied to cases outside of those where the plaintiff voluntarily entered into a relationship with the government. *Jeppesen III*, 614 F.3d 1070, 1079 (9th Cir. 2010) (en banc). However, because the *Weinberger* Court cited to *Totten* only once, and even then as more of an afterthought, *Weinberger* is more properly considered a deviation from the traditional rule. This interpretation is also supported by *Tenet*, which suggested that a relationship with the government is required for *Totten* to apply.

impermissible under U.S. and international laws.”<sup>56</sup> The use of rendition began under President Bill Clinton and continued, arguably to a greater degree, under President George W. Bush.<sup>57</sup> In President Clinton’s original Presidential Decision Directive, extraordinary rendition was specified as a counterterrorism method.<sup>58</sup> In testimony before the Joint House/Senate Intelligence Committee, then CIA Director George Tenet explained that, in the years leading up to September 11, 2001, the CIA and FBI had “rendered 70 terrorists to justice around the world.”<sup>59</sup>

The American media was largely devoid of reports on extraordinary rendition until 2005.<sup>60</sup> In February 2005, Jane Mayer, a journalist with the *New Yorker*, published an extensive and widely cited exposé titled *Outsourcing Torture: The Secret History of America’s “Extraordinary Rendition” Program*.<sup>61</sup> Since its publication, there has been extensive public debate and examination of the CIA’s extraordinary rendition program.

The U.S. government has also publicly recognized the existence of the extraordinary rendition program. For instance, in December of 2005, Secretary of State Condoleezza Rice stated:

For decades, the United States and other countries have used “renditions” to transport terrorist suspects from the country where they were captured to their home country or to other countries where they can be questioned, held, and brought to justice. In some situations, a terrorist

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56. *El-Masri v. United States*, 479 F.3d 296, 300 (4th Cir. 2007); see also *Disappearing Act: Rendition by the Numbers*, MOTHER JONES, Mar. 3, 2008, <http://motherjones.com/politics/2008/03/disappearing-act-rendition-numbers> (defining extraordinary rendition as “the extrajudicial transfer of an individual to a country where there is a reasonable probability he will be tortured”). International sources have defined extraordinary rendition similarly. See, e.g., INTELLIGENCE AND SECURITY COMMITTEE, RENDITION, 2007, Cm. 7171, at 6 (U.K.), available at <http://www.cabinetoffice.gov.uk/resource-library/intelligence-and-security-committee-special-ad-hoc-reports> (defining extraordinary rendition as “[t]he extra-judicial transfer of persons from one jurisdiction or State to another, for the purposes of detention and interrogation outside the normal legal system . . .”).

57. David Johnston, *U.S. Says Rendition to Continue, but with More Oversight*, N.Y. TIMES, Aug. 24, 2009, at A8, available at <http://www.nytimes.com/2009/08/25/us/politics/25rendition.html>.

58. Presidential Decision Directive 39, U.S. Policy on Counterterrorism (June 21, 1995), available at <http://www.fas.org/irp/offdocs/pdd39.htm>.

59. George Tenet, Written Statement for the Record of the Director of Central Intelligence Before the Joint Inquiry Committee (Oct. 17, 2002), available at [https://www.cia.gov/news-information/speeches-testimony/2002/dci\\_testimony\\_10172002.html](https://www.cia.gov/news-information/speeches-testimony/2002/dci_testimony_10172002.html).

60. The one exception is the case of Maher Arar, which began in 2002. Maher Arar’s story could be the subject of substantial study in its own right. For early reports relating to his extraordinary rendition, see, for example, Anthony DePalma, *Threats and Responses: Detainee; Canadian Immigrant Arrested at J.F.K. Is Deported to Syria*, N.Y. TIMES, Oct. 12, 2002, at A14, available at <http://www.nytimes.com/2002/10/12/us/threats-responses-detainee-canadian-immigrant-arrested-jfk-deported-syria.html>; see also, Daniel J. Wakin, *Threats and Responses: Deportations; Tempers Flare After U.S. Sends a Canadian Citizen Back to Syria on Terror Suspicions*, N.Y. TIMES, Nov. 11, 2002, at A9, available at <http://www.nytimes.com/2002/11/11/world/threats-responses-deportations-tempers-flare-after-us-sends-canadian-citizen.html>.

61. Jane Mayer, *Outsourcing Torture: The Secret History of America’s “Extraordinary Rendition” Program*, NEW YORKER, Feb. 14, 2005, at 106, available at [http://www.newyorker.com/archive/2005/02/14/050214fa\\_fact6](http://www.newyorker.com/archive/2005/02/14/050214fa_fact6).

suspect can be extradited according to traditional judicial procedures. But there have long been many other cases where, for some reason, the local government cannot detain or prosecute a suspect, and traditional extradition is not a good option. In those cases the local government can make the sovereign choice to cooperate in a rendition. Such renditions are permissible under international law and are consistent with the responsibilities of those governments to protect their citizens.<sup>62</sup>

President Bush, in fact, in 2006 “publicly disclosed the existence of a CIA program in which suspected terrorists are detained and interrogated at locations outside the United States.”<sup>63</sup> And on September 16, 2001, Vice President Dick Cheney discussed the government’s new outlook on security in the wake of Al-Qaeda’s violent attacks on the World Trade Center on the television news program “Meet the Press.”<sup>64</sup> In that appearance, Vice President Cheney stated that the government needed to

Work, though, sort of the dark side, if you will. We’ve got to spend time in the shadows in the intelligence world. A lot of what needs to be done here will have to be done quietly, without any discussion, using sources and methods that are available to our intelligence agencies, if we’re going to be successful. That’s the world these folks operate in, and so it’s going to be vital for us to use any means at our disposal, basically, to achieve our objective.<sup>65</sup>

Despite pre-election indications to the contrary, the extraordinary rendition program has continued under the Obama administration.<sup>66</sup>

### B. The “Dark Side”: The Allegations of the Plaintiffs in *Jeppesen*

The allegations of plaintiff Abou Elkassim Britel (also described in the introduction to this Note) are emblematic of the severe harm allegedly suffered by the *Jeppesen* plaintiffs. According to his first amended complaint,<sup>67</sup> Britel was an Italian citizen travelling to Iran and Pakistan in order to obtain financing to support his translation work and to conduct research on Islamic issues.<sup>68</sup> On March 10, 2002, while in Pakistan, he was arrested by the Pakistani police on

62. Condoleezza Rice, U.S. Sec’y of State, Remarks upon Her Departure for Europe (Dec. 5, 2005), available at <http://merln.ndu.edu/archivepdf/terrorism/state/57602.pdf>.

63. *El-Masri v. United States*, 479 F.3d 296, 302 (4th Cir. 2007).

64. *Meet the Press* (NBC television broadcast Sept. 16, 2001).

65. *Id.*

66. See Johnston, *supra* note 57; Jacob Sullum, *Torture Tort Terror*, REASON.COM (Sept. 15, 2010), <http://reason.com/archives/2010/09/15/torture-tort-terror>.

67. The accounts of the plaintiffs derive from the allegations made in their lawsuit against *Jeppesen Dataplan*. See First Amended Complaint, *Jeppesen I*, 539 F. Supp. 2d 1128 (N.D. Cal. 2008) (No. 5:07-cv-02798 (JW)). The case was dismissed at the pleading stage. Because of this, it is unclear whether and to what extent the government contests this narrative.

68. *Id.* at 25.

immigration charges.<sup>69</sup> Held at an interrogation facility, Britel was physically and psychologically tortured.<sup>70</sup> He was beaten with a cricket bat and hung from the ceiling for extensive periods of time.<sup>71</sup> Succumbing to the torture, Britel falsely confessed to being a terrorist, as he was asked to do, and was brought before U.S. officials who fingerprinted, photographed, and threatened him.<sup>72</sup> He was then flown, allegedly by Jeppesen Dataplan, to the Témara prison in Morocco where he was kept in total isolation, outside of routine beatings, for eight months.<sup>73</sup> Britel was released in February 2003, but Moroccan law enforcement officers arrested him just three months later after a suspected terrorist bombing.<sup>74</sup> Held for four months in the Témara prison once more, Britel signed a false confession under duress and was later convicted by a Moroccan court of terrorism charges and sentenced to nine years' imprisonment.<sup>75</sup> Britel remains incarcerated in Ain Bourja Prison in Casablanca.<sup>76</sup> Eighty-seven members of the Italian Parliament have petitioned for his release, and an Italian judge in 2006 dismissed all terrorism charges against Britel, finding a complete lack of evidence.<sup>77</sup> Britel nonetheless remains imprisoned in Morocco.<sup>78</sup>

The stories of the other *Jeppesen* plaintiffs reveal similarly outrageous harms and emphasize the need to minimize unnecessary dismissal of such cases. Plaintiff Binyam Mohamed was a twenty-eight year old Ethiopian citizen living in the United Kingdom. After U.S. officials suspected that Mohamed had ties with Al-Qaeda, Jeppesen Dataplan allegedly flew him to a CIA dark prison in Afghanistan and later to the prison in Guantánamo Bay, Cuba.<sup>79</sup> After over six years in custody, a federal judge found that Mohamed was unlawfully detained and granted his petition for habeas corpus.<sup>80</sup>

Plaintiff Ahmed Hussein Mustafa Kamil Agiza's ordeal traces all the way back to the assassination of President Anwar Sadat in 1982.<sup>81</sup> Agiza sought asylum in Sweden after being tried in absentia in Egypt for allegedly belonging to an illegal

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69. *Id.*

70. *Id.* at 26.

71. *Id.*

72. *Id.*

73. *Id.* at 27–29.

74. *Id.* at 29–30.

75. *Id.* at 30–31.

76. *Id.* at 31.

77. *Id.*

78. *Id.*

79. *Jeppesen III*, 614 F.3d 1070, 1074 (9th Cir. 2010) (en banc).

80. Mohamed's release and background are discussed in *Mohammed v. Obama*, 689 F. Supp. 2d 38, 61 (D.D.C. 2009); see also *R. (on the application of Mohamed) v. Sec'y of State for Foreign & Commonwealth Affairs*, [2010] EWCA (Civ) 65, [2011] QB 218 (appeal taken from Divisional Court) (Eng. & Wales).

81. See First Amended Complaint at 31, *Jeppesen I*, 539 F. Supp. 2d 1128 (No. 5:07-cv-02798 (JW)).

organization.<sup>82</sup> Jeppesen Dataplan then flew Agiza to Egypt at the direction of U.S. officials.<sup>83</sup> Agiza remains incarcerated in a maximum security prison in Egypt where his health continues to deteriorate.<sup>84</sup> According to the plaintiffs, the Swedish government has publicly acknowledged Agiza's account and granted his family refugee status.<sup>85</sup> The Swedish government also provided \$450,000 in relief to Agiza for its secondary role in his rendition.<sup>86</sup>

Plaintiff Mohamed Farag Ahmad Bashmilah's rendition began, like others, with immigration charges. Bashmilah, a Yemeni citizen, used a falsified Indonesian identity card to marry an Indonesian woman.<sup>87</sup> Picked up on immigration charges in Yemen, Bashmilah was placed in a CIA dark prison where he was exposed to constant white noise and alternating deafening music. In fact, Bashmilah was so tormented that he slashed his wrists in an attempt to bleed to death, then used his own blood to write "I am innocent" on the walls of his cell.<sup>88</sup> In March of 2006, he was released by the Yemeni government for time served.<sup>89</sup>

Plaintiff Bisher al-Rawi is an Iraqi citizen and permanent British resident.<sup>90</sup> From 1996 through 2002, al-Rawi worked as an interpreter for MI5 (a British secret service agency) and as an intermediary between MI5 and Abu Qatada, a Muslim cleric.<sup>91</sup> In 2002, al-Rawi flew to Gambia with several friends with the intention of starting a mobile peanut oil processing facility.<sup>92</sup> Arrested by British authorities for having a "suspicious device" that later turned out to be a battery charger, al-Rawi was taken to a dark prison in Afghanistan. In 2003, al-Rawi was flown to Guantánamo Bay, Cuba, where he was held for four and a half years before being returned to Britain.<sup>93</sup> He was never charged with any crime.<sup>94</sup>

In 2007, the European Parliament adopted a report concluding that the CIA had carried out extraordinary renditions of Mohamed, Britel, Agiza, and al-Rawi.<sup>95</sup> Separately, the Council of Europe, the Office of the Parliamentary Ombudsman of the Swedish Government, and the British All Party Parliamentary Group on Rendition have each corroborated, in whole or in part, the rendition and treatment

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82. *Id.* at 32.

83. *Id.* at 34–35.

84. *Id.* at 37.

85. *Id.* at 37–38; see also *Jeppesen III*, 614 F.3d 1070, 1074 (9th Cir. 2010) (en banc).

86. Oral Argument at 2:30, *Jeppesen III*, 614 F.3d 1070 (No. 08-15693EB), available at [http://www.ca9.uscourts.gov/media/view\\_subpage.php?pk\\_id=0000004702](http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000004702).

87. See First Amended Complaint at 38, *Jeppesen I*, 539 F. Supp. 2d 1128 (No. 5:07-cv-02798 (JW)).

88. *Id.* at 44.

89. *Id.* at 46.

90. *Id.* at 48.

91. *Id.*

92. *Id.* at 48–49.

93. *Id.* at 50–51, 53–55, 56–58.

94. *Id.* at 58.

95. *Id.* at 58–59.

of plaintiffs Mohamed and al-Rawi.<sup>96</sup> In addition, five separate United Nations bodies have corroborated all of the plaintiffs' allegations.<sup>97</sup> Extensive flight records show that Jeppesen Dataplan participated in the transportation of each plaintiff.<sup>98</sup> In fact, records show, and the Council of Europe concluded that, within a forty-eight hour period, Mohamed was transported on the same plane as Khaled el-Masri from the *El-Masri* case.<sup>99</sup>

*C. From the "Dark Side" to the Northern District of California*

On May 30, 2007, Mohamed, Britel, Agiza, al-Rawi, and Bashmilah filed a civil suit for damages in the U.S. District Court for the Northern District of California against Jeppesen Dataplan, a subsidiary of Boeing.<sup>100</sup> The plaintiffs alleged that Jeppesen provided the U.S. government with flight planning and air transportation of the plaintiffs in their extraordinary rendition and torture.<sup>101</sup> They alleged two causes of action under the Alien Tort Statute (ATS), a U.S. federal law that allows aliens to file tort claims against government officials for violations of international law.<sup>102</sup> Plaintiffs asserted ATS claims for forced disappearance and torture and other cruel, inhuman, or degrading treatment.<sup>103</sup>

On October 19, 2007, the U.S. government simultaneously filed a motion to intervene and a motion to dismiss.<sup>104</sup> The central argument of the motion to dismiss was that information required to litigate the suit was privileged for reasons of national security.<sup>105</sup> The government argued that, under *Totten*, the very subject matter of the lawsuit was a state secret and could not be litigated without reference to the privileged information.<sup>106</sup> The government further asserted that, even if the very subject matter was not a state secret, the court should dismiss the

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96. *Id.* at 59–60.

97. *Id.* at 60–61. These organizations are the U.N. Committee Against Torture, the U.N. Human Rights Committee, the U.N. Special Rapporteur on Torture, the U.N. Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, and the U.N. Working Group on Arbitrary Detention. *Id.*

98. *Id.* at 61–66.

99. *Id.* at 62–63.

100. Motion to Intervene, *Jeppesen I*, 539 F. Supp. 2d 1128 (N.D. Cal. 2008) (No. 5:07-cv-02798 (JW)); see also Complaint, *Jeppesen I*, 539 F. Supp. 2d 1128 (No. 5:07-cv-02798 (JW)).

101. See Motion to Intervene at 3, *Jeppesen I*, 539 F. Supp. 2d 1128 (No. 5:07-cv-02798 (JW)).

102. 28 U.S.C. § 1350 (2006).

103. *Jeppesen I*, 539 F. Supp. 2d. at 1132. Although the Alien Tort Statute generally involves state action, the plaintiffs in *Jeppesen* alleged that Jeppesen Dataplan conspired with the government and aided and abetted the government in committing violations of the law of nations. See First Amended Complaint at 66–67, *Jeppesen I*, 539 F. Supp. 2d 1128 (No. 5:07-cv-02798 (JW)).

104. See Notice of Motion and Motion to Intervene, *Jeppesen I*, 539 F. Supp. 2d 1128 (No. 5:07-cv-02798 (JW)); see also Memorandum of Plaintiffs in Opposition to the United States' Motion to Dismiss, or, in the Alternative, Motion for Summary Judgment, *Jeppesen I*, 539 F. Supp. 2d at 1128 (No. 5:07-cv-02798 (JW)).

105. See Notice of Motion and Motion to Dismiss, or, in the Alternative, for Summary Judgment at 22–24, *Jeppesen I*, 539 F. Supp. 2d. 1128 (N.D. Cal. 2008) (No. 5:07-cv-02798 (JW)).

106. *Id.* 12, 22–24.

case because the plaintiffs could not make out a prima facie case without the privileged information under *Reynolds*.<sup>107</sup>

The plaintiffs, represented by the American Civil Liberties Union (ACLU), responded that, even if the government's claim of privilege was legitimate, it would be premature to dismiss the case before going through discovery of at least nonprivileged evidence.<sup>108</sup> The plaintiffs further argued that the very subject matter of the case was not a state secret because use of extraordinary rendition had been publicly acknowledged by administration officials and the foreign governments that had investigated extraordinary rendition allegations.<sup>109</sup> The district court, however, was more persuaded by the United States. The district court dismissed the action, finding that it lacked subject matter jurisdiction under *Totten* because the very subject matter of the lawsuit was a state secret.<sup>110</sup>

On appeal, the Ninth Circuit Court of Appeals unanimously reversed, finding that neither the *Totten* bar nor the *Reynolds* privilege were grounds for dismissal.<sup>111</sup> The court emphatically disagreed with the district court, holding that the very subject matter theory of dismissal for lack of subject matter jurisdiction only applied in *Totten* cases premised on secret agreements and not merely where the *Reynolds* privilege was invoked.<sup>112</sup> The panel stated that *Totten* was meant to apply only to cases in which the plaintiff had an espionage relationship with the government.<sup>113</sup> Having reversed the dismissal, the panel remanded the case.<sup>114</sup>

The Ninth Circuit then voted to hear the case en banc.<sup>115</sup> On September 8, 2010, in a 6 to 5 decision, a sharply divided and impassioned court reinstated the decision of the district court. The en banc court did not use the same theory as the district court. Instead of using the very subject matter theory, the court relied exclusively on the *Reynolds* privilege. It held that, even if privileged evidence were excluded from the proceedings, there was an "unacceptable risk" that privileged evidence would emerge during litigation (the "unacceptable risk theory").<sup>116</sup> Although the court admitted that it was possible for the plaintiffs to make a prima facie case without privileged evidence, the court held that the risk of disclosure was too great to allow the case to proceed.<sup>117</sup>

107. *Id.* at 11, 22–24.

108. Memorandum of Plaintiffs in Opposition to the United States' Motion to Dismiss or, in the Alternative, for Summary Judgment, *Jeppesen I*, 539 F. Supp. 2d 1128 (No. 5:07-cv-02798 (JW)).

109. *Id.* at 32, 40–41.

110. *Jeppesen I*, 539 F. Supp. 2d at 1136.

111. *Jeppesen II*, 579 F.3d 943, 954 (9th Cir. 2009).

112. *Id.* at 952–53.

113. *Id.* at 954.

114. *Id.* at 962.

115. *Mohamed v. Jeppesen Dataplan, Inc.*, 586 F.3d 1108 (9th Cir. 2009).

116. *Jeppesen III*, 614 F.3d 1070, 1083 (9th Cir. 2010) (en banc).

117. *Id.* at 1087 ("Given plaintiff's 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 . . .").



In its opinion, the en banc court relied heavily on *El-Masri v. United States*, a Fourth Circuit Court of Appeals decision from 2007. The facts of that case are nearly identical to the *Jeppesen* case. In fact, Ben Wizner, attorney for the ACLU, was plaintiffs' counsel in both *Jeppesen* and *El-Masri*.<sup>118</sup> In that case, Khaled el-Masri, a German citizen of Lebanese descent, was arrested in Macedonia and flown by Jeppesen, at the direction of the CIA, to Afghanistan.<sup>119</sup> For the next six months, el-Masri was tortured and interrogated in much the same way as the *Jeppesen* plaintiffs.<sup>120</sup> From very early on, CIA officials allegedly knew that el-Masri had been mistakenly arrested.<sup>121</sup> Eventually Jeppesen employees transported and dumped el-Masri in Albania, and el-Masri later flew back to Germany.<sup>122</sup> El-Masri sued under the Alien Tort Statute and under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*.<sup>123</sup>

The Court of Appeals for the Fourth Circuit upheld the district court's dismissal after the United States invoked the *Reynolds* privilege.<sup>124</sup> The court reasoned that state secrets were so central to the litigation of plaintiff's claim that it required dismissal.<sup>125</sup> The court also held that the case could not be litigated because nondisclosure of the privileged information could hypothetically deprive the defendants of a defense.<sup>126</sup>

### III. TRANSFORMATION OF THE DOCTRINE: *EL-MASRI*, *JEPPESEN*, AND *REYNOLDS* AS A DE FACTO IMMUNITY DOCTRINE

The *Reynolds* privilege, as the dissent in *Jeppesen* pointed out, was intended to excuse defendants when they refused to produce documents during discovery, not to require complete dismissal of a case, as in *Totten*.<sup>127</sup> *Jeppesen* and *El-Masri* misuse and confuse the privilege in three ways, each of which will be discussed in greater depth in the following Section. These points of confusion create a growing nexus between *Reynolds* and *Totten*, the latter of which should not have applied in either *Jeppesen* or *El-Masri* because those cases did not involve secret government agreements with the plaintiffs.<sup>128</sup> First, the *El-Masri* court, like some other courts,

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118. *El-Masri v. United States*, 479 F.3d 296, 296 (4th Cir. 2007).

119. *Id.* at 300.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*; *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (finding a cause of action where a federal officer can be held civilly liable for violation of an individual's constitutional rights). See generally Michaw A. Rosenhouse, Annotation, *Bivens Actions—United States Supreme Court Cases*, 22 A.L.R. Fed. 2d 179 (2007).

124. *El-Masri*, 479 F.3d at 301.

125. *Id.* at 302.

126. *Id.* at 309.

127. *Jeppesen III*, 614 F.3d 1070, 1098 (9th Cir. 2010) (en banc) (Hawkins, J., dissenting).

128. See *supra* note 55 and accompanying text for the proposition that *Totten* should only apply in cases where the plaintiff entered into a voluntary relationship with the government.

used the very subject matter theory, which was intended to be used exclusively in *Totten* cases, to dismiss cases under *Reynolds*. Second, *Jeppesen* took *Reynolds* into the realm of *Totten* through the rarely used unacceptable risk theory, which in application bears a striking resemblance to the very subject matter theory. Third, *El-Masri*, but notably not *Jeppesen*, further collapsed *Reynolds* and *Totten* by prohibiting litigation on the grounds that nondisclosure of privileged evidence could hypothetically deprive the defendants of a defense. Expanding the doctrine in this way creates several problems. The most obvious flaw with the conflation of these two doctrines, especially at the pleading stage, is that courts will more often be forced to dismiss legitimate claims, depriving plaintiffs of their day in court and precluding compensation for potentially outrageous harms.

#### A. Misuse of the Very Subject Matter Theory

The central problem with *Jeppesen* and *El-Masri* is that they confuse *Reynolds* and *Totten* in their use of the very subject matter theory. Other courts have done so as well.<sup>129</sup> However, after *Tenet v. Doe*, it is clear that this is a mistake. The Supreme Court is partly at fault for this confusion. The language the Court used when discussing *Totten* and *Reynolds* is similar. For instance, the Court in *Tenet*, even while distinguishing between the two doctrines, referred to *Totten* as invoking the “privilege” rather than a bar or nonjusticiability doctrine.<sup>130</sup> Nevertheless, *Jeppesen* and *El-Masri*, together and individually, have moved toward a de facto doctrine of immunity in place of the *Reynolds* privilege. In particular, *El-Masri* used this theory as the basis of its dismissal despite the fact that the court applied only *Reynolds* in its holding.<sup>131</sup>

The district court in *Jeppesen* provides an excellent example of how courts, including the court in *El-Masri*, have failed to distinguish between *Totten* and *Reynolds*.<sup>132</sup> In dismissing the case on nonjusticiability grounds because the very subject matter of the case was found to be a state secret, the court relied almost exclusively on the Ninth Circuit’s 1998 opinion in *Kasza v. Browner*.<sup>133</sup> *Kasza* was a similar state secrets case that was dismissed at the pleading stage, purportedly under *Reynolds*, because the very subject matter of the case was a state secret.<sup>134</sup>

129. See, e.g., *Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998) (referring to the “very subject matter” characterization as an aspect of the privilege while citing to *Reynolds*); see also *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 984 (N.D. Cal. 2006) (adopting *Kasza*’s problematic mischaracterization).

130. *Tenet v. Doe*, 544 U.S. 1, 9 (2005) (“[W]here the very subject matter of the action, a contract to perform espionage, was a matter of state secret, we declared that such a case was to be dismissed on the pleadings without ever reaching the question of evidence, since it was so obvious that the action should never prevail over the privilege.”) (second emphasis added) (internal quotation marks omitted) (citing *U.S. v. Reynolds*, 345 U.S. 1, 11, n.26 (1953)).

131. *El-Masri*, 479 F.3d at 304–05.

132. *Jeppesen I*, 539 F. Supp. 2d 1128 (N.D. Cal. 2008).

133. *Id.* at 1134–35 (quoting *Kasza*, 133 F.3d at 1166).

134. *Id.* at 1170.

However, the *Kasza* court was mistaken in using this theory as a nonjusticiability doctrine. As discussed below, this theory was meant to apply only to *Totten* cases. In support of its decision to apply the very subject matter theory, *Kasza* cited only to footnote twenty-six in *Reynolds*.<sup>135</sup> Footnote twenty-six in *Reynolds* cited *Totten* and read:

See *Totten v. United States*, where the very subject matter of the action, a contract to perform espionage, was a matter of state secret. The action was dismissed on the pleadings without ever reaching the question of evidence, since it was so obvious that the action should never prevail over the privilege.<sup>136</sup>

Thus, in *Reynolds* the Supreme Court merely cited *Totten* as support for the absolute nature of the privilege.<sup>137</sup> Yet this footnote has since become the complete basis for using the very subject matter theory as a nonjusticiability doctrine within the *Reynolds* privilege.

The three-judge panel in *Jeppesen*, which would have allowed the case to proceed, explained at great length this misinterpretation of the *Reynolds* footnote, which has unfortunately spawned an entire theory of dismissal:

Neither does any Ninth Circuit or Supreme Court case law indicate that the “very subject matter” of any other kind of lawsuit is a state secret, apart from the limited factual context of *Totten* itself. The Supreme Court’s “very subject matter” language appeared in a footnote in *Reynolds*, where the Court simply characterized “the very subject matter of the [*Totten* lawsuit], a contract to perform espionage, [as] a matter of state secret.” That brief passage did not signal a deliberate expansion of *Totten*’s uncompromising dismissal rule beyond secret agreements with the government, and we decline to adopt that expansion here. *Tenet* leaves no doubt that the “sweeping holding in *Totten*” applies only to suits “where success depends on the existence of [the plaintiff’s] secret espionage relationship with the Government,” and that the state secrets privilege does not otherwise “provide the absolute protection” from suit available exclusively under “the *Totten* rule.”<sup>138</sup>

The en banc panel in *Jeppesen* recognized the error other courts made in using the very subject matter theory, and the court criticized *El-Masri*’s misinterpretation.<sup>139</sup> The court explicitly stated the correct standard for the very subject matter theory in describing the law.<sup>140</sup> However, where the *Jeppesen* en banc

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135. *Id.* at 1165.

136. *U.S. v. Reynolds*, 345 U.S. 1, 11 n.26 (1953) (internal citations omitted).

137. *Id.* at 11.

138. *Jeppesen II*, 579 F.3d 943, 954–55 (9th Cir. 2009) (internal citations omitted); see also *In re Sealed Case*, 494 F.3d 139, 151 (D.C. Cir. 2007) (noting that the very subject matter theory was the result of a footnote in *Reynolds* that referenced *Totten*).

139. *Jeppesen III*, 614 F.3d 1070, 1088 (9th Cir. 2010) (en banc).

140. *Id.* at 1077–78.

panel succeeded in its recitation of the law, it failed in the application. In a footnote, the *Jeppesen* court explained the crux of its analysis:

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.<sup>141</sup>

This is the point where the court privileged facts rather than evidence. In referring to “privileged information,” the *Jeppesen* court referred to facts. There are multiple evidentiary avenues a party can use to prove a fact. By closing all of these avenues, where only one may be privileged, facts become privileged rather than evidence. In privileging information or facts, rather than simply evidence, the *Jeppesen* court applied the very subject matter theory; it simply altered the language. The *Jeppesen* court relied on *El-Masri* and used the same approach in reaching its conclusion. Even though the court acknowledged that *El-Masri* was mistaken in using the very subject matter theory, it borrowed *El-Masri*’s reasoning in misapplying *Reynolds*. In fact, the *Jeppesen* court relied on other courts that had confused *Totten* and *Reynolds* in the same way *El-Masri* did.<sup>142</sup> *Jeppesen*’s application is indistinguishable from the very subject matter theory on which other courts had erroneously relied.

What is perhaps most frightening about this line of reasoning is that the use of the very subject matter theory in *Reynolds* would apply to any case involving torture or extraordinary rendition. In application, a de facto rule would altogether prohibit litigation of torture or rendition cases, even if plaintiffs could prove their cases with nonprivileged evidence. These are cases that go to the very heart of a free society, government accountability, human rights, and limitations on government authority.

#### *B. Unacceptable Risk of Disclosure Even with the Exclusion of Privileged Information*

The court in *Jeppesen* identified a rarely used theory under which *Reynolds* could be used to dismiss claims. This theory provides that a case should be dismissed if litigating the case “would present an unacceptable risk of disclosing state secrets,” even with the exclusion of privileged information.<sup>143</sup> In asserting this unacceptable risk theory, the *Jeppesen* majority dismissed the plaintiffs’ claim in

141. *Id.* at 1087 n.12 (internal quotation marks omitted).

142. In addition to *El-Masri*, the *Jeppesen* court relied on *Sterling v. Tenet*, 416 F.3d 338, 347 (9th Cir. 2005) (using the very subject matter theory), and *Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998).

143. *Jeppesen III*, 614 F.3d at 1083; *see also* *El-Masri v. United States*, 479 F.3d 296, 308 (4th Cir. 2007) (“[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.”).

an unusual way.<sup>144</sup> Very few cases had previously dismissed a claim using this theory. Even some of the few cases cited by *Jeppesen* as support for this theory were actually dismissed on other grounds.<sup>145</sup> This is the least persuasive of *Jeppesen's* justifications and is troubling for several reasons.

The first reason why this is troubling is that there was no such risk in *Jeppesen*. The plaintiffs in *Jeppesen* claimed that they could make out a prima facie case without discovery, using only the nonprivileged evidence they had so far gathered.<sup>146</sup> Presumably, therefore, they would not need to examine witnesses regarding anything close to the privileged evidence. In fact, if the plaintiffs could have made a prima facie case without discovery it is conceivable that the district court could have ordered summary judgment in their favor, assuming no facts were in dispute. In this case, attorneys would never even need to examine witnesses or introduce extra evidence that might include sensitive information. It seems bizarre, therefore, that this was the theory upon which the en banc panel dismissed the claim. This rationale is also problematic because courts following *Jeppesen* may use it to dismiss similar claims that do not rely on privileged evidence.

The unacceptable risk theory is also troubling in a broader context. What exactly would create an “unacceptable risk” is unclear. *Jeppesen* and its supporting cases point only to the risk that a witness during examination may unintentionally or unknowingly reveal privileged information.<sup>147</sup> This is questionable in at least two respects. First, is it really likely that during the course of litigation a witness or attorney would accidentally disclose privileged information? Second, does this actually protect secrecy?

It is highly unlikely that adjudicating cases implicating state secrets would result in accidental disclosure of privileged material. The court's witness examination example does not credibly support this notion.<sup>148</sup> Lawsuits such as *Jeppesen* and *El-Masri* are highly sophisticated and are normally litigated by some of the nation's finest attorneys. The court can reasonably expect these attorneys, typically litigating in teams, to lodge an objection when a question might implicate state secrets. Government attorneys in particular will likely be highly trained and informed with regard to all privileged information related to the case.<sup>149</sup>

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144. *Jeppesen III*, 614 F.3d at 1088 (holding that “any plausible effort by *Jeppesen* to defend against [plaintiffs’ claims] 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”).

145. *In re Sealed Case*, 494 F.3d 139, 153 (D.C. Cir. 2007) (dismissing the claim against one defendant because a prima facie case could not be made against him without privileged evidence); *El-Masri*, 479 F.3d at 308 (dismissing because the very subject matter of the case was a state secret).

146. Oral Argument at 21:05, *Jeppesen III*, 614 F.3d 1070 (9th Cir. 2010) (No. 08-15693EB), available at [http://www.ca9.uscourts.gov/media/view\\_subpage.php?pk\\_id=0000004702](http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000004702).

147. *Jeppesen III*, 614 F.3d at 1088; see also, e.g., *Bareford v. General Dynamic Corp.*, 973 F.3d 1138, 1144 (5th Cir. 1992); *Farnsworth Cannon, Inc., v. Grimes*, 635 F.2d 268, 281 (4th Cir. 1987); *Fitzgerald v. Penthouse Intern., Inc.*, 776 F.2d 1236, 1243 (4th Cir. 1985).

148. See *Jeppesen III*, 614 F.3d at 1088.

149. The United States Attorney's Office has its own very extensive training department. See

Similarly, it is also reasonable to expect attorneys to have the foresight to tailor their witness's questions to appropriately limit potential disclosures. Although judges may *sua sponte* make objections to inadmissible evidence,<sup>150</sup> in practice judges generally rely on attorneys to object if a question is privileged or otherwise inappropriate. Of course, the harm that could result when an attorney fails to object to a leading question is minor compared to the harm that may result if an attorney fails to object to a question that induces a witness to disclose privileged information. Nevertheless, when dealing with testimony regarding such extraordinarily sensitive issues, it is incumbent upon the attorneys, witnesses, and the court to adjust their awareness and caution accordingly. When conducting and objecting to examinations of witnesses about extraordinary rendition, it is highly likely that witnesses, attorneys, and the court will ensure that every word of testimony is deliberate. It is conceivable, admittedly, that in all of the state secrets cases the occasional witness might fail to censor his or her own speech and mistakenly reveal privileged information, but this remote possibility is insufficient to support the *Jeppesen* court's unacceptable risk theory.

In addition, the court's hypothetical underestimates witnesses' ability to regulate the scope of their testimony and the scope of witness preparation. Counsel for the government could instruct witnesses before examination on how to avoid using privileged information. Cases implicating state secrets involve government activity at the highest levels of the executive branch. In fact, invoking the privilege requires the personal approval of the U.S. Attorney General.<sup>151</sup> It is unlikely that attorneys, under these circumstances, will fail to properly control witnesses and allow sensitive material to leak out. This unlikely scenario does not justify the vastly more draconian result of dismissing these cases outright.

Nevertheless, there is admittedly some risk of inadvertent or accidental disclosure. Although attorneys and witnesses may be held to a high standard in cases such as *Jeppesen* and *El-Masri*, the prospect of an errant fax, misaddressed e-mail, or rambling witness is not entirely imaginary. Moreover, it is conceivable that secret information could be inferred through publicly available information. For instance, a witness who was tortured may be examined concerning the injuries he or she suffered. A thorough examination such as this may lead to inferred

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Executive Office for U.S. Attorneys, Office of Legal Educ., *CLE for Agency Counsel*, JUSTICE.GOV, <http://www.justice.gov/usao/eousa/ole/cle/index.html> (last modified Sept. 27, 2010).

150. See 3 FRED LANE, GOLDSTEIN TRIAL TECHNIQUE § 13:37 (3d ed. 1984) (The judge "may sustain objections on her own, even when not made by counsel. This is in line with her duty to prevent a miscarriage of justice. Consistent with this duty, a trial judge may *sua sponte* object to improper conduct or irrelevant evidence, and may also delete objectionable material from certain documents originally admitted into evidence although there has been no objection.").

151. See Eric Holder, 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), available at <http://www.justice.gov/opa/documents/state-secret-privileges.pdf>.

disclosure of secret interrogation techniques or other sensitive information. Thus, there are two legitimate fears: that of the errant fax and that of inferred disclosure.

These fears are either mitigated or outweighed by other important interests. First, attorneys and litigants in cases where state secrets are at issue are generally extremely competent and will inevitably hold themselves to high professional standards. No attorney would carelessly risk the tremendous reputational injury and possible disciplinary action that could result from accidentally disclosing state secrets. Second, these risks must be balanced against the need for the fair administration of justice and government accountability. The *Reynolds* doctrine does, after all, represent a balancing approach to the state secrets problem. When balanced against such important values, the low risk of inadvertent disclosure is tolerable. Lastly, every state secrets case will involve a certain element of risk. Dismissal on this basis is troubling because any case that implicates state secrets arguably poses this same risk. As such, any state secrets case could be dismissed on this basis.

Another problem with the unacceptable risk theory is that, unlike the very subject matter theory, the unacceptable risk theory is not fact-specific.<sup>152</sup> The benefit of a fact-specific analysis is that it is much more limited in scope. Thus, it is considerably less likely to operate as an immunity or nonjusticiability doctrine. However, that is not the case under the unacceptable risk theory. Because it is unbounded by the facts of the case, the government could potentially use the unacceptable risk theory to argue for dismissal of substantially more cases, even where there is little evidence that state secrets will be revealed. The court's only justification for this principle suggests that witnesses may accidentally or unknowingly disclose privileged information on direct or cross-examination.<sup>153</sup> There will undoubtedly be direct and cross-examination of witnesses who possess privileged information in almost every lawsuit that implicates state secrets. The pervasiveness of this risk highlights the need for a foundational shift in handling state secrets cases, a need that could be best satisfied with the creation of a subject matter court.<sup>154</sup>

### C. Dismissal Based on Deprivation of a Hypothetical Defense

One area in which *El-Masri* and *Jeppesen* diverge is the effect of a defense that potentially lies within the privileged material. *El-Masri* takes the more expansive view; in *El-Masri* the hypothetical loss of a defense through the exclusion of privileged evidence is a basis for dismissal (the "hypothetical defense theory").<sup>155</sup>

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152. It is unclear whether the hypothetical defense theory, as mentioned by *El-Masri*, would be fact-specific because the court does not explain how that theory would work in practice. *El-Masri v. United States*, 479 F.3d 296, 310 (4th Cir. 2007).

153. *In re United States*, 872 F.2d 472, 481 (D.C. Cir. 1989).

154. *See infra* Part V.B.3.

155. *El-Masri*, 479 F.3d at 310 ("We do not, of course, mean to suggest that any of these

The *Jeppesen* court, on the other hand, ruled out dismissal based on a hypothetical defense, but allowed dismissal based on an actual defense: “If the [*Reynolds*] 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.”<sup>156</sup> These grounds differ substantially from the very subject matter and unacceptable risk theories cited by *Jeppesen*. In this case, the dismissal would be, in effect, a grant of summary judgment.

The hypothetical defense theory is a dangerous expansion of the state secrets doctrine. The *El-Masri* court asserted that even hypothetical defenses that might not represent “the true state of affairs” could support dismissal.<sup>157</sup> This standard is purely speculative and would occur during a nascent stage of litigation. The *El-Masri* court did not explain how this theory would work in practice. The hypothetical defense theory has since been rejected by every other circuit to address this issue.<sup>158</sup> There are good reasons why it has been so soundly rejected. There is no reason why a defendant should not have to assert an authentic, if general, defense rather than a conceivable defense. This could be done in a way that does not reveal any factual information, such as through an ex parte filing or under a gag order.

The hypothetical defense theory could apply to any case as it is based on speculation. This is a true expansion of *Reynolds* into a nonjusticiability doctrine. It is unlikely that a plaintiff would be capable of successfully litigating a claim with this standard in place. However, *El-Masri* appears to be an outlier in this respect, as even *Jeppesen* did not use this approach.

#### IV. THE PROBLEMS WITH OVERINCLUSIVE DISMISSAL: DISMISSAL OF LEGITIMATE CLAIMS AND THE FAILURE TO PROTECT SECRECY

An expansion of *Reynolds* into the realm of *Totten* might be appropriate if this expansion served the interests of national security. In the absence of this justification, the only effect is to deprive plaintiffs of legitimate claims while undermining the principles the legal system serves to protect—the very same principles the court in *Jeppesen* admittedly struggled to balance.<sup>159</sup> *Jeppesen* and *El-Masri* do not serve the interests of national security for two reasons. First, the facts that the government sought to conceal were already known to the general

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hypothetical defenses represents the true state of affairs . . .”).

156. *Jeppesen III*, 614 F.3d 1070, 1083 (9th Cir. 2010) (en banc) (quoting *Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998)); see also *In re Sealed Case*, 494 F.3d 139 (D.C. Cir. 2007); *Tenenbaum v. Simonini*, 372 F.3d 776, 777 (6th Cir. 2004); *Bareford v. Gen. Dynamics Corp.*, 973 F.2d 1138 (5th Cir. 1992).

157. *El-Masri*, 479 F.3d at 310.

158. See *Tenenbaum*, 372 F.3d at 777–78; *Bareford*, 973 F.2d at 1141; *Zuckerbraun v. Gen. Dynamics Corp.*, 935 F.2d 544, 547 (2d Cir. 1991).

159. *Jeppesen III*, 614 F.3d 1070, 1073 (9th Cir. 2010) (en banc).



public. Second, intense secrecy breeds distrust of the U.S. government among foreign governments and peoples.

On the surface, the most apparent danger of the *Jeppesen* and *El-Masri* approach is that plaintiffs with legitimate claims may be denied their day in court and prevented from obtaining compensation for their injuries. However, the danger goes much deeper than that. Rendition, torture, and forced disappearance are not ordinary allegations or theories of recovery. The claims in *Jeppesen* and *El-Masri* come at a crossroads between liberty and authoritarian government. With the blurring of the lines of the privilege comes the traditional slippery slope danger of continuous expansion of government authority. The danger is further exacerbated by the values the privilege tends to compromise—the values of transparency, accountability, human rights, and limits on government authority.

A slightly more subtle danger is the possibility that the government will invoke the privilege to effectively insulate government actions from judicial review even when state secrets are not actually at stake. In some cases, *Reynolds* might even preclude judges from reviewing the government evidence supporting the claim of privilege “alone, in chambers.”<sup>160</sup> If even judges cannot review claims of privilege, it would be one of the few areas where there would be no check on the executive branch. More worrisome, the privilege resides in areas where government skepticism should be at its peak: military and national security affairs. Taken to an extreme, the executive branch could target rival political figures for detainment, extraordinary rendition, interrogation, or other illegal acts, and then insulate its actions from future judicial review by arguing that the sensitive nature of the evidence necessitates dismissal. Thus, in cases where significant evidence of government wrongdoing is not public, the executive’s power to have lawsuits dismissed, forever hiding their contents from the public, is a supremely powerful tool. The privilege is so powerful that, if used without supervision, it could have dire consequences.

In many cases, there will be little or no national security interest in concealing the evidence because it will already be public. For example, the tragic irony of *Jeppesen* and *El-Masri* is that the dismissal of those claims likely did very little to protect secrecy. For instance, the defendants in *Jeppesen* argued that the claim must be dismissed at the pleading stage because allowing *Jeppesen* to file a responsive pleading would require *Jeppesen* to either admit or deny a relationship with the government—a state secret.<sup>161</sup> But this relationship was already publicly known to exist. The CEO of *Jeppesen* was on the record before the media admitting that *Jeppesen* Dataplan conducted the government’s torture flights.<sup>162</sup> Concealing this fact during litigation, therefore, accomplished nothing to protect

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160. U.S. v. *Reynolds*, 345 U.S. 1, 10 (1953).

161. Notice of Motion and Motion to Dismiss, or, in the Alternative, for Summary Judgment by the United States, *Jeppesen I*, 539 F. Supp. 2d 1128 (N.D. Cal. 2008) (No. 5:07-cv-02798 (JW)).

162. *Jeppesen III*, 614 F.3d at 1106 (appendix) (Hawkins, J. dissenting).

its secrecy. In fact, the publicly available information on the rendition flights was so extensive that the dissent in *Jeppesen* elected to attach an appendix summarizing over 1,800 pages of information submitted by the plaintiffs.<sup>163</sup> It is ironic that the *Jeppesen* majority claimed to be protecting privileged information when the very publication of its opinion led to the widespread dissemination of privileged information. The existence of this voluminous and publicly available information makes it crystal clear that very little of that non-public information would have been litigated because this voluminous evidence was likely sufficient to prove the plaintiffs' case. Considering almost everything was already publicly known, the security interest in preventing the lawsuit from progressing was minimal.

Even if the litigation did result in disclosure of information, it is possible that this information would have been publicly disclosed anyway by the plaintiffs via the media. It is difficult to imagine that the *Jeppesen* litigation would have revealed anything that the plaintiffs at least did not already know. The five plaintiffs were, after all, incarcerated for years and interacted with a myriad of U.S. officials. Further, everything they learned could be freely reported to the media, as was the case with Khaled el-Masri.<sup>164</sup> Because of this, whether the secret information came out through a plaintiff's interview with the media or through a judicial opinion, the effect would have been the same: to place security at risk. It is hypothetically possible that, had *Jeppesen* proceeded, a dangerous state secret that none of the plaintiffs knew about would have come out, resulting in disaster for the United States, but this is unlikely. Moreover, this concern is better addressed through reform of the state secrets doctrine rather than through any of the *Jeppesen* theories. In particular, this hypothetical would never arise were the case litigated in a subject matter court designed to handle such matters.

## V. SOLUTIONS AND ALTERNATIVES

Having painted a dark picture using the opinions of *Jeppesen* and *El-Masri*, it is useful to look at ways of brightening the canvas. There are several methods through which this can be accomplished. First, given that the state secrets doctrine has developed through the common law, there certainly must be an alternative judicial approach to reform the doctrine. Of course, this may not solve the entire problem. Larger, more structural changes to the doctrine are also appealing. In the alternative, Congress has the authority to shape the doctrine from the top down in the form of legislation. Each of these solutions, while improving upon *Jeppesen* and *El-Masri*, leave open certain holes. There is, however, at least one solution that largely protects state secrets and the rights of litigants: the creation of a subject matter court.

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163. *Id.* at 1095 n.2.

164. For one of the news reports resulting from el-Masri's interviews with the media, see James Meek, *They Beat Me from All Sides*, GUARDIAN (Jan. 26, 2012, 1:00 PM), <http://www.guardian.co.uk/world/2005/jan/14/usa.germany>.

*A. An Alternative Judicial Approach: A Return to Reynolds*

Despite the growing popularity of the *Jeppesen/El-Masri* approach,<sup>165</sup> not all courts have allowed dismissal when plaintiffs were able to make out a prima facie case with nonprivileged evidence. One alternative to *Jeppesen/El-Masri* is the D.C. Circuit's approach in *Ellsburg v. Mitchell*<sup>166</sup> and, more significantly, in *In re United States*.<sup>167</sup> *Ellsburg* is a traditional, status quo application of *Reynolds*. The case emerged tangentially from the "Pentagon Papers" criminal prosecution in the 1970's.<sup>168</sup> The defendants and their attorneys from the prior criminal case alleged that federal government officials had subjected them to warrantless wiretapping, and sued several government agencies for damages.<sup>169</sup> Although the government initially admitted to conducting several of the wiretaps, it later refused to respond to the plaintiffs' other allegations on the ground that the evidence was protected by the state secrets privilege.<sup>170</sup> The court described the application of *Reynolds* differently from either *El-Masri* or *Jeppesen*:

The effect of the government's successful invocation of the state secrets privilege, when the government is not itself a party to the suit in question, is well established: "[T]he result is simply that the evidence is unavailable, as though a witness had died, and the case will proceed accordingly, with no consequences save those resulting from the loss of the evidence." Likewise, it is now settled that, when the government is a defendant in a civil suit, its invocation of the privilege results in no alteration of pertinent substantive or procedural rules; the effect is the same, in other words, as if the government were not involved in the controversy.<sup>171</sup>

*Ellsburg* simply made the privileged material unavailable, an approach that was affirmed in *In re Sealed Case*, which was decided the same year as *El-Masri*.<sup>172</sup>

The other D.C. Circuit case mentioned above, however, best exemplifies this approach to the exclusion of evidence. In *In re United States*, the difference between the *Jeppesen/El-Masri* approach and the D.C. Circuit's approach is striking. In that case, the plaintiff, through Freedom of Information Act requests, claimed that she could make a prima facie case without discovery and without using privileged documents.<sup>173</sup> The court allowed the case to move forward, stating: "Denying discovery, but letting the action go forward, is simply a less drastic solution than

165. See, e.g., *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 52–54 (D.D.C. Dec. 7, 2010) (citing exclusively to *Jeppesen* and *Reynolds* in its discussion of state secrets) (dismissed on other grounds).

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

167. *In re United States*, 872 F.2d 472 (D.C. Cir. 1989).

168. *Ellsburg*, 709 F.2d at 52; *In re Sealed Case*, 494 F.3d 139 (D.C. Cir. 2007).

169. *Ellsburg*, 709 F.2d at 53.

170. *Id.* at 53–54.

171. *Id.* at 64 (quoting MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 233 (E. Cleary ed., 1972) (footnote omitted)).

172. *In re Sealed Case*, 494 F.3d at 139.

173. *In re United States*, 872 F.2d at 481.

the outright dismissal authorized by our previous cases.<sup>174</sup> This stands in stark contrast to the *Jeppesen* approach where the court dismissed the action despite the plaintiffs' claim that they could make out a case without privileged information. The *In re United States* court also followed the *Reynolds* Court's original intention of allowing multiple avenues to discovery.<sup>175</sup> In other words, the D.C. Circuit acknowledged what the *Jeppesen* and *El-Masri* courts failed to embrace: that when there are both privileged and non-privileged avenues to the same information, either of which could make a prima facie case, dismissal is unnecessary.<sup>176</sup>

The D.C. Circuit's approach in *Ellsberg* and *In re United States* does a better job than *Jeppesen* and *El-Masri* of balancing government interests with the needs of the plaintiffs. The simple concept of excluding evidence rather than dismissing cases allows plaintiffs to attempt to make a prima facie case in spite of the privilege.<sup>177</sup> Nevertheless, even this approach has substantial problems. First, this approach still allows courts to dismiss claims where a judge, in camera, verifies the validity of an actual defense within privileged evidence.<sup>178</sup> Ergo, a plaintiff cannot critique that defense, attack it, contradict it, or otherwise contest its validity. Nevertheless, as the court in *In re Sealed Case* pointed out, this is still preferable to the hypothetical defense theory used in *El-Masri*, where even a hypothetical defense could result in dismissal.<sup>179</sup> Lastly, the D.C. Circuit's approach remains flawed in that it allows courts to dismiss cases based on privileged information that is in the hands of the plaintiff and is therefore no longer secret.<sup>180</sup>

Despite its flaws, the D.C. Circuit's approach preserves the plaintiff's access to multiple evidentiary methods of proving the same facts. *Jeppesen* and *El-Masri*, in dismissing cases even when a prima facie case could be made, represent a much greater nexus between *Reynolds* and *Totten*. The D.C. Circuit's approach, even with its flaws, is preferable because it does not collapse the two rules. The D.C.

174. *Id.*

175. *United States v. Reynolds*, 345 U.S. 1, 11, (1953) (stating that the respondents could have reached the necessary information through examination of witnesses, to which the government agreed).

176. *In re United States*, 872 F.2d at 481 ("At the same time, an action as to which a certain avenue of discovery would compromise state secrets need not be dismissed if an alternative, non-sensitive avenue of discovery is available. In *Reynolds*, the Supreme Court held that the Government could prevent discovery of a sensitive report sought by plaintiffs in their wrongful death case arising out of the crash of a military aircraft. The Court noted, however, that a readily available alternative to disclosure of the sensitive information existed . . . to adduce the essential facts without resort to material touching upon military secrets.") (internal citations omitted) (internal quotation marks omitted).

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

178. *In re United States*, 872 F.2d at 481–82.

179. *In re Sealed Case*, 494 F.3d at 149–50 (stating that the hypothetical defense model would mean "virtually every case in which the United States successfully invokes the state secrets privileged would need to be dismissed . . . [resulting in] a system of conjecture").

180. *Ellsberg v. Mitchell*, 709 F.2d 51, 65 (D.C. Cir. 1983).

Circuit's approach may thus allow more claims to go forward in the D.C. Circuit, as opposed to the Ninth and Fourth Circuits.

### *B. Opportunities for Structural Reform*

#### *1. Congressional Alternatives: Legislative Reform*

One intriguing proposal is Congress' State Secrets Protection Act (SSPA).<sup>181</sup> The SSPA, in essence, is aimed at administering a new set of procedures for judges to handle state secrets cases. The proposed law would allow claims to proceed while still preserving the secrecy of privileged information.

The SSPA begins by defining the term "state secret." Seemingly obvious, this is important, as no court has given a more precise definition of the term than that offered by *Reynolds* decades ago.<sup>182</sup> *Reynolds* described state secrets as "matters which, in the interest of national security, should not be divulged."<sup>183</sup> In contrast, the SSPA defines a "state secret" as "any information that, if disclosed publicly, would be reasonably likely to cause significant harm to the national defense or foreign relations of the United States."<sup>184</sup> There are several notable differences between these definitions, such as the SSPA's limitation to the United States and the "reasonably likely" qualifier. However, of more subtle importance is the requirement that the information be "disclosed publicly" rather than "divulged." "Disclosed publicly" leaves open the possibility that plaintiffs could use sensitive evidence if it was disclosed under seal or in camera.

The SSPA provides a plethora of mechanisms to preserve the secrecy of information during litigation of state secrets claims. For instance, the SSPA requires that courts use the security procedures established in the Classified Information Procedures Act.<sup>185</sup> However, the most appealing aspect of the SSPA is that it prohibits dismissal on state secrets grounds outside of limited circumstances.<sup>186</sup> The SSPA would allow for dismissal only if litigation in the absence of the privileged material, or substitute material, would "substantially impair the ability of a party to pursue a valid defense to the claim or counterclaim."<sup>187</sup>

The inclusion of nonprivileged substitute material is another significant

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181. State Secrets Protection Act, S. 417, 111th Cong. (2009). A similar bill was proposed in the House of Representatives. *See* H.R. 984, 111th Cong. (2009).

182. *See, e.g., Jeppesen III*, 614 F.3d 1070, 1082 (9th Cir. 2010) (en banc) ("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.')" (citing *U.S. v. Reynolds*, 345 U.S. 1, 10 (1953)).

183. *Reynolds*, 345 U.S. at 10.

184. S. 417 § 4501.

185. *Id.* § 4507(a).

186. *Id.* § 4503(b).

187. *Id.* §§ 4505(1), (3).

feature of the SSPA. It requires that the government provide a nonprivileged substitute when material evidence is excluded as privileged.<sup>188</sup> If a nonprivileged substitute is not provided, then the court can resolve the factual dispute in favor of the civilian party.<sup>189</sup> This mechanism amply protects plaintiffs in state secrets cases. Requiring nonprivileged substitutes ensures that as much evidence as possible is made available to plaintiffs. Further, it would discourage the government from asserting the privilege frivolously.

Unfortunately, both the Senate and the House bills have not been active since 2009.<sup>190</sup> Additionally, several of the Senate sponsors are no longer sitting.<sup>191</sup> Considering this, it is difficult to imagine that a bill similar to the SSPA will become law unless a dramatic national event occurs to alter the lack of momentum.

## 2. Congressional Alternatives: Oversight

Another option for effectively limiting application of the privilege is establishing a Congressional oversight committee to review the executive branch's invocation of the privilege. There are advantages to this alternative. Members of Congress certainly can be trusted with knowledge related to state secrets, although one could still argue they lack the same expertise as the executive. Moreover, congressional authority to conduct such investigations is well established.<sup>192</sup> A simple method of implementing congressional oversight would be to add an additional step in the *Reynolds* procedure for invoking the privilege. For instance, in addition to having the Attorney General personally review the claim of privilege, a congressional oversight committee could be required, perhaps even as part of the *Reynolds* test, to approve the use of the privilege.

For historical precedent, one can look to the Senate Select Committee on Intelligence (SSCI) and the House Permanent Select Committee on Intelligence (HPSCI), which have monitored the CIA for decades.<sup>193</sup> The Independent Counsel Statute is a good practical model.<sup>194</sup> This statute allows the Attorney General to appoint independent counsel to conduct investigations of high-ranking individuals such as the president, vice president, department heads, and the

188. *Id.* § 4504(f), (g).

189. *Id.*

190. State Secrets Protection Act, S. 417 111th Cong. (2009), available at <http://www.govtrack.us/congress/bills/111/s417>; State Secrets Protection Act of 2009, H.R. 984 111th Cong. (2009), available at <http://www.govtrack.us/congress/bills/111/hr984>.

191. For example, one of the sponsors, the late Senator Edward ("Ted") Kennedy, died in August of 2009. *Ted Kennedy Dies of Brain Cancer at the Age of 77*, ABC NEWS (Aug. 26, 2009), <http://abcnews.go.com/Politics/TedKennedy/story?id=6692022#.TyonT1zy8z0>.

192. See generally 91 C.J.S. *United States* § 34 (2011).

193. James S. Van Wagenen, *A Review of Congressional Oversight: Critics and Defenders*, CIA.GOV (Jan. 23, 2012, 10:00 AM), <https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/csi-studies/studies/97unclass/wagenen.html>; see also 10 U.S.C. § 1614 (2006).

194. 28 U.S.C. §§ 591–99 (2006).

director of the CIA.<sup>195</sup> The Independent Counsel Statute grants Congress jurisdiction over the independent counsel's conduct, in addition to requiring reporting.<sup>196</sup> Similarly, the Attorney General could be required to appoint independent counsel to evaluate and defend state secrets actions. The independent counsel would then be required to report to Congress, perhaps before a formal invocation of the doctrine at the district court level. This would give Congress the chance to push back, if necessary, on the executive branch's use of the privilege. In the alternative, Congress could simply pass a statute that requires the Attorney General to obtain the approval of a congressional oversight committee, such as the SSCI or HPSCI, before approving the invocation of the privilege (as required by *Reynolds*).

Nevertheless, there are problems with such a mechanism. The risk of politicizing national security measures may be undesirable. Second, it is debatable, some would say doubtful, whether members of Congress have any more national security expertise than the judiciary. On the other hand, Congress often deals with immense issues of national security, such as implementing the Patriot Act or funding specific Department of Defense projects. Congressional oversight can take so many forms that it is difficult to imagine that some of these concerns cannot be obviated. Lastly, there are a multitude of congressional oversight committees that have debatable effectiveness. It would surprise very few if such a committee either acted as a rubber stamp or otherwise approached the function with apathy. Despite these flaws, congressional involvement in the privilege would certainly be a step in the right direction.

### 3. *A Judicial Alternative: In Camera Trials and a Subject Matter Court*

If secrecy is the problem with litigating privileged information, then there must be methods to litigate cases while preserving secrecy. There must be a middle ground between public disclosure and complete dismissal. In camera trials or, ideally, a subject matter court are the most complete solutions to problematic state secrets cases because they would nearly eliminate the secrecy problem from the proceedings.

In camera trials could meet this need. This idea has been suggested by courts before; in one instance a court even suggested that all counsel and even the stenographer receive security clearances before proceeding to an in camera trial.<sup>197</sup> Cases could proceed as bench trials under permanent seal. This would eliminate almost any risk of exposure of state secrets. Aspects of this approach have also been suggested by courts as possible solutions.<sup>198</sup> Nevertheless, there are at least

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195. *Id.*

196. *Id.* § 595.

197. *Farnsworth Cannon v. Grimes*, 635 F.2d 268 (4th Cir. 1980).

198. *Doe v. Tenet*, 329 F.3d 1135, 1152 (9th Cir. 2003) ("Finally, sealing of records and secret hearings are possible ways to adjudicate issues without public exposure of state secrets."), *rev'd*, 544

three significant problems with this approach. First, cases implicating state secrets may require a certain level of expertise that most judges do not have. Second, the judge would have to make all factual and legal determinations alone. However, in one variation of this model, it would be conceivable to utilize attorneys bound by court order not to divulge state secrets outside of the litigation; the threat of disbarment, contempt, or other sanctions should be sufficient to prevent secrets from leaking out. Lastly, the benefits of an open judicial system would be lost.

Overall, the creation of a subject matter court is the most attractive alternative.<sup>199</sup> A model for such a court already exists in the Foreign Intelligence Surveillance Court (FISC).<sup>200</sup> This court has a very similar purview as a potential state secrets court in that it monitors secret intelligence-gathering activities that implicate national security. FISC decides whether or not to grant highly secretive intelligence-gathering warrants to the government concerning electronic eavesdropping—often in matters dealing with national security.<sup>201</sup> In fact, FISC's jurisdiction could simply be expanded to include cases implicating state secrets. As experienced federal judges dealing mostly with so-called paper trials while serving on FISC, it would be a smooth transition for this court to adopt a new docket. This solution is more convenient because it simply expands the docket of an already existing and amply qualified court. Additionally, there has already been some overlap between FISC issues and state secrets cases. For instance, in *Al-Haramain Islamic Foundation v. Bush*, one of the parties argued that the Foreign Intelligence Surveillance Act (FISA) statute preempted the state secrets privilege.<sup>202</sup> The Ninth Circuit did not decide that issue because it was not raised in the district court, but the court did compare the statutory approach of FISA with the common law approach of the state secrets privilege.<sup>203</sup> Although there are many benefits to expanding FISC's jurisdiction, critics might see it as a concentration of power in an already mysterious entity. Further, the creation of an entirely new subject matter court would allow Congress to design a court specific to the needs of state secrets cases.

Whether FISC's jurisdiction is simply expanded or a new court is created from scratch, there are numerous advantages to a subject matter court. A subject

U.S. 1 (2005); *see also, e.g., In re United States*, 872 F.2d 472, 478 (D.C. Cir. 1989); *Halpern v. United States*, 258 F.2d 36, 43 (2d Cir. 1958).

199. Professor Robert M. Chesney, of Wake Forest University School of Law, advocates for this solution as well. *See* Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249, 1313 (2007).

200. The FISC court is a product of the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. § 1803 (2006 & Supp. IV 2010).

201. *See* Eric Lightblau, *Judges on Secretive Panel Speak Out on Spy Program*, N.Y. TIMES, Mar. 29, 2006, at A19, available at <http://www.nytimes.com/2006/03/29/politics/29nsa.html>.

202. *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1205 (9th Cir. 2007).

203. *Id.* at 1206. It should be noted that one district court did find that FISA preempted the state secrets privilege in electronic surveillance, partly abrogating the privilege. *In re Nat'l Sec. Agency Telecomms. Records Litig.*, 564 F. Supp. 2d 1109, 1111 (N.D. Cal. 2008).



matter court has the potential, depending on the individual judges appointed, to render moot the oft-cited argument that Article III judges do not have the expertise to make judicial determinations regarding state secrets and should thus defer to the executive branch.<sup>204</sup> FISA presents a straightforward model for the selection of FISC judges: the Chief Justice of the Supreme Court selects district court judges to fill seats on FISC.<sup>205</sup> In creating a subject matter court, the same approach could be used. In the alternative, each federal circuit could select one of its members to sit by designation on the subject matter court. These selection procedures would arguably ensure that the judges were insulated from the political process and qualified to handle state secrets cases with appropriate expertise.

The most significant problem with the creation of a subject matter court relates to plaintiff participation. Congress may have to limit plaintiff participation, to a certain extent, to prevent plaintiffs from learning sensitive information. For instance, if the court needed to examine documents detailing the coordinates of secret military installations, the plaintiff likely could not participate in a hearing on the matter or be served briefs, motions, or other documents with such details. The extent of this limitation would depend upon the individual circumstances of the case. If the entirety of the claims at issue were privileged, then it is possible that the majority of the proceedings would occur in camera or under seal. However, this could be remedied to a certain extent by using guardians ad litem. The court could appoint individuals with appropriate security clearances to argue on behalf of the plaintiffs in such circumstances. Or, if the sensitive information at issue is minimal, the court could simply impose a gag order, with potential sanctions or contempt if violated, on the parties and then allow full plaintiff participation. The circumstances of each case may dictate the nature of the proceedings. These varying circumstances underscore the need for a specialized court that can adapt to individual cases.

Despite the myriad of benefits a subject matter court offers, there are, of course, some downsides. One of the central functions of the judiciary is transparency. In camera hearings, private proceedings, and the permanent seal of documents prevent the public exposure of governmental activity. Although preserving this secrecy allows claims to proceed, it comes at the cost of public knowledge. On the other hand, the public still benefits from the proceedings because allowing the claims to proceed can deter the government from violating the law in the same way tort law encourages the public to adhere to a standard of care. Nevertheless, the deterrent effect of public exposure is somewhat lost with such a solution. Alternately, Congress could mitigate this quandary by requiring the subject matter court to have closed hearings where attorneys for both sides

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204. See, e.g., Oral Argument at 13:55, *Jeppesen III*, 614 F.3d 1070 (9th Cir. 2010) (No. 08-15693EB), available at [http://www.ca9.uscourts.gov/media/view\\_subpage.php?pk\\_id=0000004702](http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000004702).

205. See 50 U.S.C. § 1803.

participate under court-ordered confidentiality. A gag order on attorneys sworn to uphold the law may be sufficient to ensure the secrecy of sensitive material. However, this variation would require placing a great deal of trust in attorneys. Despite its flaws, in camera trials or a subject matter court would go a long way to allowing plaintiffs to litigate legitimate claims. In its application, a subject matter court, FISC or otherwise, would satisfy the two most important considerations: protecting secret information and allowing plaintiffs with legitimate claims to have their day in court.

Overall, the subject matter court is more advantageous than congressional proposals like the State Secrets Protection Act. First, a subject matter court could be composed of judges with expertise in national security or foreign relations. Second, a subject matter court would offer the advantage, and the obvious disadvantages, of a single location. A court in a single location would be better equipped to ensure security, while some district courts may be unsecure for the purpose of conducting in camera hearings of highly sensitive material. Nevertheless, maintaining litigation in the district court of original filing would have other advantages. District courts may be more convenient for plaintiffs, the expense of creating a new subject matter court would be avoided, and a greater diversity of judges would allow for a diversity of interpretation. In sum, a subject matter court would not only allow for the greatest flexibility in reshaping the doctrine, but would do so in the most effective, substantive manner.

#### CONCLUSION

There must be a balance between guarding state secrets and the values of liberty and transparency. However, at some point this balance tips too far in one direction. *Jeppesen* and *El-Masri* have reached that point. In *Jeppesen* the en banc court recognized that there are cases where the interest of justice must be sacrificed in the interest of national security.<sup>206</sup> At times, this may be true. The caveat is that expanding this sacrifice beyond instances in which it is absolutely necessary presents great danger. Justice, transparency, and accountability are simply too important to be so easily dismissed.

In addition to these larger goals of the justice system, the plaintiffs from *Jeppesen* and *El-Masri* must not be forgotten. As illustrated in Section II, these individuals underwent incredible hardship; they deserve some sort of compensation. What makes their cases unique is that the cases were dismissed regardless of whether they could make out a prima facie case with nonprivileged evidence. When a legal system filters out perfectly legitimate claims that can be proven without privileged information, there is, undoubtedly, something fundamentally flawed.

The solutions discussed above are designed to correct this failure. A remedy

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206. *Jeppesen III*, 614 F.3d 1070, 1073 (9th Cir. 2010) (en banc).

is available through the common law in an alternative judicial approach. However, this would likely require the Supreme Court to issue a definitive and comprehensive opinion on the subject, which the Court has been reluctant to do.<sup>207</sup> Structural remedies such as a subject matter court or increased procedural safeguards could significantly alter the balance and are the best overall options at this time. Of course, congressional action is necessary for such an undertaking. These solutions are nevertheless more desirable than the continued confusion of the *Totten* and *Reynolds* rules and the resulting dismissal of legitimate claims.

Other questions outside of these solutions still remain. Should the privilege exist in cases where the executive branch has exceeded its constitutional authority? Or in cases where violations of jus cogens have taken place? Should the privilege exist at all? Is it time for a statutory framework to take the place of the judicially fashioned framework? Each of these reflects legitimate concerns. While those questions remain unanswered, it is frightfully clear that the balance struck by *Jeppesen* and *El-Masri* tilts too heavily in one direction.

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207. See, e.g., *Mohamed v. Jeppesen Dataplan, Inc.*, 131 S. Ct. 2442 (2011) (mem.) (denying the *Jeppesen* plaintiffs' petition for certiorari).