

United States Court of Appeals,
Ninth Circuit.
Binyam MOHAMED; Abou Elkassim Britel; Ahmed Agiza; Mohamed Farag
Ahmad Bashmilah; Bisher Al-Rawi, Plaintiffs-Appellants,

v.

JEPPESEN DATAPLAN, INC., Defendant-Appellee,
United States of America, Intervenor-Appellee.

Argued and Submitted En Banc Dec. 15, 2009.
Filed Sept. 8, 2010.

Before: [ALEX KOZINSKI](#), Chief Judge, [MARY M. SCHROEDER](#), [WILLIAM C. CANBY](#), [HAWKINS](#), [SIDNEY R. THOMAS](#), [RAYMOND C. FISHER](#), [RICHARD A. PAEZ](#), [RICHARD C. TALLMAN](#), [JOHNNIE B. RAWLINSON](#), [CONSUELO M. CALLAHAN](#) and [CARLOS T. BEA](#), Circuit Judges.

OPINION

[FISHER](#), Circuit Judge.

This case requires us to address the difficult balance the state secrets doctrine strikes between fundamental principles of our liberty, including justice, transparency, accountability and national security. Although as judges we strive to honor *all* of these principles, there are times when exceptional circumstances create an irreconcilable conflict between them. On those rare occasions, we are bound to follow the Supreme Court's admonition that "even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that [state] secrets are at stake." [United States v. Reynolds](#), 345 U.S. 1, 11, 73 S.Ct. 528, 97 L.Ed. 727 (1953). After much deliberation, we reluctantly conclude this is such a case, and the plaintiffs' action must be dismissed. Accordingly, we affirm the judgment of the district court.

I. BACKGROUND

* * * We emphasize that this factual background is based only on the *allegations* of plaintiffs' complaint, which at this stage in the litigation we construe "in the light most favorable to the plaintiff[s], taking all [their] allegations as true and drawing all reasonable inferences from the complaint in [their] favor." [Doe v. United States](#), 419 F.3d 1058, 1062 (9th Cir.2005). Whether plaintiffs' allegations are in fact true has not been decided in this litigation, and, given the sensitive nature of the allegations, nothing we say in this opinion should be understood otherwise.

A. Factual Background

1. The Extraordinary Rendition Program

Plaintiffs allege that the Central Intelligence Agency ("CIA"), working in concert with other government agencies and officials of foreign governments, operated an extraordinary rendition program to gather intelligence by apprehending foreign nationals suspected of involvement in terrorist activities and transferring them in secret to foreign countries for detention and interrogation by United

States or foreign officials. According to plaintiffs, this program has allowed agents of the U.S. government “to employ interrogation methods that would [otherwise have been] prohibited under federal or international law.” Relying on documents in the public domain, plaintiffs, all foreign nationals, claim they were each processed through the extraordinary rendition program. They also make the following individual allegations.

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

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

Plaintiff Binyam Mohamed, a 28-year-old Ethiopian citizen and legal resident of the United Kingdom, was arrested in Pakistan on immigration charges. Mohamed was allegedly flown to Morocco under conditions similar to those described above, where he claims he was transferred to the custody of Moroccan security agents. These Moroccan authorities allegedly subjected Mohamed to “severe physical and psychological torture,” including routinely beating him and breaking his bones. He says they cut him with a scalpel all over his body, including on his penis, and poured “hot stinging liquid” into the open wounds. He was blindfolded and handcuffed while being made “to listen to extremely loud music day and night.” After 18 months in Moroccan custody, Mohamed was allegedly transferred back to American custody and flown to Afghanistan. He claims he was detained there in a CIA “dark prison” where he was kept in “near permanent darkness” and subjected to loud noise, such as the recorded screams of women and children, 24 hours a day. Mohamed was fed sparingly and irregularly and in four months he lost between 40 and 60 pounds. Eventually, Mohamed was transferred to the U.S. military prison at Guantanamo Bay, Cuba, where he remained for nearly five years. He was released and returned to the United Kingdom during the pendency of this appeal

[Details of similar allegations from two other plaintiffs removed to save space.]

2. Jeppesen's Alleged Involvement in the Rendition Program

Plaintiffs contend that publicly available information establishes that defendant Jeppesen Dataplan, Inc., a U.S. corporation, provided flight planning and logistical support services to the aircraft and crew on all of the flights transporting each of the five plaintiffs among the various locations where they were detained and allegedly subjected to torture. The complaint asserts “Jeppesen played an integral role in the forced” abductions and detentions and “provided direct and substantial services to the United States for its so-called ‘extraordinary rendition’ program,” thereby “enabling the clandestine and forcible transportation of terrorism suspects to secret overseas detention facilities.” It also alleges that Jeppesen provided this assistance with actual or constructive “knowledge of the objectives of the rendition program,” including knowledge that the plaintiffs “would be subjected to forced disappearance, detention, and torture” by U.S. and foreign government officials.^{FN2}

^{FN2}. Among the materials plaintiffs filed in opposition to the government's motion to dismiss is a former Jeppesen employee's declaration, which plaintiffs assert demonstrates this knowledge. *See* Dissent at 1095 n.3.

B. Summary of the Claims

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

With respect to the forced disappearance claim, plaintiffs assert four theories of liability: (1) direct liability for active participation, (2) conspiracy with agents of the *1076 United States, (3) aiding and abetting agents of the United States and (4) direct liability “because [Jeppesen] demonstrated a reckless disregard as to whether Plaintiffs would be subjected to forced disappearance through its participation in the extraordinary rendition program and specifically its provision of flight and logistical support services to aircraft and crew that it knew or reasonably should have known would be used to transport them to secret detention and interrogation.” *Id.* ¶¶ 254-57.

On the torture and degrading treatment claim, plaintiffs assert three theories of liability: (1) conspiracy with agents of the U.S. in plaintiffs' torture and degrading treatment, (2) aiding and abetting agents of the U.S. in subjecting plaintiffs to torture and degrading treatment and (3) direct liability “because [Jeppesen] demonstrated a reckless disregard as to whether Plaintiffs would be subjected to torture or other cruel, inhuman, or degrading treatment by providing flight and logistical support to aircraft and crew it knew or reasonably should have known would be used in the extraordinary rendition program to transport them to detention and interrogation.” *Id.* ¶¶ 262-64.

Regarding Jeppesen's alleged actual or constructive knowledge that its services were being used to facilitate “forced disappearance,” plaintiffs allege that Jeppesen “knew or reasonably should have known that the flights involved the transportation of terror suspects pursuant to the extraordinary rendition program,” that their “knowledge of the objectives of the rendition program” may be inferred from the fact that they allegedly “falsified flight plans submitted to European air traffic control authorities to avoid public scrutiny of CIA flights” and

that a Jeppesen employee admitted actual knowledge that the company was performing extraordinary rendition flights for the U.S. government. *Id.* ¶¶ 16, 17, 56. Similarly, plaintiffs allege that Jeppesen knew or should have known that that torture would result because it should have known it was carrying terror suspects for the CIA and that “the governments of the destination countries routinely subject detainees to torture and other forms of cruel, inhuman, or degrading treatment.” *Id.* ¶¶ 17, 56. They also rely on U.S. State Department country reports describing torture as “routine” in some of the countries to which plaintiffs were allegedly rendered, and note that Jeppesen claims on its website that it “monitors political and security situations” as part of its trip planning services. *Id.* ¶¶ 14, 42, 56.

C. Procedural History

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

The district court granted the motions to intervene and dismiss and entered judgment in favor of Jeppesen, stating that “at the core of Plaintiffs' case against Defendant Jeppesen are ‘allegations' of covert U.S. military or CIA operations in foreign countries against foreign nationals-clearly a subject matter which is a state secret.” * * *

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

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III. THE STATE SECRETS DOCTRINE

The Supreme Court has long recognized that in exceptional circumstances courts must act in the interest of the country's national security to prevent disclosure of

state secrets, even to the point of dismissing a case entirely. See [Totten v. United States](#), 92 U.S. 105, 107, 23 L.Ed. 605 (1876). * * *

A. The Totten Bar

In 1876 the Supreme Court stated “as a *general principle* [] that public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential.” [Totten](#), 92 U.S. at 107 (emphasis added). The Court again invoked the principle in 1953, citing [Totten](#) for the proposition that “where the very subject matter of the action” is “a matter of state secret,” an *1078 action may be “dismissed on the pleadings without ever reaching the question of evidence” because it is “so obvious that the action should never prevail over the privilege.” [Reynolds](#), 345 U.S. at 11 n. 26, 73 S.Ct. 528. This application of [Totten](#)'s general principle-which we refer to as the [Totten](#) bar-is “designed not merely to defeat the asserted claims, but to preclude judicial inquiry” entirely. [Tenet v. Doe](#), 544 U.S. 1, 7 n. 4, 125 S.Ct. 1230, 161 L.Ed.2d 82 (2005).

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

A century later, the Court applied the [Totten](#) bar in [Weinberger v. Catholic Action of Hawaii/Peace Education Project](#), 454 U.S. 139, 146-47, 102 S.Ct. 197, 70 L.Ed.2d 298 (1981). There, the plaintiffs sued under the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.*, to compel the Navy to prepare an environmental impact statement regarding a military facility where the Navy allegedly proposed to store nuclear weapons. The Court held that the allegations were “beyond judicial scrutiny” because, “[d]ue to national security reasons, ... the Navy can neither admit nor deny that it proposes to store nuclear weapons at [the facility].” *Id.* (citing [Totten](#), 92 U.S. at 107).

The Court more recently reaffirmed and explained the [Totten](#) bar in a case involving two former Cold War spies who accused the CIA of reneging on a commitment to provide financial support in exchange for their espionage services. Relying on “[Totten](#)'s core concern” of “preventing the existence of the plaintiffs' relationship with the Government from being revealed,” the Court held that the action was, like [Totten](#) and [Weinberger](#), incapable of judicial review. [Tenet](#), 544 U.S. at 8-10, 125 S.Ct. 1230.

* * *

B. The Reynolds Privilege

[3] In addition to the [Totten](#) bar, the state secrets doctrine encompasses a “privilege against revealing military [or state] secrets, a privilege which is well established in the law of evidence.” [Reynolds](#), 345 U.S. at 6-7, 73 S.Ct. 528. A successful assertion of privilege under [Reynolds](#) will remove the privileged evidence from the litigation. Unlike the [Totten](#) bar, a valid claim of privilege under

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

Reynolds involved a military aircraft carrying secret electronic equipment. Id. at 3, 73 S.Ct. 528. After the plane crashed, the estates of three civilian observers killed in the accident brought tort claims against the government. In discovery, plaintiffs sought production of the Air Force's official accident investigation report and the statements of three surviving crew members. The Air Force refused to produce the materials, citing the need to protect national security and military secrets. Id. at 4-5, 73 S.Ct. 528. The district court ordered the government to produce the documents in camera so the court could determine whether they contained privileged material. When the government refused, the court sanctioned the government by establishing the facts on the issue of negligence in plaintiffs' favor. Id. at 5, 73 S.Ct. 528.

The Supreme Court reversed and sustained the government's claim of privilege because "there was a reasonable danger that the accident investigation report would contain references to the secret electronic equipment which was the primary concern of the mission." Id. at 10, 73 S.Ct. 528. The Court also provided guidance on how claims of privilege should be analyzed and held that, under the circumstances, the district court should have sustained the privilege without even requiring the government to produce the report for in camera review. *1080Id. at 10-11, 73 S.Ct. 528. The Court did not, however, dismiss the case outright. Rather, given that the secret electronic equipment was unrelated to the cause of the accident, it remanded to the district court, affording plaintiffs the opportunity to try to establish their claims without the privileged accident report and witness statements. Id. at 11, 73 S.Ct. 528.

Analyzing claims under the Reynolds privilege involves three steps:

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

Al-Haramain, 507 F.3d at 1202. We discuss these steps in turn.

1. Procedural Requirements

[The court discussed procedural requirements for invoking the privilege.]

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

* * * The court must sustain a claim of privilege when it is satisfied, "from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose ... matters which, in the interest of national security, should not be divulged." Reynolds, 345 U.S. at 10, 73 S.Ct. 528. If this standard is met, the evidence is absolutely privileged, irrespective of the plaintiffs' coun-

tervailing need for it. . . .

This step in the *Reynolds* analysis “places on the court a special burden to assure itself that an appropriate balance is struck between protecting national security matters and preserving an open court system.” *Al-Haramain*, 507 F.3d at 1203. In evaluating the need for secrecy, “we acknowledge the need to defer to the Executive on matters of foreign policy and national security and surely cannot legitimately find ourselves second guessing the Executive in this arena.” *Id.* But “the state secrets doctrine does not represent a surrender of judicial control over access to the courts.” *El-Masri*, 479 F.3d at 312. Rather, “to ensure that the state secrets privilege is asserted no more frequently and sweepingly than necessary, it is essential that the courts continue critically to examine instances of its invocation.” *Ellsberg*, 709 F.2d at 58. “We take very seriously our obligation to review the[government's claims] with a very careful, indeed a skeptical, eye, and not to accept at face value the government's claim or justification of privilege,” *Al-Haramain*, 507 F.3d at 1203, though we must “do so without forcing a disclosure of the very thing the privilege is designed to protect... Too much judicial inquiry into the claim of privilege would force disclosure of the thing the privilege was meant to protect, while a complete abandonment of judicial control would lead to intolerable abuses.” *Reynolds*, 345 U.S. at 8, 73 S.Ct. 528.

* * *

3. How Should the Matter Proceed?

* * * [11] When the government successfully invokes the state secrets privilege, “the evidence is completely removed from the case.” *Kasza*, 133 F.3d at 1166. . . . However, there will be occasions when, as a practical matter, secret and nonsecret information cannot be separated. In some cases, therefore, “it is appropriate that the courts restrict the parties' access not only to evidence which itself risks the disclosure of a state secret, but also those pieces of evidence or areas of questioning which press so closely upon highly sensitive material that they create a high risk of inadvertent or indirect disclosures.” *Bareford v. Gen. Dynamics Corp.*, 973 F.2d 1138, 1143-44 (5th Cir.1992). . . .

Ordinarily, simply excluding or otherwise walling off the privileged information may suffice to protect the state secrets and “ ‘the case will proceed accordingly, with no consequences save those resulting from the loss of evidence.’ ” *Al-Haramain*, 507 F.3d at 1204 .

In some instances, however, application of the privilege may require dismissal of the action. When this point is reached, the *Reynolds* privilege converges with the *Totten* bar, because both require dismissal. There are three circumstances when the *Reynolds* privilege would justify terminating a case.

[12][13] First, if “the plaintiff cannot prove the *prima facie* elements of her claim with nonprivileged evidence, then the court may dismiss her claim as it would with any plaintiff who cannot prove her case.” *Kasza*, 133 F.3d at 1166; see also *Ellsberg*, 709 F.2d at 65. Second, “ ‘if the privilege deprives the defendant of information that would otherwise give the defendant a valid defense to the claim, then the court may grant summary judgment to the defendant.’ ” *Kasza*, 133 F.3d at 1166 (quoting *Bareford*, 973 F.2d at 1141);

[14] Third, and relevant here, even if the claims and defenses might theoretically be established without relying on privileged evidence, it may be impossible to proceed with the litigation because-privileged evidence being inseparable from nonprivileged information that will be necessary to the claims or defenses-litigating the case to a judgment on the merits would present an unacceptable risk of disclosing state secrets. . . . As we shall explain, this circumstance exists here and requires dismissal.

IV. APPLICATION

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

A. The *Totten* Bar

The categorical, “absolute protection [the Court] found necessary in enunciating the *Totten* rule” is appropriate only in narrow circumstances. *Tenet*, 544 U.S. at 11, 125 S.Ct. 1230. The *Totten* bar applies only when the “very subject matter” of the action is a state secret-i.e., when it is “obvious” without conducting the detailed analysis required by *Reynolds* “that the action [c]ould never prevail over the privilege.” *Reynolds*, 345 U.S. at 11 n.26, 73 S.Ct. 528. The Court has applied the *Totten* bar on just three occasions, involving two different kinds of state secrets: In *Tenet* and *Totten* the Court applied the *Totten* bar to “the distinct class of cases that depend upon clandestine spy relationships,” see *Tenet*, 544 U.S. at 9-10, 125 S.Ct. 1230; *Totten*, 92 U.S. at 107, and in *Weinberger* the Court applied the *Totten* bar to a case that depended on whether the Navy proposed to store nuclear weapons at a particular facility, see *Weinberger*, 454 U.S. at 146-47, 102 S.Ct. 197. Although the Court has not limited the *Totten* bar to cases premised on secret espionage agreements or the location of nuclear weapons, neither has it offered much guidance on when the *Totten* bar applies beyond these limited circumstances. . . .

Here, some of plaintiffs' claims might well fall within the *Totten* bar. In particular, their allegations that Jeppesen conspired with agents of the United States in plaintiffs' forced disappearance, torture and degrading treatment are premised on the existence of an alleged covert relationship between Jeppesen and the government—a matter that the Fourth Circuit has concluded is “practically indistinguishable from that categorically barred by *Totten* and *Tenet*.” *El-Masri*, 479 F.3d at 309. On the other hand, allegations based *1085 on plaintiffs' theory that Jeppesen should be liable simply for what it “should have known” about the alleged unlawful extraordinary rendition program while participating in it are not so obviously tied to proof of a secret agreement between Jeppesen and the government.

We do not resolve the difficult question of precisely which claims may be barred under *Totten* because application of the *Reynolds* privilege leads us to conclude that this litigation cannot proceed further. . . .

B. The Reynolds Privilege

* * *

1. Whether and to What Extent the Evidence Is Privileged

The government asserts the state secrets privilege over four categories of evidence. In particular, the government contends that neither it nor Jeppesen should be compelled, through a responsive pleading, discovery responses or otherwise, to disclose: “[1] information that would tend to confirm or deny whether Jeppesen or any other private entity assisted the CIA with clandestine intelligence activities; [2] information about whether any foreign government cooperated with the CIA in clandestine intelligence activities; [3] information about the scope or operation of the CIA terrorist detention and interrogation program; [or 4] any other information concerning CIA clandestine intelligence operations that would tend to reveal intelligence activities, sources, or methods.” U.S. Br. 7-8. These indisputably are matters that the state secrets privilege may cover. . . .

We have thoroughly and critically reviewed the government's public and classified declarations and are convinced that at least some of the matters it seeks to protect from disclosure in this litigation are valid state secrets, “which, in the interest of national security, should not be divulged.” [Reynolds, 345 U.S. at 10, 73 S.Ct. 528](#). The government's classified disclosures to the court are persuasive that compelled or inadvertent disclosure of such information in the course of litigation would seriously harm legitimate national security interests. In fact, every judge who has reviewed the government's formal, classified claim of privilege in this case agrees that in this sense the claim of privilege is proper, although we have different views as to the scope of the privilege and its impact on plaintiffs' case. . . .

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

2. Effect on the Proceedings

* * *

[W]e hold that dismissal is . . . required under [Reynolds](#) because there is no feasible way to litigate Jeppesen's alleged liability without creating an unjustifiable risk of divulging state secrets. See [El-Masri, 479 F.3d at 312](#) (coming to the same conclusion in a related and comparable case), cert. denied, [552 U.S. 947, 128 S.Ct. 373, 169 L.Ed.2d 258 \(2007\)](#).

We reach this conclusion because all seven of plaintiffs' claims, even if taken as

true, describe Jeppesen as providing logistical support in a broad, complex process, certain aspects of which, the government has persuaded us, are absolutely protected by the state secrets privilege. Notwithstanding that some information about that process has become public, Jeppesen's alleged role and its attendant liability cannot be isolated from aspects that are secret and protected. Because the facts underlying plaintiffs' claims are so infused with these secrets, *any* plausible effort by Jeppesen to defend against them would create an unjustifiable risk of revealing state secrets, even if plaintiffs could make a prima facie case on one or more claims with nonprivileged evidence. . .

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

* * *

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

First, we recognize that plaintiffs have proffered hundreds of pages of publicly available documents, many catalogued in the dissent's Appendix, that they say corroborate some of their allegations concerning Jeppesen's alleged participation in aspects of the extraordinary rendition program. As the government has acknowledged, its claim of privilege does not extend to public documents. Accordingly, we do not hold that any of the documents plaintiffs have submitted are subject to the privilege; rather, we conclude that even assuming plaintiffs could establish their entire case *solely* through nonprivileged evidence-unlikely as that may be-any effort by Jeppesen to defend would unjustifiably risk disclosure of state secrets. . . .

Second, we do not hold that the existence of the extraordinary rendition program is itself a state secret. The program has been publicly acknowledged by numerous government officials including the President of the United States. Even if its mere existence may once have been a "matter[] which, in the interest of national security, should not be divulged," it is not a state secret now. [Reynolds, 345 U.S. at 10, 73 S.Ct. 528](#); . . . Nonetheless, partial disclosure of the existence and even some aspects of the extraordinary rendition program does not preclude

other details from remaining state secrets if *their* disclosure would risk grave harm to national security. . .

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

***1091 V. OTHER REMEDIES**

Our holding today is not intended to foreclose-or to pre-judge-possible *nonjudicial* relief, should it be warranted for any of the plaintiffs. . . . For the individual plaintiffs in this action, our decision forecloses at least one set of judicial remedies, and deprives them of the opportunity to prove their alleged mistreatment and obtain damages. . . . Other remedies may partially mitigate these concerns, however, although we recognize each of these options brings with it its own set of concerns and uncertainties.

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

Second, Congress has the authority to investigate alleged wrongdoing and restrain excesses by the executive branch. "The power of the Congress to conduct investigations is inherent in the legislative process."

Third, Congress also has the power to enact private bills. *See* [*1092 *Nixon v. Fitzgerald*, 457 U.S. 731, 762 n. 5, 102 S.Ct. 2690, 73 L.Ed.2d 349 \(1982\)](#) (Burger, C.J., concurring) ("For uncompensated injuries Congress may in its discretion provide separate nonjudicial remedies such as private bills."); . . . When national security interests deny alleged victims of wrongful governmental action meaningful access to a judicial forum, private bills may be an appropriate

alternative remedy.

Fourth, Congress has the authority to enact remedial legislation authorizing appropriate causes of action and procedures to address claims like those presented here. When the state secrets doctrine “compels the subordination of appellants’ interest in the pursuit of their claims to the executive’s duty to preserve our national security, this means that remedies for ... violations that cannot be proven under existing legal standards, if there are to be such remedies, must be provided by Congress. That is where the government’s power to remedy wrongs is ultimately reposed.” [Halkin v. Helms, 690 F.2d at 1001](#) (footnote omitted).

VI. CONCLUSION

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

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

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

AFFIRMED.

[MICHAEL DALY HAWKINS](#), Circuit Judge, with whom Judges [SCHROEDER](#), [CANBY](#), [THOMAS](#), and [PAEZ](#), Circuit Judges, join, dissenting:

A Flawed Procedure

* * *

Government claims of state secrets . . . must be entertained by the judiciary. But the doctrine is so dangerous as a means of hiding governmental misbehavior under the guise of national security, and so violative of common rights to due process, that courts should confine its application to the narrowest circumstances that still protect the government's essential secrets.^{FN1} When, as here, the doctrine is successfully invoked at the threshold of litigation, the claims of secret are necessarily broad and hypothetical. The result is a maximum interference with the due processes of the courts, on the most general claims of state secret privilege. It is far better to require the government to make its claims of state secrets with regard to specific items of evidence or groups of such items as their use is sought in the lawsuit. An official certification that evidence is truly a state secret will be more focused if the head of a department must certify that specific evidence sought in the course of litigation is truly a secret and cannot be revealed without danger to overriding, essential government interests. And when responsive pleading is complete and discovery under way, judgments as to whether secret material is essential to Plaintiffs' case or Jeppesen's defense can be made more accurately.

^{FN1}. Abuse of the Nation's information classification system is not unheard of. Former U.S. Solicitor General Erwin Griswold, who argued the government's case in the Pentagon Papers matter, later explained in a *Washington Post* editorial that “[i]t quickly becomes apparent to any person who has considerable experience with classified material that there is massive overclassification, and that the principal concern of the classifiers is not with national security, but rather with governmental embarrassment of one sort or another.” Erwin N. Griswold, *Secrets Not Worth Keeping: the Courts and Classified Information*, Wash. Post, Feb. 15, 1989, at A25.

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

Even in *Reynolds*, avoidance of embarrassment-not preservation of state secrets-appears to have motivated the Executive's invocation of the privilege. There the Court credited the government's assertion that “this accident occurred to a military plane which had gone aloft to test secret electronic equipment,” and that “there was a reasonable danger that the accident investigation report would contain references to the secret electronic equipment which was the primary concern of

the mission.” [345 U.S. at 10, 73 S.Ct. 528](#). In 1996, however, the “secret” accident report involved in that case was declassified. A review of the report revealed, not “details of any secret project the plane was involved in,” but “[i]nstead, ... a horror story of incompetence, bungling, and tragic error.” Garry Wills, *Why the Government Can Legally Lie*, 56 N.Y. Rev. of Books 32, 33 (2009). Courts should be concerned to prevent a concentration of unchecked power that would permit such abuses.

* * *

Reynolds and [Rule 12\(b\)\(6\)](#)

* * *

Our task in reviewing the grant of a [Rule 12](#) motion to dismiss “is necessarily a limited one.” ***1100**[Scheuer v. Rhodes](#), 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974). We are not to determine whether a particular party will ultimately prevail, but instead only whether the complaint “state[s] a claim upon which relief can be granted,” [Fed. R. Civ. Pro. 12\(b\)\(6\)](#). If Plaintiffs here have stated a claim on which relief can be granted, they should have an opportunity to present evidence in support of their allegations, without regard for the likelihood of ultimate success . . .

This limited inquiry—a long-standing feature of the Rules of Civil Procedure—serves a sensible judicial purpose. We simply cannot resolve whether the [Reynolds](#) evidentiary privilege applies without (1) an actual request for discovery of specific evidence, (2) an explanation from Plaintiffs of their need for the evidence, and (3) a formal invocation of the privilege by the government with respect to that evidence, explaining why it must remain confidential. . . . Nor can we determine whether the parties will be able to establish their cases without use of privileged evidence without also knowing what non-privileged evidence they will marshal. . . . Thus neither the Federal Rules nor [Reynolds](#) would permit us to dismiss this case for “failure to state a claim upon which relief can be granted,” [Fed. R. Civ. Pro. 12\(b\)\(6\)](#), on the basis of an evidentiary privilege relevant, not to the sufficiency of the complaint, but only to the sufficiency of evidence available to later substantiate the complaint.

* * *

The majority’s analysis here is premature. This court should not determine that there is no feasible way to litigate Jeppesen’s liability without disclosing state secrets; such a determination is the district court’s to make once a responsive pleading has been filed, or discovery requests made. . . .

Conclusion

The majority concludes its opinion with a recommendation of alternative remedies. Not only are these remedies insufficient, but their suggestion understates the severity of the consequences to Plaintiffs from the denial of judicial relief. Suggesting, for example, that the Executive could “honor [] the fundamental principles of justice” by determining “whether plaintiffs’ claims have merit,” [see Maj. Op. at 1091] disregards the concept of checks and balances. Permitting

the executive to police its own errors and determine the remedy dispensed would not only deprive the judiciary of its role, but also deprive Plaintiffs of a fair assessment of their claims by a neutral arbiter. The majority's suggestion of payment of reparations to the victims of extraordinary rendition, such as those paid to Japanese Latin Americans for the injustices suffered under Internment during World War II, over fifty years after those injustices were suffered [Maj. Op. at 1091], elevates the impractical to the point of absurdity. Similarly, a congressional investigation, private bill, or enacting of "remedial legislation," [Maj. Op. at 1092], leaves to the legislative branch claims which the federal courts are better equipped to handle. See [*Kosak v. United States*, 465 U.S. 848, 867, 104 S.Ct. 1519, 79 L.Ed.2d 860 \(1984\)](#) (Stevens, J., dissenting).

Arbitrary imprisonment and torture under any circumstance is a " 'gross and notorious ... act of despotism.' " [*Hamdi v. Rumsfeld*, 542 U.S. 507, 556, 124 S.Ct. 2633, 159 L.Ed.2d 578 \(2004\)](#) (Scalia, J., dissenting) (quoting 1 *Blackstone* 131-33 (1765)). But " 'confinement [and abuse] of the person, by secretly hurrying him to [prison], where his sufferings are unknown or forgotten; is a less public, a less striking, and therefore a more dangerous engine of arbitrary government.' " [*Id.*](#) (Scalia, J., dissenting) (quoting 1 *Blackstone* 131-33 (1765)) (emphasis added).

I would remand to the district court to determine whether Plaintiffs can establish the prima facie elements of their claims or whether Jeppesen could defend against those claims without resort to state secrets evidence.