Comments

Jeppesen Dataplan: Redefining the State-Secrets Doctrine in the Global War on Terror

By Janelle Smith*

The very word “secrecy” is repugnant in a free and open society; and we are as a people inherently and historically opposed to secret societies, to secret oaths and to secret proceedings. We decided long ago that the dangers of excessive and unwarranted concealment of pertinent facts far outweighed the dangers that are cited to justify it. Even today, there is little value in opposing the threat of a closed society by imitating its arbitrary restrictions. Even today, there is little value in insuring the survival of our nation if our traditions do not survive with it. And there is very grave danger that an announced need for increased security will be seized upon by those anxious to expand its meaning to the very limits of official censorship and concealment.¹

—John F. Kennedy

Introduction

The United States’ “extraordinary rendition” ² program authorized the apprehension and secret transport of any U.S. citizen or foreign national suspected of terrorism and found in an overseas

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2. The term “extraordinary rendition” is used in this Comment to refer to the extra-judicial transfer of a person from one country to another. See Black’s Law Dictionary 1410 (9th ed. 2009) (defining “extraordinary rendition” as “[t]he transfer, without formal charges, trial, or court approval, of a person suspected of being a terrorist or supporter of a terrorist group to a foreign nation for imprisonment and interrogation on behalf of the transferring nation”).
jurisdiction. Individuals captured as a result of this program were held against their will and without being charged with any crime at foreign sites where they were subjected to isolation, interrogation, and torture.3 U.S. officials first acknowledged America’s use of extraordinary rendition in late 2006.4 But, even before that admission, the media and academics alike had written extensively about the practice,5 and, ever since extraordinary rendition by the United States was publicly acknowledged, their focus on the subject has intensified. When confronted with any lawsuit that could shed light on extraordinary rendition or on torture perpetuated by U.S. officials, the government has invoked the state-secrets doctrine, claiming that information pertaining to these programs would compromise national security if made public through litigation in the courts.6

The state-secrets doctrine has been used to bar lawsuits against the government in special circumstances or, in cases that go forward, to preclude the use of evidence deemed to contain sensitive information that might endanger national security.7 However, in 2007 the government intervened and invoked the state-secrets doctrine in a new context in Mohamed v. Jeppesen Dataplan, Inc., a lawsuit against a corporation holding a contract with the U.S. government for flight plan information.8 Accepting the government’s argument, the Ninth Circuit applied the state-secrets doctrine to prevent the lawsuit from going

4. In November 2006, the CIA informed the public that President Bush had signed a memorandum authorizing the CIA to detain and interrogate terror suspects overseas; however, the content of the memorandum was not released. David Johnston, C.I.A. Tells of Bush’s Directive on the Handling of Detainees, N.Y. Times, Nov. 15, 2006, at A14 (“The Central Intelligence Agency has acknowledged for the first time the existence of two classified documents, including a directive signed by President Bush, that have guided the agency’s interrogation and detention of terror suspects.”).
forward, effectively expanding the limits of unaccountability to encompass government contractors. As a result, the plaintiffs petitioned the U.S. Supreme Court to review the decision.

This Comment analyzes how the Supreme Court should address the state-secrets argument if certiorari is granted. The state-secrets doctrine is a privilege within the broader framework of the litigation process. As such, this Comment argues that the doctrine has a logical application that fits into the framework of the Federal Rules of Civil Procedure (“FRCP”). Additionally, this Comment argues that, even when national security is at stake, the FRCP already offers ample protection for sensitive information, while maintaining the aggrieved party’s right to be heard. This Comment explains that the state-secrets doctrine works effectively within the FRCP and should not be expanded beyond its established limits as the Ninth Circuit has done in Jeppesen Dataplan.

Part I of this Comment provides the background necessary to understand the legal protections afforded to privileged information in the U.S. court system. First, it explains the general right of access to the courts and the ways that procedural safeguards are used to inhibit access. Then, it describes the history of the state-secrets doctrine and how it has been invoked to deny access to secret information. Part II details the Ninth Circuit’s application of the state-secrets doctrine in Jeppesen Dataplan. Finally, Part III points out the flaws in the reasoning employed by the Ninth Circuit, determines that the application of the state-secrets doctrine in Jeppesen Dataplan was unsound, and argues that the doctrine should be applied in a manner consistent with procedure and precedent. Part III also offers an alternative solution to the issue of litigation involving state secrets, contending that the FRCP already offers sufficient protection for sensitive information and that, even if the FRCP’s protections are insufficient, litigation should still be allowed to proceed on issues involving nonsecret information.

I. Legal Protections for Privileged Information: The Totten Bar and the Reynolds Privilege

In the United States there is an established right of access to the courts and to court documents, but there are times when this right must be balanced against the need to protect government secrets.
This need has led to the creation of the state-secrets doctrine. The state-secrets doctrine is actually two separate judicial doctrines. The first offers a complete bar to litigation involving secret matters and is known as the *Totten* bar. The second allows a matter to be litigated but prevents discovery of information deemed “secret” and is known as the *Reynolds* evidentiary privilege. The right of access and the state-secrets doctrine are equally important, but underlying each are competing policy interests. The *Totten* bar and *Reynolds* evidentiary privilege are used to balance the important policies of each.

A. The Right of Access to Courts: The Right to Be Heard and to Access Court Records

There are two ways to view the right of access to the courts: (1) the right of an individual to be heard by a court, and (2) the right of the public to access court records and proceedings.

The right to be heard by a court is a fundamental right derived from the Privileges and Immunities Clauses, the First Amendment right to petition the government for redress of grievances, and the Due Process Clause. The fundamental right of access cannot be denied—not even for a sitting U.S. President, as *Jones v. Clinton* demonstrated. In *Jones*, President Clinton expressed to the court his concerns about the impact facing litigation while in office would have on his duties as president. Despite the validity of these concerns, the court called the plaintiff’s right to be heard a “substantial concern because it involves fundamental constitutional rights governing access to and use of the judicial process under the First and Fourteenth Amendments.” Thus, the concern regarding Jones’s right to be heard by a court outweighed the concern that litigation would interfere with presidential duties.

Part of the right of access, but different from the right to be heard by a court, is the public’s right to access court records. The right derives from the First Amendment right of public access to judicial proceedings. The Supreme Court has held that the public has a general right to inspect documents filed with a court.

12. *See infra* Part I.B.
13. U.S. Const. art. IV, § 2, cl. 1; U.S. Const. amends. I, XIV.
15. *Id.* at 1363 (Beam, J., concurring).
have extended this right to civil proceedings as well, creating a common law right of access.18 While this common law right is broad, when outweighed by other interests, the presumption of public access is easily overcome. Nonetheless, when presented with a sealing request that would hinder either the First Amendment or the common-law right of access, a court must follow certain procedures before it can grant the request and seal the judicial document or record.19 The procedures regarding the right of public access to court filings are integrated into the local rules governing the federal-court system.20 The mechanism used to deny access to court documents involves submitting a request to file under seal.21 Local rules specify that a sealing order may only be issued upon a request establishing that the document—or a portion thereof—is privileged, protectable as a trade secret, or otherwise entitled to protection under the law.22 Such rules are in accordance with Ninth Circuit case law holding that every court has supervisory power over its own records and files and that courts can deny access where compelling reasons "outweigh the public’s interest in disclosure and justify sealing court records . . . [and where] such 'court files might have become a vehicle for improper purposes.'"23 This "compelling reasons" standard is satisfied by specific proof that disclosure of the information would result in "improper use of the material for scandalous or libelous purposes or infringement upon trade secrets."24 Furthermore, "[a] litigant who might be embarrassed, incriminated, or exposed to litigation through dissemination of materials is not, without more, entitled to the court’s protection . . . ."25 In addition to trade secrets and other improper uses of information, another accepted compelling reason—that outweighs the public’s disclo-

18. See Richmond Newspapers, 448 U.S. at 580 n.17 ("[W]e note that historically both civil and criminal trials have been presumptively open.").
19. Kamakana v. City & Cnty. of Honolulu, 447 F.3d 1172, 1179 (9th Cir. 2006) (explaining that courts have the supervisory power to deny access to records under certain circumstances).
20. See, e.g., N.D. Cal. Civ. R. 79-5(a) cmt. ("As a public forum, the Court has a policy of providing to the public full access to papers filed in the Office of the Clerk.").
21. See, e.g., id. R. 79-5(a)–(c).
22. Id. R. 79-5(a).
sure interest and permits a record to be sealed—is the threat that a government secret will be revealed.26

B. Protecting Government Secrets: The State-Secrets Doctrine

In American history, discussion regarding the judicial system’s protection of government secrets from public disclosure can be traced back as early as the trial of Aaron Burr.27 Today, courts protect government secrets either by barring lawsuits involving state secrets entirely or by excluding from discovery evidence that, if revealed, would compromise national security.28 This process is referred to as the “state-secrets doctrine,” and its current application involves a two-step approach.29 The first step is a threshold matter, where the court determines whether the very subject of the litigation is a state secret; if so, the Totten bar applies to prevent the lawsuit in its entirety.30 If the Totten bar does not apply, the second step is to apply the Reynolds evidentiary privilege test, which requires the court to embark on: (1) an analysis of whether the procedural requirements for invoking the privilege are met;31 (2) an independent evaluation of whether the information is a government secret;32 and (3) an analysis of how the matter should proceed.33 The legal history of both steps and how each developed into its current application will now be addressed in turn.

26. Totten v. United States, 92 U.S. 105 (1875) (barring a lawsuit when litigating the very subject itself would compromise national security); United States v. Reynolds, 345 U.S. 1 (1953) (excluding specific evidence that would compromise national security).

27. “That there may be matter, the production of which the court would not require, is certain . . . . What ought to be done, under such circumstances, presents a delicate question, the discussion of which, it is hoped, will never be rendered necessary in this country.” 1 David Robertson, Reports of the Trials of Colonel Aaron Burr 186 (1808) (quoting Marshall, C.J., delivering opinion on “motion to issue a subpoena duces tectum, to be directed to the [P]resident of the United States”).


29. Although the application of Totten is a separate analysis from the state-secrets doctrine, it has consistently been applied as a threshold question before addressing secret evidence. The Ninth Circuit recently applied this two-step approach in Jeppesen Dataplan, 614 F.3d 1070. See also Tenet v. Doe, 544 U.S. 1, 9 (2005) (“When invoking the ‘well established’ state secrets privilege, we indeed looked to Totten.”).


32. Id. at 11.

33. Id.
1. Applying the Totten Bar: From Espionage to National Security

In 1875, the Court in *Totten v. United States* was confronted with a lawsuit involving a secret government contract. The plaintiff was the estate of a secret agent commissioned by President Lincoln to spy on the Confederate Army during the Civil War. The estate alleged that the United States had failed to adequately compensate the agent in accordance with his contract, despite the agent’s successful completion of the contracted espionage services. When confronted with this case, the U.S. Supreme Court held that, due to the very nature of the dispute, it could not be litigated. The Court reasoned that the mere litigation of a case involving an espionage contract with the government would necessarily break an implied covenant of secrecy inherent in such contracts and, thus, barred the lawsuit in its entirety from going forward.

The reasoning in *Totten* has since been applied in other cases involving espionage contracts. For instance, in *Tenet v. Doe*, a husband and wife claimed that they had been citizens, and employed as diplomats, of a foreign country that, at the time, was considered an enemy of the United States. The couple contended that after they expressed interest in defecting to the United States, Central Intelligence Agency ("CIA") agents persuaded them to remain in their posts as spies for the United States. In return, the CIA promised them it “would arrange for travel to the United States and ensure financial and personal security for life.” After completing these espionage services, the couple defected from their country of origin and, with the government’s help, became U.S. citizens. The couple alleged that the U.S. government later denied them the promised financial assistance and security, and they brought an action against the CIA to enforce the contract, asserting that they were denied substantive and procedural due process when the United States refused to provide them with the promised security and financial assistance.

The Court in *Tenet* adhered to *Totten*, holding:

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34. 92 U.S. 105.
35. *Id.* at 105–06.
36. *Id.*
37. *Id.* at 106–07.
38. *Id.*
40. *Id.* at 3–4.
41. *Id.*
42. *Id.* at 4.
43. *Id.* at 4–5.
The possibility that a suit may proceed and an espionage relationship may be revealed, if the state secrets privilege is found not to apply, is unacceptable: "Even a small chance that some court will order disclosure of a source's identity could well impair intelligence gathering and cause sources to 'close up like a clam.'"\textsuperscript{44}

\textit{Tenet} made clear that, when applying \textit{Totten}, the inquiry is neither about the merits of the case, nor about whether a cause of action exists. Rather, \textit{Totten} is a jurisdictional bar, precluding judicial inquiry into the matter at the outset, much like the issue of standing.\textsuperscript{45}

For purposes of \textit{Totten}, between a suit brought by an acknowledged (though covert) employee of the CIA and one filed by an alleged former spy[,] \textit{only in the latter} . . . \textit{is Totten's core concern implicated: preventing the existence of the plaintiff's relationship with the Government from being revealed}. That is why the CIA regularly entertains Title VII claims concerning the hiring and promotion of its employees, . . . yet \textit{Totten} has long barred suits such as respondents'.\textsuperscript{46}

Under this reasoning, allowing the litigation would acknowledge a clandestine relationship exists between the parties, and acknowledging the clandestine relationship destroys the contract.

For the \textit{Totten} bar to apply, however, the plaintiff does not need to be a party to the government contract. In \textit{Weinberger v. Catholic Action of Hawaii}, a peace action group sought an injunction against the construction of new naval facilities.\textsuperscript{47} The group claimed that the navy was required, under the National Environmental Policy Act ("NEPA"), to publicly disclose an environmental-impact statement in relation to these facilities prior to construction because they were capable of storing nuclear weapons.\textsuperscript{48} However, Congress included language in NEPA stating that information concerning the storage of nuclear weapons is exempt from disclosure under the Freedom of Information Act because it relates to national defense.\textsuperscript{49} The Court held in \textit{Weinberger} that "whether or not the Navy has complied with [NEPA] 'to the fullest extent possible' is beyond judicial scrutiny in this case," since, "[d]ue to national security reasons, . . . the Navy can neither admit nor deny that it proposes to store nuclear weapons at [a particular facility]."\textsuperscript{50}

\textsuperscript{44} \textit{Id.} at 11 (quoting CIA v. Sims, 471 U.S. 159, 175 (1985)).
\textsuperscript{45} \textit{Id.} at 6 n.4.
\textsuperscript{46} \textit{Id.} at 10 (internal citations omitted).
\textsuperscript{48} \textit{Id.}
\textsuperscript{49} \textit{Id.} at 142–43.
\textsuperscript{50} \textit{Id.} at 146.
Weinberger represents a departure from the application of Totten solely to espionage contracts, because it applies the reasoning of Totten to a lawsuit against the government that, instead, threatens to reveal information that could compromise national security. Unlike the plaintiffs in Totten and Tenet, the plaintiffs in Weinberger were not a party to any government contract, and there was no “clandestine relationship” with an implied covenant of secrecy that would be broken by disclosure. Yet, the lawsuit was nonetheless barred from proceeding using the exact reasoning of Totten—the government could neither admit nor deny the allegations without compromising national security.

Tenet and Weinberger demonstrate the two scenarios warranting application of the Totten bar: (1) where the plaintiff is a party to a secret government agreement and the litigation would, necessarily, require the government to admit or deny the existence of such an agreement; and (2) in a suit against the government seeking to solicit secret information, where the government can neither admit nor deny the allegations without compromising national security. Outside of these narrow contexts, the state-secrets doctrine does not prevent a suit from being litigated, even if the government regards the allegations as secret. How the suit proceeds, however, will be subject to the evidentiary privileges and protections regarding the disclosure of confidential information.

2. Applying the Reynolds Evidentiary Privilege: Procedure and Necessity

United States v. Reynolds is the quintessential case addressing the evidentiary privilege in matters involving state secrets. In Reynolds, three widows brought suit against the government under the Tort Claims Act for the deaths of their husbands, who were civilians onboard a military aircraft that crashed while testing secret electronic equipment. During the discovery phase of the suit, the plaintiffs requested an accident investigation report from the air force. The air

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51. Id.
55. See generally Reynolds, 345 U.S. 1.
56. Id.
57. Id. at 2–3.
58. Id. at 3.
force refused to produce the document, and the Secretary of the Air
Force filed a formal claim of privilege, including an affidavit by the
Judge Advocate General of the Air Force asserting that the demanded
material “could not be furnished ‘without seriously hampering na-
tional security, flying safety[,] and the development of highly tech-
nical and secret military equipment.’”59 Instead, the government
offered to produce the three surviving crewmembers from the crash
for examination by the plaintiffs.60 These witnesses “would be allowed
to refresh their memories from any statement made by them to the
Air Force, and authorized to testify as to all matters except those of a
‘classified nature.’”61 Plaintiffs refused this compromise and insisted
on production of the accident investigation report.62 This standoff re-
quired the Court to examine whether and how the government could
claim such a privilege to avoid being compelled to produce the
report.

After determining that the subject matter of the lawsuit did not
warrant automatic dismissal per Totten, the Court addressed the gov-
ernment’s invocation of the state-secrets privilege with respect to ex-
cluding the evidence in question.63 The Reynolds Court implemented a
three-part analysis to determine the validity of the government’s invo-
cation of the privilege.64

First, a court must determine whether the procedural require-
ments for invoking the state secrets privilege have been satisfied.65
Procedurally, “[t]he privilege belongs to the Government and must be
asserted by it; it can neither be claimed nor waived by a private
party.”66 Further, the privilege “is not to be lightly invoked. There
must be formal claim of privilege, lodged by the head of the depart-
ment [that] has control over the matter, after actual personal consid-
eration by that officer.”67 Therefore, the government must assert the
privilege by having the proper authority file a formal claim. In Reyn-
olds, the Court found that the procedural requirements for invoking
the state-secrets privilege were met.

59. Id. at 4–5.
60. Id. at 5.
61. Id.
62. Id. at 11.
63. The Reynolds Court makes this determination by reference to Totten via footnote.
   Id. at 11 n.26.
64. Id. at 7–11.
65. Id. at 7–8. See also El-Masri v. United States, 479 F.3d 296, 304 (4th Cir. 2007).
67. Id. at 7–8.
Second, a court must make an independent determination of whether the information is privileged. In deciding whether the privilege attaches, a court primarily considers a party’s need to access the allegedly privileged information. Based on the level of necessity demonstrated by the requesting party, the court will probe either more or less rigorously into the appropriateness of invoking the state-secrets privilege—more demonstrated necessity garners a less rigorous probe and vice versa. In *Reynolds*, the Court found that “necessity was greatly minimized by an available alternative, which might have given respondents the evidence to make out their case without forcing a showdown on the claim of privilege.” Furthermore, because they failed to pursue the alternative offered by the air force (interviewing the surviving witnesses), the Court found that the respondents had created the necessity that they were now presenting to refute the government’s claim of privilege. Due to these circumstances, the Court found that the plaintiffs’ need to access the information was not so great as to overcome the invocation of the privilege.

Finally, a court must resolve how the matter should proceed in light of a successful privilege claim. In *Reynolds*, the Court determined that the information the air force sought to protect by invoking the state secrets privilege (i.e., what electronic equipment was being tested on the flight that crashed) had no causal connection to the accident. “Therefore, it should be possible for respondents to adudge the essential facts as to causation without resort to material touching upon military secrets.” The Court further found that respondents “were given a reasonable opportunity to do just that, when [the air force] formally offered to make the surviving crew members available for examination.” The Court held that the lawsuit could proceed without production of the report and suggested that the

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68. *Id.* at 11; *El-Masri*, 479 F.3d at 304.
70. *Id.* (“Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake.”).
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.* See also *El-Masri v. United States*, 479 F.3d 296, 304 (4th Cir. 2007).
76. *Id.*
77. *Id.*
plaintiffs take the air force up on its offer to allow the witnesses to be interviewed.78

In sum, the state-secrets doctrine is, in fact, the application of two separate doctrines: (1) the Totten justiciability bar, and (2) the Reynolds evidentiary privilege. The Totten bar is generally limited to either litigation where the plaintiff is a party to a secret government agreement and such litigation requires the government to admit or deny the clandestine contract or, similarly, litigation seeking to solicit secret information when the government can neither admit nor deny the allegations without compromising national security.79 Outside of these two contexts, a suit may proceed even when the government asserts the Reynolds evidentiary privilege.80 An assertion of the Reynolds privilege requires a court to determine whether the procedural requirements have been met and whether the information is privileged.81 If the court answers both questions affirmatively, the privilege attaches, and the court provides instructions regarding how the litigation will proceed in light of the state-secrets privilege.82


The Ninth Circuit, sitting en banc in Jeppesen Dataplan, held that the lawsuit against Jeppesen Dataplan, a private company, could not proceed because state secrets were at stake. The court barred the suit, not by applying the Totten bar but rather through its application of the Reynolds evidentiary privilege. To understand the Ninth Circuit’s expansion of the state-secrets doctrine to include protecting a private company, the context of the lawsuit—a contract with the U.S. government and the facilitation of its extraordinary rendition program—must first be understood.

A. Extraordinary Rendition and State Secrets: Shielding Private Contractors from Litigation

Extraordinary rendition is commonly defined as “[t]he transfer, without formal charges, trial, or court approval, of a person suspected of being a terrorist or supporter of a terrorist group to a foreign na-

78. *Id.* at 11–12.
81. *Id.* at 7–8.
82. *Id.* at 11.
tion for imprisonment and interrogation on behalf of the transferring nation. Government officials first acknowledged that a U.S. extraordinary rendition program was part of the Global War on Terror ("GWOT") in late 2006. Ever since, the courts, the media, and academics have written extensively about the extraordinary rendition program. Antiterrorism efforts, spawned by the September 11, 2001 attacks, remain the subject of intense controversy, especially extraordinary rendition because it is alleged to facilitate torture. Victims have brought lawsuits against the U.S. government alleging they were illegally tortured and interrogated pursuant to the extraordinary rendition program and the GWOT. But, until recently, the actions of nongovernment officials had not been implicated, despite the U.S. Department of Defense’s ("DOD") heavy use of contractors overseas.

The DOD has 207,600 contract personnel in Iraq and Afghanistan. In fact, the number of contract personnel exceeds the number of U.S. military personnel, as contractors make up fifty-four percent of the DOD personnel in these regions. The responsibilities of contractors in Iraq and Afghanistan range from laundry services to security. One such contractor, Jeppesen Dataplan, entered into an agreement with the CIA to provide flight and logistical services to aircrafts and flight crews that are alleged to have transported the plaintiffs to secret sites, where they were tortured and interrogated, as part of the U.S. extraordinary rendition program.

84. See sources cited supra note 4.
85. See sources cited supra note 5.
86. See Mayer, supra note 3, at 106 (describing specific instances of torture and interrogation in secret rendition programs); Michael John Garcia, Cong. Research Serv., RL 32890, Renditions: Constraints Imposed by Laws on Torture (2009).
88. See Moshe Schwartz & Joyprada Swain, Cong Research Serv., R 40764, Department of Defense Contractors in Iraq and Afghanistan: Background and Analysis (2010).
89. Id.
90. Id.
91. Id. at 8 ("Contractors perform a wide range of services in Iraq. As of March 2010, 62,295 personnel (65% of contractors) performed base support functions such as maintaining the grounds, running dining facilities, and performing laundry services . . . . Security was the second most common service provided, with 11,610 personnel (12% of contractors).”).
92. Jeppesen Dataplan, 614 F.3d at 1075.
B. *Mohamed v. Jeppesen Dataplan, Inc.: Using the Reynolds Evidentiary Privilege as a Bar to Litigation*

In *Jeppesen Dataplan*, the plaintiffs alleged that the CIA, “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.”93 A statement of each plaintiff’s experience follows:

**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.”94

**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.95

**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

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93. *Id.* at 1073.
94. *Id.* at 1074.
95. *Id.*
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.96

Bisher al-Rawi,
a 39-year-old Iraqi citizen and legal resident of the United Kingdom, was arrested in Gambia while traveling on legitimate business. Like the other plaintiffs, al-Rawi claims he was put in a diaper and shackles and placed on an airplane, where he was flown to Afghanistan. He says he was detained in the same “dark prison” as Mohamed and loud noises were played 24 hours per day to deprive him of sleep. Al-Rawi alleges he was eventually transferred to Bagram Air Base, where he was “subjected to humiliation, degradation, and physical and psychological torture by U.S. officials,” including being beaten, deprived of sleep and threatened with death. Al-Rawi was eventually transferred to Guantanamo; in preparation for the flight, he says he was “shackled and handcuffed in excruciating pain” as a result of his beatings. Al-Rawi was eventually released from Guantanamo and returned to the United Kingdom.97

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

96. Id.
97. Id. at 1074–75.
he was transferred once more to Yemen, where he was tried and convicted of a trivial crime, sentenced to time served abroad and released.98

On May 30, 2007, instead of filing suit against the U.S. government, the plaintiffs in Jeppesen Dataplan brought suit against the company contracted to facilitate these purported “torture flights.”99 The plaintiffs brought suit under the Alien Tort Statute, asserting that Jeppesen Dataplan’s role in the forced abductions and detentions “provided direct and substantial services to the United States for its so-called ‘extraordinary rendition’ program,” and “enabl[ed] the clandestine and forcible transportation of terrorism suspects to secret overseas detention facilities.”100 The complaint further alleged that Jeppesen Dataplan 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.”101

On October 19, 2007, before Jeppesen Dataplan answered the complaint, the Director of the CIA filed declarations with the court in support of the government’s motion to intervene, which would allow the United States to assert the state-secrets doctrine and, potentially, have the lawsuit dismissed.102 These declarations asserted that certain information required to adjudicate the suit was privileged and that revelations through further litigation would compromise national security.103

The district court granted the government’s motion to intervene and dismissed the case in favor of Jeppesen Dataplan.104 The plaintiffs appealed to the Ninth Circuit, where a three-judge panel reversed the

98. Id. at 1075.
99. Id. at 1075; Complaint, Mohamed v. Jeppesen Dataplan (Jeppesen I), 563 F.3d 992 (9th Cir. 2009), rev’d en banc, 614 F.3d 1070 (9th Cir. 2010) (No. 07-02798), 2007 WL 1623289. Management at Jeppesen Dataplan, Inc., has allegedly used the term “torture flights” to describe their services under the government contract. Jane Mayer, The C.I.A.’s Travel Agent, New Yorker, Oct. 30, 2006, available at http://www.newyorker.com/archive/2006/10/30/061030ta_talk_mayer#ixzz1A1QElw7r (“Bob Overby, the managing director of Jeppesen International Trip Planning, said, ‘We do all of the extraordinary rendition flights—you know, the torture flights. Let’s face it, some of these flights end up that way.’”).
101. Id.
102. Id. at 1076; Motion to Intervene, Jeppesen I, 563 F.3d 992 (No. 07-02798), 2007 WL 5023524; Motion to Dismiss, Jeppesen I, 563 F.3d 992 (No. 07-02798), 2007 WL 3223297.
103. Jeppesen Dataplan, 614 F.3d at 1076.
decision to dismiss and remanded the case, holding that the government had failed to establish a basis to dismiss under the state-secrets doctrine but that this did not prohibit the government from reasserting the doctrine later in the litigation. The Ninth Circuit later reheard the case en banc, because the suit involved “questions of exceptional importance regarding the scope and application of the state-secrets doctrine.”

Rehearing the case, the Ninth Circuit acknowledged that Totten is usually the first step in analyzing whether the state-secrets doctrine should be applied. However, the majority opinion sidestepped the proper application of Totten (which requires the court to decide whether the very subject matter of the action is a state secret), stating: “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.”

The Ninth Circuit proceeded by applying Reynolds to determine: (1) whether the procedural requirements were met; (2) whether the matters for which the privilege was invoked are, indeed, state secrets; and (3) whether and how the litigation could proceed without relying on evidence that would reveal state secrets. Since the plaintiffs conceded that the government had complied with the procedural requirements for invoking the privilege, the court focused on the second and third prongs of the Reynolds analysis.

The government asserted that, in this suit, four types of information should be classified as secret: (1) “information that would tend to confirm or deny whether Jeppesen [Dataplan] 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

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106. Id. at 953, 961–62.
107. Jeppesen Dataplan, 614 F.3d at 1076–77. See Fed. R. App. P. 35(a)(2) (“When Hearing or Rehearing En Banc May Be Ordered. A majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court’s decisions; or (2) the proceeding involves a question of exceptional importance.”).
108. See Jeppesen Dataplan, 614 F.3d at 1078–79, 1083–85, 1089.
109. Id. at 1085.
110. Id.
111. Id.
tion program”; and (4) “any other information concerning CIA clandestine intelligence operations that would tend to reveal intelligence activities, sources, or methods.” To determine whether the matters were indeed state secrets deserving the privilege’s protection under the second prong of the Reynolds analysis, the Ninth Circuit conducted a secret hearing following oral argument. At this secret hearing, the court reviewed the government’s classified disclosures and agreed that “at least some of the matters [the government] seeks to protect from disclosure in this litigation are valid state secrets.” However, the court explained that it was precluded from revealing which of the four types of information the privilege covered, “lest we jeopardize the secrets we are bound to protect.”

Addressing the third Reynolds prong, the court then evaluated whether and how the litigation could proceed without relying on evidence that would reveal state secrets. The court explained that, ordinarily, excluding or “walling off” the privileged information will protect state secrets, allowing the case to proceed. However, it held that there are three circumstances where the Reynolds privilege converges with the Totten bar and dismissal of the case is required.

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. 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. 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.

Basing its reasoning on consideration of this third factor, the en banc majority found that the Jeppesen Dataplan litigation simply could not proceed, explaining: “A case may fall outside the Totten bar and

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112. Id. at 1086.
114. Jeppesen Dataplan, 614 F.3d at 1086.
115. Id.
116. Id. at 1087–89.
117. Id. at 1082.
118. Id. at 1083.
119. Id. (citations and internal quotation marks omitted).
yet it may become clear during the Reynolds analysis that dismissal is required at the outset.” The court stated:

[W]e assume without deciding that plaintiffs’ prima facie case and Jeppesen [Dataplan]’s defenses may not inevitably depend on privileged evidence. Proceeding on that assumption, we hold that dismissal is nonetheless required under Reynolds because there is no feasible way to litigate Jeppesen [Dataplan]’s alleged liability without creating an unjustifiable risk of divulging state secrets.

The Ninth Circuit then suggested that, despite denial of a judicial forum, “other remedies” could be available to the aggrieved plaintiffs by way of turning to the other branches of government. For example, the executive branch might make reparations to the aggrieved plaintiffs or Congress could restrain the activities of the executive branch, enact a bill that would compensate the victims, or enact remedial legislation authorizing procedures to address the plaintiffs’ claims.

Unsatisfied with the decision, the plaintiffs petitioned for certiorari on December 7, 2010. The plaintiffs asked the Supreme Court to review “[w]hether the Court of Appeals, sitting en banc, erred in affirming the pleading-stage dismissal on the basis of the evidentiary state secrets privilege of a suit seeking compensation for Petitioners’ unlawful abduction, arbitrary detention, and torture.”

III. State Secrets: A Doctrine Misapplied in Jeppesen Dataplan

In Jeppesen Dataplan, the Ninth Circuit, in effect, barred the entire litigation at the pleading stage. Such a drastic measure should not be taken without balancing the interest of public access to the courts against the threat to national security or without mindfulness of the distinct circumstances in which Totten and Reynolds apply. The Ninth Circuit’s decision in Jeppesen Dataplan was flawed in both respects. After explaining the flaws in the application of the state-secrets doctrine in this case, this Comment suggests a solution that is procedurally and doctrinally consistent with both the Federal Rules of Civil Procedure and the state-secrets doctrine.

120. Id. at 1089.
121. Id. at 1087.
122. Id. at 1091.
123. Id. (noting that the Government made reparations to Japanese Latin Americans abducted from Latin America for internment in the United States during World War II).
125. Id.
A. The Ninth Circuit’s Faulty Application of the State-Secrets Doctrine

Despite the glaring human-rights concerns extraordinary rendition and torture present, the issue in *Jeppesen Dataplan* is a procedural one. Specifically, the issue is solely “whether the Court of Appeals, sitting en banc, erred in affirming the pleading-stage dismissal on the basis of the evidentiary state secrets privilege.” If the Supreme Court grants certiorari, it should answer this question affirmatively, because by ignoring the procedural context of the case, misapplying *Totten* and *Reynolds*, and holding a secret hearing, the Ninth Circuit arrived at an inherently flawed decision in *Jeppesen Dataplan*.

1. Ignoring Procedural Context: The Distinction Between *Totten* and *Reynolds*

In *Jeppesen Dataplan*, the Ninth Circuit ignored the procedural context of the case in its application of *Totten* and *Reynolds*. The government moved for dismissal at the pleading stage under FRCP Rule 12. Although the state-secrets doctrine is invoked to prevent sensitive information from being revealed, the effect of the invocation should be framed by the stage of litigation. *Totten* and *Reynolds* have distinct applications that have been recognized in the Ninth Circuit’s own cases. As described below, a motion to dismiss for lack of jurisdiction is distinct from a motion to dismiss for failure to state a claim—and a motion to dismiss for failure to state a claim should not invoke an evaluation of the likelihood of success on the merits of the case.

The difference between the subject matter of the lawsuit and the information necessary to establish a case is not always clear. Courts tend to treat the “subject matter” issue described in *Totten* as a separate threshold determination. *Reynolds*, therefore, does not replace the categorical *Totten* bar but, instead, regulates access to informa-

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126. *Id.*
127. *Id.*
128. Defendants simultaneously moved in the alternative for summary judgment. Motion to Dismiss, *Jeppesen I*, 563 F.3d 992 (No. 07-02798), 2007 WL 3223297. The court acknowledged “if the [state secrets] 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.” *Jeppesen Dataplan*, 614 F.3d at 1083. The court, however, did not convert defendants’ motion to one of summary judgment (which would invoke an evaluation of the likelihood of success on the merits of the case) but instead dismissed the case on other grounds. *Id.*
129. See, e.g., Kasza v. Browner, 133 F.3d 1159, 1166 (9th Cir. 1998).
130. Al-Haramain Islamic Found., Inc. v. Bush, 507 F.3d 1190, 1201 (9th Cir. 2007).
tion. Totten and Reynolds highlight the difference between the subject matter of a case and the information available to prove the case. This distinction is analogous to the distinction between FRCP Rules 12(b)(1) and 12(b)(6), and the application of Totten and Reynolds should be guided by these procedural rules.

a. The Totten Bar: A Form of Subject Matter Jurisdiction

Asserting Totten is akin to claiming that the court lacks subject-matter jurisdiction under FRCP Rule 12(b)(1)—both defenses, if successful, make a suit nonjusticiable. "Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree." Because Totten offers a complete bar to litigation, it is properly invoked in the pleading stage—where the "subject matter" issue can be evaluated as a threshold determination regarding the survival of a lawsuit, in the same manner as a 12(b)(1) motion to dismiss.

The plaintiff has the burden of proving jurisdiction in order to survive a motion to dismiss. "A plaintiff suing in a federal court must show in his pleading, affirmatively and distinctly, the existence of whatever is essential to federal jurisdiction, and, if he does not do so, the court, on having the defect called to its attention or on discovering the same, must dismiss the case, unless the defect be corrected by amendment."133

When Totten is properly invoked during the initial pleading stage, the court must ask itself if allowing the litigation to continue would acknowledge the existence of a government secret and whether the government can either confirm or deny the allegations without compromising national security.134 However, in order to answer the question the court must conduct an in-depth examination of the circumstances.

One difference between asserting a lack of subject-matter jurisdiction under Rule 12(b)(1) and asserting Totten to bar the litigation is that under Totten the burden of proof is always on the government moving for dismissal rather than the plaintiff who bears the burden to show by a preponderance of the evidence that the court has subject-matter jurisdiction.135 Both Rule 12(b)(1) and the Totten bar result in

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133. Tosco Corp. v. Cmtys. for a Better Env’t, 236 F.3d 495, 499 (9th Cir. 2001) (citation omitted) (quoting Smith v. McCullough, 270 U.S. 456, 459 (1926)).
134. See Totten, 92 U.S. 105.
an all-out dismissal of the case, though for different reasons and achieved by different means. In a Rule 12(b)(1) motion to dismiss for lack of jurisdiction, the movant may submit materials outside of the pleadings to support the motion. In that case, “[i]t then becomes necessary for the party opposing the motion to present affidavits or any other evidence necessary to satisfy its burden of establishing that the court, in fact, possesses subject matter jurisdiction.” This allows an opportunity for meaningful opposition to the Rule 12(b)(1) motion. However, when applying the Totten bar, the evidence submitted by the government will likely be examined under seal, and the court will conduct an in camera review, leaving little opportunity for meaningful opposition. Despite the burden of proof always being on the government and the fact that evidence is submitted under seal, Totten remains akin to a Rule 12(b)(1) motion in that, “[i]f the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.”

The Ninth Circuit should not have circumvented the threshold question raised by Totten. Instead, it should have determined whether it even had the authority to hear the case. Failure to address this question is a fatal flaw. Since Totten is recognized as a bar to justiciability, its successful application would have precluded judicial inquiry into the matter at the outset, much like the issue of standing. By not making a determination on Totten, the Ninth Circuit did not secure its ability to hear Jeppesen Dataplan in the first place, let alone analyze the evidence under Reynolds.

b. The Reynolds Evidentiary Privilege and the Cognizable Legal Theory Standard Under FRCP 12(b)(6)

The Ninth Circuit’s use of Reynolds in Jeppesen Dataplan presents another flawed application. Reynolds is an assertion that can block access to information. Because it can create a hindrance to litigation, Reynolds may be properly invoked at the pleading stage or during discovery. When Reynolds is invoked, the party asserting the Reynolds privilege can move to dismiss the action if it appears that the plaintiffs are unable to articulate a plausible claim without the secret information.

137. St. Clair v. City of Chico, 880 F.2d 199, 201 (9th Cir. 1989).
Rule 12(b)(6) of the FRCP is the procedural tool for a motion to dismiss in federal court under this standard.

Rule 12(b)(6) is used to dismiss a complaint if the plaintiff fails to state a cognizable legal theory or has not alleged sufficient facts to support a cognizable legal theory, similar to a common-law demurrer.\footnote{Balistreri v. Pacifica Police Dep’t, 901 F.2d 696, 699 (9th Cir. 1990).} To survive the motion to dismiss, the plaintiff must allege “only enough facts to state a claim to relief that is plausible on its face.”\footnote{Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007).} The pleadings must “give the defendant fair notice of what . . . the claim is and the grounds upon which it rests.”\footnote{Erickson v. Pardus, 551 U.S. 89, 93 (2007) (internal quotation marks omitted).} When considering a motion to dismiss under Rule 12(b)(6), a court must take the allegations as true and construe them in the light most favorable to the plaintiff.\footnote{See Knievel v. ESPN, 393 F.3d 1068, 1072 (9th Cir. 2005).} However,

the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. . . . While legal conclusions can provide the complaint’s framework, they must be supported by factual allegations.\footnote{Ashton v. Iqbal, 129 S. Ct. 1937, 1950 (2009).}

The factual allegations must be sufficient to push the claims “across the line from conceivable to plausible.”\footnote{Id. at 1951 (quoting Twombly, 550 U.S. at 557).}

In \textit{Kasza v. Browner}, the Ninth Circuit made the distinction “between dismissal on the grounds that the subject matter of an action is a state secret, and dismissal on the grounds that a plaintiff cannot prove the prima facie elements of the claim absent privileged evidence.”\footnote{Kasza v. Browner, 133 F.3d 1159, 1166 (9th Cir. 1998).} But it should be noticed that in \textit{Kasza} the court found that the state-secrets privilege barred the plaintiff from establishing her prima facie case on \textit{all} asserted claims and that proceeding any further in the case would jeopardize national security.\footnote{Id. at 1166.} Since the court held that “[n]o protective procedure [could] salvage [the] suit,” the action was dismissed.\footnote{Id. at 1170.} This is an example of how the assertion of \textit{Reynolds} can lead to the dismissal of a case at the pleading stage because the discovery required to prove essential elements of a claim are barred—not because the subject of the suit was a matter of state secret.

\footnote{141. Balistreri v. Pacifica Police Dep’t, 901 F.2d 696, 699 (9th Cir. 1990).} \footnote{142. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007).} \footnote{143. Erickson v. Pardus, 551 U.S. 89, 93 (2007) (internal quotation marks omitted).} \footnote{144. See Knievel v. ESPN, 393 F.3d 1068, 1072 (9th Cir. 2005).} \footnote{145. Ashton v. Iqbal, 129 S. Ct. 1937, 1950 (2009).} \footnote{146. Id. at 1951 (quoting Twombly, 550 U.S. at 557).} \footnote{147. Kasza v. Browner, 133 F.3d 1159, 1166 (9th Cir. 1998).} \footnote{148. Id. at 1170.} \footnote{149. Id.}
Undoubtedly, given the facts and circumstances of the *Jeppesen Dataplan* lawsuit, one might be tempted to jump ahead, in both the reasoning and the litigation process, to ask: How will it be possible for plaintiffs to prove their case? However, the fact that the plaintiffs might not prevail on their claims without surviving an arduous uphill battle does not preclude them from passing the pleading stage. At this stage in the *Jeppesen Dataplan* litigation, the plaintiffs were not required to prove every allegation of capture, transport, and torture. But the Ninth Circuit nonetheless appears to have submitted to the temptation of prematurely judging the probable success of a case where, as is the case here, the plaintiffs are so limited with respect to available evidence.

In *Jeppesen Dataplan*, the Ninth Circuit failed to look at the claims through Rule 12(b)(6)’s procedural lens. By the court’s own admission, “at least some of the matters [the government] [sought] to protect from disclosure in this litigation [we]re valid state secrets.”150 This begs the question: If only *some* of the matters are valid state secrets, and *others* are not, how can the entire case be dismissed? If the effect of *some* matters being secret was so detrimental as to cause outright dismissal of the case, then the court should have laid a better foundation. The barebones statement that “at least some of the matters” are state secrets provides weak support for dismissing a lawsuit at the pleading stage where a claim is only required to be “plausible.”151

The court’s outcome-oriented approach to the *Totten* and *Reynolds* analysis fails to recognize that litigation is a deliberate process. Determining the probability of any single outcome during the pleading stage is premature. The litigation must first be allowed to develop from the pleading stage to information gathering through discovery, before any determination on the merits can be made. For this reason, the government’s preemptive assertion of the state-secrets privilege should have led the court to prescribe the rules for proceeding in litigation. If the claims had been allowed to proceed, the government and *Jeppesen Dataplan* would have had to carefully delineate which documents are privileged and which are not. Then, the plaintiffs would have at least had the possibility of proceeding if they could make a plausible claim using the nonprivileged documents. Invocation of the state secrets privilege under *Reynolds* should not prevent a litigant “from persuading a jury of the truth or falsity of an allegation

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by reference to non-privileged evidence, regardless whether privileged evidence might also be probative of the truth or falsity of the allegation.”

Plaintiffs’ case would no doubt be more difficult to prove, because, considering the services that Jeppesen Dataplan is alleged to have provided, most of the relevant evidence is likely to be privileged. The evidence may even be so limited as to cause the plaintiffs to be unable to prove their claims, but the pleading stage is not about proving claims. Rather, it is about whether the complaint clearly states a claim for which relief can be granted and adequately notifies the defendant why they are being hailed into court.

The Ninth Circuit should not have allowed all-out dismissal without applying the proper Rule 12(b)(6) standard. If a case survives the Rule 12(b)(6) analysis, only then should the court outline “how the case is to proceed,” and, at that point, if the plaintiffs are unable to obtain the information required to continue suit, then the court can make a determination on the merits through summary judgment. As the Jeppesen Dataplan decision currently stands, courts are allowed to ignore the procedural stature of a case. This, effectively, creates a bar to litigation that is equivalent to Totten under factual circumstances that do not demand such a prohibition. Failing to look at an invocation of the state-secrets doctrine through both the Rule 12(b)(1) and Rule 12(b)(6) lens results in an unsound application of the doctrine.

2. The Ninth Circuit’s Secret Hearing: Endangering Judicial Integrity

Not only was the Ninth Circuit’s application of the state-secrets doctrine in Jeppesen Dataplan procedurally incongruent and doctrinally unsound, the decision also threatens the integrity of the judicial system. First, the court denied the plaintiffs the right to be heard. Second, the court denied the public access to court proceedings.

Access to the justice system is important because public oversight maintains judicial transparency. Public access to the courts safeguards the integrity of the judicial process by “foster[ing] an appearance of fairness” and “permit[ting] the public to participate in and serve as a check upon the judicial process.” Even though the First Amendment does not compel public access to all proceedings, the Supreme Court has held that if a proceeding has historically been open to the

152. Jeppesen I, 563 F.3d 992, 1003 (9th Cir. 2009).
public, it is subject to the right of public access. However, the interest in public access must be balanced against the interest in national security. There are certainly situations where denying the public right of access is justified because the information that could be divulged has serious implications for national security. In *Jeppesen Dataplan*, the problem is that, in blocking public access due to national-security concerns, the plaintiffs’ right to be heard was also swallowed up. Furthermore, it was done in a manner that prevented scrutiny of the decision, because the court was purposefully obtuse in discussing the specifics of the case in a secret hearing and providing very little explanation publicly.

*Jeppesen Dataplan* removed part of the court proceeding from public view by conducting a secret hearing. Both the plaintiff and the public were deprived of the opportunity to determine for themselves whether justice was being done. Scrutiny of the Ninth Circuit’s decision is difficult, because very little explanation is given as to what information was deemed secret and as to why or how this secret information justified completely disposing of the case. The Ninth Circuit appears to have followed the Fourth Circuit’s lead in *El-Masri v. United States*. There, the court ruled that if the case were to proceed, it would expose “how the CIA organizes, staffs and supervises its most sensitive intelligence operations.” Unlike the Fourth Circuit’s specific explanation, the Ninth Circuit’s secret proceeding only yielded a statement that at least one of the four types of secret information the government asserted warranted protection of the privilege was actually secret and privileged. This obtuse conclusion deprives the public from any meaningful scrutiny of the judgment. Further, the secret hearing, in-and-of itself, gives the impression of injustice, whether or not there were valid reasons for barring the suit in its entirety. It also creates a perception of judicial abuse and diminishes public confidence in the judicial system.

Such a deprivation of justice in the state-secrets context is normally prevented, or at least explained, through the *Totten/Reynolds* analysis, which creates, essentially, a sliding scale of access to information. The resulting denial of access could have little effect on the litigation or could be highly detrimental (depending on how central the secret information is to the case). In *Jeppesen Dataplan*, the Ninth Circuit, in effect, took what should be a “sliding scale” and converted it to

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156. *Id.* at 309.
a “slippery slope” by skipping important analytical and procedural steps in the doctrine.

The Ninth Circuit’s application should not be permitted if the state-secrets doctrine, precedent, procedure, and the right to public access are taken seriously. After all, the integrity of the American court system is at stake. When and if the Supreme Court evaluates the case, this Comment suggests the following approach, because it is procedurally sound, consistent with precedent, and maintains judicial integrity.

B. A Prescription to Remedy the Ninth Circuit’s Flaws

The Federal Rules of Civil Procedure already offer sufficient protection for sensitive information, and even if one believes that the protections offered are insufficient, the litigation should still be allowed to proceed on nonsecret information.

First, after the state-secrets doctrine is invoked, courts are capable of in camera review to make determinations regarding privileged information and of properly redacting information from opinions to prevent giving away state secrets. A sealing order may be issued upon a request establishing that the document, or a portion thereof, is privileged or protectable under the law.157 The type of information involved in the application of the state-secrets doctrine is categorically protected under the law from being compelled for production during litigation.158 Although this proposed alternative might at first seem inconsistent with Reynolds, which completely bars production of the information even to the court, it can be constructed so that it is consistent. After an initial determination is made as to which types of information are protected, the defendants may either refuse production of the privileged documents or produce documents with redactions. This method is not a foreign concept during litigation. In fact, courts are well accustomed to the practice. Discovery practice already involves laborious review of documents to ensure that privileged information is not turned over. However, battles more than likely will ensue when plaintiffs disagree with the defendants about whether the documents sought are subject to the privilege. In this situation, secrets are in jeopardy of being revealed to the court, a practice that Reynolds clearly seeks to avoid.

158. United States v. Reynolds, 345 U.S. 1, 7–11 (1953) (excluding evidence that would compromise national security).
This problem can be resolved, however, if a second alternative is pursued instead. Where information is deeply intermingled with state secrets but not barred by *Totten* (as proclaimed to be the situation in *Jeppesen Dataplan*), the court should simply invoke the state-secrets privilege to bar the information and allow the case to proceed on information that is already publicly available. This alternative is both procedurally and doctrinally sound. Procedurally, it allows a suit to proceed so long as, when based on publicly available information, the claims are still plausible. Doctrinally, by allowing the suit to proceed using only publicly available information, disputes over whether a document is privileged or not are prevented.

This alternative is of particular consequence in *Jeppesen Dataplan*, because the existence of the extraordinary rendition program is no longer a secret kept from the public. Yet, proceeding to prove their case in *Jeppesen Dataplan*, based solely on information available to the public, presents a particular challenge to the plaintiffs. Courts consider public admissions or denials by the government or by defendants to the litigation as reliable sources of information. Media reports, however, are deemed to be inherently unreliable. So even though the extraordinary rendition program has been widely discussed in the press and in reports and proceedings of foreign governments, the plaintiffs in *Jeppesen Dataplan* should be limited to those sources of information considered reliable by courts.

With the addition of this extreme limitation, the court in *Jeppesen Dataplan* would have to either: (1) decide that the defendants are unable to present their defenses without revealing state secrets, in which case the court can dismiss the case on those grounds; or (2) allow the plaintiffs to put forth their case using admissible information only (a highly difficult task). In either situation, the interest of national security is properly balanced against the correct application of procedure and the right of access to the courts. In the first situation, the case would be justifiably dismissed because defendants would be unfairly disadvantaged from meaningfully defending themselves—a circumstance contemplated in the application of *Reynolds* that allows a court to dismiss the case on grounds that are doctrinally sound. In the second situation, the plaintiffs and the public will receive an open proceeding, where the case can be presented, heard, and evaluated with

159. See, e.g., sources cited supra note 5.
161. Id. at 991.
the proper procedural standards and explained without cryptic references to secret hearings.

**Conclusion**

Our justice system is suspicious of secrets, and as a society, we must be wary of a government that conceals information, regardless of the assertions justifying such secrecy. Participating in a program repugnant to human rights should not be tolerated simply because it is deemed “secret.” The U.S. program for extraordinary rendition is a dirty secret that is slowly being exposed. Some of the information relating to the program would undoubtedly risk compromising national security if exposed during litigation. The government’s announcement of the need for increased security, perpetuated by the Global War on Terror, has been seized upon. The state-secrets doctrine has now been used to officially prohibit legal accountability of corporate actors, in addition to the government. When applying the state-secrets doctrine, a court must be mindful of the procedural context of the case and protect the right of access to the courts, while also protecting secrets vital to national security. Applying the approach suggested in this Comment to the case of *Jeppesen Dataplan* may yield the same outcome as the Ninth Circuit’s en banc decision, but it would do so in a manner that embraces precedent, procedure, and the right of access—all of which maintain the integrity of the justice system.