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A Total Eclipse of Human Rights-Illustrated by
Mohamed v. Jeppesen Dataplan, Inc.

John P. Blanc
West Virginia University College of Law

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A TOTAL ECLIPSE OF HUMAN RIGHTS—ILLUSTRATED BY MOHAMED v. JEPPSENE DATAPLAN, INC.

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I. INTRODUCTION

Some cases require courts to address the difficult balance between individual human rights and national security. *Mohamed v. Jeppesen Dataplan*1 ("*Jeppesen II"*) was one of those cases. The five plaintiffs in *Jeppesen II* were subjects of the extraordinary rendition program, which is executed by the Central Intelligence Agency ("CIA"). The plaintiffs alleged that they endured egregious torture at the hands of the United States government as it worked in concert with a United States corporation, Jeppesen Dataplan, Inc., and foreign governments.2 Plaintiff Ahmed Agiza alleged that he was "severely and repeatedly beaten and subjected to electric shock through electrodes attached to his ear lobes, nipples and genitals."3 Another plaintiff, Elkassim Britel, alleged that he was "deprived of sleep and food and threatened with sexual torture, including sodomy with a bottle and castration."4 This Note, using *Jeppesen II* to illustrate, argues that the federal judiciary has allowed human rights to be eclipsed by the national security interests pursued by the Executive Branch. Others have made similar arguments.5 In giving excessive deference to the Executive Branch’s claims of privilege under the judicially-created “state secrets doctrine,” the federal judiciary has undertaken a “complete abandonment of judicial control . . . lead[ing] to intolerable abuses."6 Victims of the extraordinary rendition pro-

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2 *See Jeppesen II*, 614 F.3d at 1075-76.

3 *Id.* at 1074.


6 United States v. Reynolds, 345 U.S. 1, 8 (1953) (analogizing the state secrets doctrine to the privilege against self-incrimination for the purpose of explaining the Court’s task of upholding the state secrets doctrine without giving too much deference to the Executive’s privilege claims).
gram, like the plaintiffs in *Jeppesen II*, should have a monetary remedy under the Alien Tort Statute.\(^7\)

Part II of this Note gives the background of the state secrets doctrine, which stems from only three Supreme Court cases. Part III gives a brief overview of the holdings of the *Jeppesen II* majority opinion. Part IV argues that the Alien Tort Statute should be constructed in a manner that allows plaintiffs to obtain judgments against transnational corporations that help the United States government commit torts against foreign nationals. Part V then exposes the shortcomings of alternate congressional remedies suggested by the *Jeppesen II* majority. Next, Part VI elaborates on the workable framework put forth by Judge Michael D. Hawkins in his dissenting opinion and further explains the flaws of the reasoning employed by the majority’s construction of the state secrets doctrine. In order to restore the balance between national security and human rights, federal courts should adopt Judge Hawkins’ more narrow approach to applying the state secrets doctrine, thereby compensating victims of the extraordinary rendition program under the Alien Tort Statute.

II. THE STATE SECRETS DOCTRINE

The state secrets doctrine refers to two judicially created rules—one is a non-justiciability doctrine and the other is evidentiary—that apply to factual situations implicating state secrets within national security concerns. The nonjusticiability doctrine is the *Totten* bar, which was created in *Totten v. United States*.\(^8\) The *Totten* bar “applies only when the ‘very subject matter’ of the action is a state secret”\(^9\) and requires complete dismissal of a case. Different courts have different ideas regarding the scope of the *Totten* bar, but the prevailing trend has been an expansive application of the bar. The other rule is the *Reynolds* privilege, which was created in *United States v. Reynolds*.\(^10\) The *Reynolds* privilege does not automatically require dismissal of a case, but can require summary judgment if at least one of three conditions is met: (1) “the plaintiff cannot prove the prima facie elements of her claim with non-privileged evidence”; (2) “the privilege deprives the defendant of information that would otherwise give the defendant a valid defense to the claim”; or (3) if further litigating the case would present an unjustifiable risk of disclosing state secrets because privileged evidence is inseparable from non-privileged information that will be necessary to the claims or defenses.\(^11\)

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\(^7\) 28 U.S.C. § 1350 (2006). This statute provided the cause of action in *Jeppesen II*. It is examined in detail below. See infra Part IV.

\(^8\) 92 U.S. 105 (1876).

\(^9\) *Jeppesen II*, 614 F.3d at 1084.

\(^10\) 345 U.S. 1, 7–8 (1953).

\(^11\) *Jeppesen II*, 614 F.3d at 1083.
A. Totten v. United States: The Source of the Totten Bar

In Totten, the plaintiff was the administrator of an intestate estate. The plaintiff brought an action to recover compensation for services allegedly rendered by the intestate under a contract with President Abraham Lincoln. The plaintiff alleged that the intestate had agreed to spy on the insurrectionary states during the time of the Civil War and reported the intelligence gathered to President Lincoln. The Supreme Court held that the trial court had properly dismissed the action because the service stipulated by the alleged contract was a secret in and of itself. Public policy forbade the “maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters that the law itself regards as confidential.” Totten thus held that a contract for secret services between an intestate and the government is a fact not to be disclosed in litigation. It follows that any lawsuit based on such a fact is non-justiciable and must be dismissed at the outset.

Since Totten was decided in 1875, the Supreme Court has applied the Totten bar in only three other cases: Weinberger v. Catholic Action of Hawaii, Tenet v. Doe, and most recently in General Dynamics Corp. v. United States. In Weinberger, the Court held that the Totten bar precluded a lawsuit for information regarding the possible environmental consequences of a military facility that was allegedly going to be used to store nuclear weapons. Particularly, the Weinberger plaintiffs sought to enjoin the construction of a military facility that was allegedly to be used for the storage of weapons. To show the need for an injunction, the plaintiffs sought to compel the United States Navy to prepare and disclose a report known as an “Environmental Impact Statement,” which was required by the National Environmental Policy Act of 1969 (“NEPA”) if a facil-

12 92 U.S. at 105.
13 Id. at 105–06.
14 Id. at 106.
15 See id.
16 Id. at 107.
17 See Jeppesen II, 614 F.3d 1070, 1096 (Hawkins, J., dissenting).
20 131 S. Ct. 1900 (2011).
21 Weinberger, 454 U.S. at 140–41.
22 Id. at 142.
23 See id. “An Environmental Impact Assessment [EIA] is a document prepared by a federal agency in order to determine whether a formal Environmental Impact Statement should be prepared.” See 40 CFR § 1508.9 (1981). If the EIA shows that the construction will have no significant environmental impact, then no Environmental Impact Statement [EIS] is required at the construction stage. See Weinberger, 454 U.S. at 141. Because the EIA in Weinberger reportedly showed that the construction would have no significant environmental impact, the Navy did not prepare an EIS. Id.
ity was capable of storing nuclear weapons. But the Court found that an exemption under the Freedom of Information Act ("FOIA") barred the plaintiffs from forcing the Navy to confirm whether it planned to store nuclear weapons at the military facility. Additionally, Weinberger held that the Totten bar also prohibited the Court from scrutinizing the Navy’s alleged non-compliance with NEPA because such an inquiry "would inevitably lead to the disclosure of matters which the law itself regards as confidential." Weinberger thus made the Totten bar applicable in one other type of lawsuit—a lawsuit against the government for secret information.

Recently, in General Dynamics Corp. v. United States, the Court applied the Totten bar to a contract dispute between the Navy and two private companies that agreed in 1988 to develop a stealth aircraft for the Navy. The government sought return of funds it paid to the contractors for work that the government ultimately rejected. Meanwhile, the contractors sought to assert an affirmative defense that is well-established in this context. Particularly, the contractors claimed that they breached the contract because the government refused to provide them with information to assist the development of the stealth aircraft. The government admitted that it possessed this information but refused to disclose it to the contractors because the information was secret. In a very narrow holding, General Dynamics decided that "[w]here liability depends upon the validity of a plausible superior-knowledge defense, and when full litigation of that defense ‘would inevitably lead to the disclosure of’ state secrets, the Totten bar was applicable.

25 See Weinberger, 454 U.S. at 145 ("Since the public disclosure requirements of NEPA are governed by FOIA, it is clear that Congress intended that the public’s interest in ensuring that federal agencies comply with NEPA must give way to the Government’s need to preserve military secrets."). Thus, the FOIA alone was an independent basis for dismissal of Weinberger. The Court did not even need to rely on the state secrets doctrine.
26 Id. at 146–47 (citing Totten v. United States, 92 U.S. 105, 107 (1875)).
27 Then, in Tenet v. Doe, 544 U.S. 1 (2005), the Court affirmed Totten’s more than century-old holding, precluding a suit by plaintiffs who alleged that they were former espionage agents for the United States government. Id. at 3–4. The plaintiffs sought to compel the government to compensate them, alleging that they were entitled to the financial assistance under the terms of a secret agreement with the government. See id. at 4–5. Tenet, then, did nothing to further expand Totten because the holdings of both cases were the same: A secret agreement between the government and the plaintiff was non-justiciable because such an agreement is a fact not to be disclosed in litigation.
29 Id. at 1903.
30 See id.
31 Id. at 1904.
32 See id.
33 Id.
neither party can obtain judicial relief."^34 The contractors thus did not have to return the funds sought by the government.

Despite these cases, little about the *Totten* bar has changed since 1876. Like *Totten* and *Tenet*, *General Dynamics* consisted of a secret agreement between private parties and the government. Thus, *General Dynamics* does not add much to this line of Supreme Court precedent. The Supreme Court has applied the *Totten* bar to only three factual situations: (1) a secret agreement between the plaintiff and the government;^35 (2) a lawsuit for information regarding the storage of nuclear weapons;^36 and (3) a contract dispute between the government and private contractors who were asserting a superior knowledge defense.\(^37\) It is also worth emphasizing that the *Totten* bar precludes the adjudication of a dispute even when a prima facie claim is supported by privileged evidence.\(^38\) Because the *Totten* bar is such a sure extinguisher of claims, this Note argues that the *Totten* bar should be applied infrequently and only in a context that is factually similar to *Totten* itself, *Weinberger*, *Tenet*, or *General Dynamics*. The *Totten* bar should never have been expanded by lower federal courts to cases, like *Jeppesen II*, where foreign nationals claim they were victims of torture in the CIA’s highly-publicized extraordinary rendition program.

**B. United States v. Reynolds: The Source of the Reynolds Privilege**

*United States v. Reynolds* comprises the other half of the judicially-created state secrets doctrine.\(^39\) Unlike the *Totten* bar, the *Reynolds* privilege does not always require complete dismissal of the claim. In *United States v. Reynolds*, the plaintiffs were widows of three civilian observers who died in a military plane crash.\(^40\) The Air Force had conducted an accident investigation and produced an accompanying report.\(^41\) When the plaintiffs sought production of the report, the Air Force asserted that the report was privileged under Air Force rules because the personnel on board at the time of the crash were engaged in a highly secret Air Force mission.\(^42\) When the Air Force declined to produce the documents for the district court, the district court ordered that the issue of negligence would be established in the plaintiffs’ favor.\(^43\) The Air Force appealed, and the Supreme Court reversed and remanded, holding that the Air

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^34 Id. at 1902 (citation omitted).
^38 Id. at 1903.
^39 345 U.S. 1, 6 (1953).
^40 Id. at 3.
^41 See id. at 3.
^42 Id. at 4.
^43 Id. at 5.
Force properly asserted a privilege against revealing state secrets. Instead of dismissing the case, the Court remanded it to give the plaintiffs the opportunity to prove the underlying facts with non-privileged evidence. Today, judges and courts disagree on the particular circumstances that warrant dismissal of a claim under the Reynolds privilege. In fact, Jeppesen II applied the Reynolds privilege as if it was the Totten bar. This issue is discussed below in further detail.

III. BRIEF SUMMARY OF THE MAJORITY’S HOLDINGS IN MOHAMED V. JEPPSEN DATAPLAN, INC.

In deciding Mohamed v. Jeppesen Dataplan, Inc., the Ninth Circuit reviewed Totten and Reynolds. As this Part will demonstrate, the majority opinion both construed the Totten bar too broadly and unnecessarily dismissed the case against the government and Jeppesen Dataplan under the Reynolds privilege. Although it did not apply the Totten bar to dismiss the case, the Jeppesen II majority’s analysis failed to distinguish Weinberger from the lawsuit by the foreign nationals in Jeppesen II. Additionally, Jeppesen II erroneously applied the Reynolds privilege prospectively to dismiss the case in its entirety at the outset of the litigation. Instead, the Jeppesen II majority should have allowed the case to go forward. This Note argues that the plaintiffs had a prima facie claim under the Alien Tort Statute and might well have had enough non-privileged evidence to win the case or force Jeppesen Dataplan to settle.

A. The Facts and Procedural History of Jeppesen Dataplan

The five Jeppesen plaintiffs were foreign nationals, who alleged broadly that the CIA worked with foreign governments to operate an “extraordinary rendition program, to gather intelligence by apprehending foreign nationals sus-

\[44\] Id. at 11 (explaining that the plaintiffs’ necessity for the privileged information was greatly minimized by the availability of non-privileged evidence which would still allow the plaintiffs to make their case). This Note argues that the Jeppesen II court should have allowed the plaintiffs to make their case with non-privileged evidence. In fact, when Judge Hawkins wrote the Jeppesen I opinion, the reason for remand was based largely on the availability of non-privileged evidence: “[T]he Reynolds privilege... cannot be invoked to prevent a litigant from persuading a jury of the truth or falsity of an allegation by reference to non-privileged evidence, regardless whether privileged evidence might also be probative of the truth or falsity of the allegation.” Jeppesen I, 579 F.3d 943, 957–58 (9th Cir. 2009). Part V, infra, further expounds on the viability of Judge Hawkins’s approach.


\[46\] See infra text accompanying notes 156–162.

\[47\] The Jeppesen II majority expressly eschewed deciding whether the claims were cognizable under the Alien Tort Statute. See Jeppesen II, 614 F.3d 1070, 1084 n.7 (9th Cir. 2010). Part IV, infra, discusses the disagreement over the parameters of the Alien Tort Statute in detail.
pected of involvement in terrorist activities and transferring them in secret to foreign countries for detention and interrogation by United States or foreign officials. Each plaintiff also claimed that he was illegally detained and tortured through the extraordinary rendition program. Finally, the plaintiffs alleged that public information showed that Jeppesen Dataplan, a U.S. corporation, assisted the aircraft and crew on all of the flights transporting the plaintiffs among the various locations where they were detained and allegedly subjected to torture. The plaintiffs sued under the Alien Tort Statute alleging seven theories of liability under two claims, “forced disappearance” and “torture and other cruel, inhuman or degrading treatment.” The United States government moved to intervene and dismiss. The district court 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.”

On appeal, a three judge panel of the Ninth Circuit reversed and remanded, holding that the government had failed to establish a basis for dismissal under the state secrets doctrine. Circuit Judge Hawkins wrote the opinion (“Jeppesen I”), which held Totten inapplicable because the plaintiffs were third-party plaintiffs and had no secret contract with the government. Jeppesen I further held that Reynolds did not require dismissal of the claims because “the privilege applies to prevent discovery of the evidence itself and not litigation of the truth or falsity of the information that might be contained within it.” Here, the court was referring to the public information on which the plaintiffs’ claims were partly based. While the privilege could be asserted to prevent disclosure of the communications themselves, the privilege could not prevent the plaintiffs from proving the underlying facts with non-privileged public information.

48 Jeppesen II, 614 F.3d at 1073.
49 See id. at 1073–75.
50 Id. at 1075. The appendix at the end of Jeppesen II lists voluminous public information that helps establish the claims of the plaintiffs. Id. at 1102. Perhaps the most disturbing public statement was made by a former employee of Jeppesen Dataplan named Bob Overby, who referred to the extraordinary rendition flights as “torture flights.” Id. at 1108. Taken with all the other public information regarding the nature and activities of the extraordinary rendition program, Overby’s statement lends significant credence to the claims of the Jeppesen II plaintiffs.
51 28 U.S.C. § 1350 (2006) (“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”).
52 Jeppesen II, 614 F.3d at 1075.
54 Jeppesen I, 579 F.3d 943, 944 (9th Cir. 2009).
55 See id. at 954.
56 Id. at 957.
57 Id.
Next, the Ninth Circuit took the case en banc "to resolve questions of exceptional importance regarding the scope and application of the state secrets doctrine." Applying the state secrets doctrine, the Jeppesen II court noted that the case required it to balance the fundamental principles of liberty and national security. The court dismissed the case under the Reynolds privilege, holding that there was "no feasible way to litigate Jeppesen's alleged liability without creating an unjustifiable risk of divulging state secrets." Although Jeppesen II did not decide whether the Totten bar applied to the claims, the court did state that "some of [the] plaintiffs' claims might well fall within the Totten bar.

B. The Majority Construed the Totten Bar Too Broadly

The Jeppesen II majority was an en banc decision written by Circuit Judge Fisher. While Judge Fisher acknowledged that the Totten bar "applies only when the 'very subject matter' of the action is a state secret," he seemed hesitant to limit the scope of the bar's possible application:

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

In its remarks, the Jeppesen II majority failed to distinguish Weinberger, which was a suit for information under FOIA, from the case before the Jeppesen II court. Considering the devastating nature of the Totten bar to the

58 See Jeppesen II, 614 F.3d 1070, 1077 (9th Cir. 2010).
59 Id. at 1073.
60 Id. at 1087.
61 See id. at 1084.
62 Id.
63 Id. at 1070.
64 Id. at 1084.
65 Id. at 1079.
claims of aggrieved persons, the federal circuit courts should not expand it beyond the factual circumstances of the three Supreme Court cases that applied the Totten bar. Additionally, the majority ignored the fact that public information existed to confirm the relationship between the United States government and Jeppesen Dataplan. Public information is not secret information. Thus, if public information is sufficient to state a claim against the government, the Totten bar should be inapplicable. As noted above, the appendix attached to the Jeppesen II opinion clearly details numerous sources of public information that could have been used by the plaintiffs to prove their case against Jeppesen Dataplan. The activities of the United States government in the extraordinary rendition were no secret by the time Jeppesen II was decided. Thus, applying the Totten bar to the facts of Jeppesen II would not have served the purpose of “prevent[ing] the revelation of state secrets harmful to national security” because much of the public had already believed that subjects of the extraordinary rendition program were being tortured. As Part III shows, rather than preventing state secrets from being revealed, Jeppesen II illuminated the eclipse of human rights.

C. The Jeppesen II Majority Wrongly Applied the Reynolds Privilege Prospectively.

Drawing support from the Fourth Circuit, Jeppesen II applied the Reynolds privilege prospectively to hold “that dismissal is nonetheless required under Reynolds because there is no feasible way to litigate Jeppesen’s alleged liability without creating an unjustifiable risk of divulging state secrets.” Although the Fourth Circuit consistently applies the Reynolds privilege prospectively, the Jeppesen II majority is actually just relying on dicta from Al-Haramain Islamic Foundation, Inc. v. Bush. Notably, Al-Haramain dismissed its case under the Totten bar, not the Reynolds privilege. In a lengthy footnote, the majority acknowledged that it previously condemned, in Al-Haramain, the prospective use of the Reynolds privilege because it erroneously conflates “the Totten bar’s ‘very subject matter’ inquiry with the Reynolds privilege.” In the same footnote, the court makes a strained attempt to distinguish El-Masri’s “erroneous conflation of the Totten bar” and those cases in which the Reynolds privilege can be properly applied at the pleading stage of the litigation. The

See id. at 1081 (citing El-Masri v. United States, 479 F.3d 296, 308 (4th Cir. 2007); Al-Haramain Islamic Found., Inc. v. Bush, 507 F.3d 1190, 1201 (9th Cir. 2007); Farnsworth Cannon, Inc. v. Grimes, 635 F.2d 268, 281 (4th Cir. 1980)).
Id. at 1087.
507 F.3d 1190 (9th Cir. 2007).
Other important factual differences between Al-Haramain and Jeppesen II are discussed infra.
Jeppesen II, 614 F.3d at 1087.
Id.
court's explanation amounts to a distinction without a difference. Thus, *Jeppesen II* actually made the same error for which the Ninth Circuit had criticized the Fourth Circuit. Part III of this Note further articulates the problems with the cases and propositions relied upon by the majority and further explains why the *Reynolds* privilege should not be applied prospectively.

IV. THE ALIEN TORT STATUTE SHOULD BE CONSTRUED TO ALLOW ALIEN TORT PLAINTIFFS TO COLLECT AGAINST TRANSNATIONAL CORPORATIONS LIKE JEPPESEN DATAPLAN.

The Alien Tort Statute has been around for a long time. In fact, it was passed by the first Congress as part of the Judiciary Act of 1789. The text is brief: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." This seemingly simple text has proved to be a fertile topic of academic and practical discussion. From the time the statute was passed and until the year 1980, it was largely a dormant statute. Then, *Filartiga v. Pena-Irala* was decided by the Court of Appeals for the Second Circuit. In *Filartiga*, Joelito Filartiga, the seventeen-year-old son of a politically active Paraguayan, was kidnapped and tortured to death by a man who was affiliated with the Paraguayan government. The man who committed the murder eventually came to the United States and was arrested for staying well past the expiration of his visa. The sister of the slain Joelito was also in the United States during this time. Upon learning of Pena's arrest, Joelito's sister filed suit for wrongful death under the Alien Tort Statute.

Initially, the district court dismissed the case, holding that the statute did not permit recovery in situations involving a country's treatment of its own citizens. On appeal, the Second Circuit interpreted the statute differently, holding that the statute grants jurisdiction when an alien sues an alleged torturer within the borders of the United States. The Filartiga family ended up collecting over

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72 See id. (discussing a "continuum of analysis").
73 Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77.
76 630 F.2d 876 (2d Cir. 1980).
77 Id. at 878.
78 Id. at 878–79.
79 Id.
80 Id.
81 Id. at 880.
82 Id. at 878.
$10 million under the statute, and a new era of cases was born—cases in which the federal courts had jurisdiction over claims for torts that allegedly occurred outside the country.

The Supreme Court has taken only one case involving the interpretation of the Alien Tort Statute, Sosa v. Alvarez-Machain. In that case, a Drug Enforcement Agency ("DEA") special agent was allegedly kidnapped, tortured, and murdered by a Mexican drug cartel. Humberto Alvarez-Machain, a member of the cartel, allegedly participated in the crimes. When Mexico refused to extradite Alvarez-Machain, the DEA paid off several Mexican nationals to kidnap him and bring him to the United States. Alvarez-Machain was eventually found not guilty in the criminal case. Afterwards, Alvarez-Machain brought several tort claims under the Alien Tort Statute, claiming that his abduction and arrest were unlawful. The district court found that it did have jurisdiction over the claim, but that Alvarez-Machain was not entitled to damages because the DEA arrested him lawfully. On appeal, the Ninth Circuit reversed the district court, holding that the DEA was liable because it could not lawfully authorize a citizen's arrest in Mexico.

The Supreme Court took the Sosa case and decided that Sosa was not entitled to damages because the Alien Tort Statute did not create any new causes of action; it was, on the other hand, purely jurisdictional. Importantly, Sosa also held that the statute gives federal courts the authority to create new causes of action based on international norms. Alvarez-Machain thus lost his case because his abduction and arrest did not violate any international norms; it was lawful. Jeppesen II is different because torture in the fashion alleged by the

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85 Id. at 697.
86 Id. ("Alvarez-Machain (Alvarez), a Mexican physician, was present at the house and acted to prolong the agent's life in order to extend the interrogation and torture.") (internal citation omitted).
87 Id. at 698.
88 Id.
89 Id.
91 See Alvarez-Machain v. United States, 331 F.3d 604, 618–19 (9th Cir. 2003) (en banc), vacated, 374 F.3d 1384 (9th Cir. 2004).
92 Sosa, 542 U.S. at 747–49.
93 Id. at 730 ("The First Congress, which reflected the understanding of the framing generation and included some of the Framers, assumed that federal courts could properly identify some international norms as enforceable in the exercise of § 1350 jurisdiction. We think it would be unreasonable to assume that the First Congress would have expected federal courts to lose all capacity to recognize enforceable international norms . . . ").
plaintiffs indisputably violates international norms. Sosa was also, however, not a case involving the suit of a transnational corporation like Jeppesen Dataplan.

Since Sosa was decided, there has been quite an academic battle over the Alien Tort Statute and the role of transnational corporations in the extraordinary rendition program. Numerous arguments have been advanced on the issue of corporate liability under the Alien Tort Statute. This Note argues that transnational corporations can be liable under an "aiding and abetting" theory, as used by the Jeppesen II plaintiffs. Particularly, the plaintiffs alleged that Jeppesen Dataplan should be liable as a transnational corporation for aiding and abetting the torts that were allegedly committed by the CIA. Unfortunately, neither Jeppesen II nor the Supreme Court spoke on the corporate liability issue: The Ninth Circuit dismissed the case under the Totten bar, and the Supreme Court denied certiorari. This debate on the issue of corporate liability under the Alien Tort Statute is far from settled, and it is not the main focus of this Note. But corporations should face potential liability under the statute because transnational corporations like Jeppesen Dataplan are often more than mere bystanders to egregious human rights violations. If Jeppesen Dataplan participated in the transport of illegally abducted foreign nationals, Jeppesen Dataplan should be liable to those foreign nationals for helping the CIA violate international norms.

V. THE JEPPSENI MAJORITY SUGGESTED SEVERAL INADEQUATE CONGRESSIONAL REMEDIES

Jeppesen II made several suggestions for alternate procedures which would, in theory, provide the plaintiffs in this or similar cases with a remedy:


95 For an excellent discussion on the challenges of fitting transnational corporations into the existing theoretical framework for liability and accountability, see Jena Martin Amerson, What’s in a Name? Transnational Corporations as Bystanders Under International Law, 85 ST. JOHN’S L. REV. 1 (2011). Professor Amerson argues that the transnational corporation is best-conceived as a legal “bystander” under international law. See id. at 2–3. A subsection of Professor Amerson's article concludes that application of the bystander theory to Alien Tort claims would preclude alien tort plaintiffs from maintaining claims against transnational corporations. Id. at 36.


(1) Executive Branch remedies; (2) congressional investigations of the Executive; (3) private bills; and (4) remedial legislation. Each of these suggestions is untenable as a solution. The Executive Branch is unlikely to undermine its own policies by voluntarily compensating victims of the extraordinary rendition program. If the Executive Branch started divvying out monetary remedies, opponents of the extraordinary rendition program would gain momentum against the already oft-criticized program. Next, Congress is ill-equipped to act as a makeshift judicial body for the purpose of investigating the lawfulness of the extraordinary rendition program. The third suggestion, private bills, is not going to work in the rendition context. As detailed below, Congress uses this solution only when the aggrieved party is sympathetic and clearly innocent. That is not the case in the rendition context. Finally, Congress is highly unlikely to pass remedial legislation to ensure compensation of rendition victims because such legislation would not be politically expedient.

A. Remedies from Within the Executive Branch

*Jeppesen II* suggested that the Executive Branch could decide whether it violated the human rights of the plaintiffs and compensate them accordingly. The court drew a surprising comparison to Japanese internment in the United States during World War II ("WWII"). This Note takes the position that the internment camps of WWII were a major mistake, a bad policy choice, and an eclipse of human rights. The *Jeppesen II* majority ignores this point by focusing only on the fact that some internment victims were eventually compensated years later. The court declined to use its judicial power to step in and provide a


99 The suggestion that the Executive Branch can check its own actions flies in the face of the tenets of our tripartite government. When left to its own devices, the Executive has a history of engaging in underhanded activities. For example, it has only recently been revealed that the United States government was experimenting on Guatemalan prisoners in the 1940s by purposefully infecting them with sexually transmitted diseases ("STDs"). The government was ruthlessly pursuing its interest in furthering the science of antibiotics. Ashley Portero, *U.S. Admits to Infecting Guatemalans with STDs in 1940s Experiments*, INT’L BUS. TIMES (Aug. 31, 2011), http://www.ibtimes.com/articles/206584/20110901/u-s-experiments-infected-guatemalans-with-stds.htm.

100 *Jeppesen II*, 614 F.3d 1070, 1091 (9th Cir. 2010).

101 *Id.* In *Korematsu v. United States*, 323 U.S. 214 (1944), the Court upheld the government’s order to place Japanese-Americans in internment camps, holding that it was more important to guard against espionage than to vindicate the individual rights of innocent Japanese-Americans. Like the debate over the modern extraordinary rendition program, the commentary on Japanese internment camps cuts in both directions. Some scholars defend the use of internment camps during WWII, while others rebut such defenses. For a defense of the use of internment camps, see Daniel Pipes, *Why the Japanese Internment Still Matters*, N.Y. SUN. (Dec. 28, 2004), available at http://www.danielpipes.org/2309/why-the-japanese-internment-still-matters. For the opposite view that internment camps were unnecessary and “wrong,” see Irfan Khawaja, *Japanese Internment: Why Daniel Pipes is Wrong*, GEORGE MASON UNIVERSITY’S HISTORY NEWS NETWORK (June 26, 2005), http://hnn.us/articles/9512.html.
remedy, as allowed by application of the Alien Tort Statute and the Reynolds privilege. Another problem with this suggestion is that the Executive Branch is simply not likely to compensate victims of its extraordinary rendition program, which is an established policy choice of the Executive. To compensate victims would be to admit that the Executive Branch commits gross violations of human rights in the name of national security. Therefore, the Executive Branch is unlikely to acquiesce to pressure from the political and legal communities by admitting that the United States sometimes tortures suspected terrorists.

B. Congressional Investigations of the Executive

The Jeppesen II majority also suggested that Congress has the authority to “investigate alleged wrongdoing and restrain excesses by the Executive Branch.”\(^\text{102}\) Presumably, the majority was suggesting that Congress could form committees and hold hearings for the purpose of questioning corporate and government officials accused of being involved in tortuous activities. To support this suggestion, the majority cited Watkins v. United States\(^\text{103}\) and Eastland v. U.S. Servicemen’s Fund,\(^\text{104}\) both cases dealing with remedial legislation used by Congress to assist the efforts of the Executive during and shortly after WWII.

The events at issue in Watkins stemmed from hearings held before the congressional Committee on Un-American Activities during the 1940s.\(^\text{105}\) The Committee was authorized to enact remedial legislation.\(^\text{106}\) The purpose of the Committee was essentially to identify Communists living in America and attempt to prevent the dissemination of Communist propaganda.\(^\text{107}\) Petitioner Watkins was identified as a suspected Communist and forced to testify before Congress.\(^\text{108}\) Watkins was convicted of a misdemeanor for refusing to make certain disclosures.\(^\text{109}\) When the Supreme Court reviewed the conviction, it reversed, holding that Watkins’s conviction violated the Due Process Clause because the Court could not even determine from the record whether the questions Watkins refused to answer were even pertinent to the congressional inquiry.\(^\text{110}\) The Court stated that “Congress [is not] a law enforcement or trial agency. These are functions of the executive and judicial departments of government.”\(^\text{111}\)

\(^{102}\) Jeppesen II, 614 F.3d at 1090.

\(^{103}\) 354 U.S. 178 (1957).

\(^{104}\) 421 U.S. 491 (1975).

\(^{105}\) See 354 U.S. at 182 (“[Watkins] appeared as a witness in compliance with a subpoena issued by a Subcommittee of the Committee on Un-American Activities of the House of Representatives.”).

\(^{106}\) Id. at 202.

\(^{107}\) Id. at 201–02.

\(^{108}\) Id. at 182–83.

\(^{109}\) Id.

\(^{110}\) Id. at 187.

\(^{111}\) Id.
This demonstrates that congressional hearings are not a suitable solution for the problem of alleged torture in the extraordinary rendition program. Congress is simply not equipped to adjudicate alien tort claims.

In *Eastland v. U.S. Servicemen's Fund*, 112 Congress formed a Committee to enforce the Internal Security Act of 1950, which was designed to identify Communists under Soviet control living within the United States. 113 The Committee had directed a bank to produce records related to a nonprofit membership corporation supported by contributions. 114 When the nonprofit corporation objected on First Amendment grounds, the Court held that the legislative purpose served by the Committee outweighed the corporation's interest in unfettered free speech. 115 *Eastland* merely established that Congress can obtain private records from private companies to further a "legitimate task of Congress." 116 *Eastland* is inapposite to the circumstances of the extraordinary rendition program because a branch of the United States government already possesses the information about the extraordinary rendition program. In *Eastland*, the government was seeking to uncover information from a private bank. 117 Contrariwise, in *Jeppesen II*, the government was seeking to keep information that it already possessed from being used as evidence in a tort suit under the Alien Tort Statute. *Watkins* and *Eastland* are not even examples of Congress using "authority to investigate alleged wrongdoing and excesses by the Executive Branch." 118 Rather, those two cases are examples of Congress working in concert with the Executive to eradicate the Communist problem which plagued the world in the 1940s and 1950s. The majority's suggestion of remedial legislation is also a problem of motivation and politics. Congress is not sufficiently motivated to allocate resources for the purpose of investigating this type of alleged torture of suspected terrorists. With the recent financial crisis, fierce debates over healthcare, employment, and the debt ceiling have substantially consumed the time and resources of Congress. 119 Although the alleged human rights violations are undoubtedly troublesome, the constituents of Congress largely dictate the congressional agenda. And those constituents simply have other priorities.

Moreover, there is still widespread fear of future terrorist attacks. It is still quite common to hear of incidents on domestic and international flights in

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113 *Id.* at 493.
114 *Id.* at 494.
115 *Id.* at 506–07.
116 *Id.* at 505–06.
117 *Id.* at 494.
118 *See supra* text accompanying note 102.
which a terrorist plot was foiled or discovered before it came to fruition. These factors make it unlikely that Congress will spend the requisite time and money to provide a monetary remedy for victims of the extraordinary rendition program. Even if Congress were to launch an investigation, the Executive Branch would probably be uncooperative; this would certainly drive-up the cost of an effective investigation by causing Congress to spend valuable time and money trying to force the Executive to produce sought information. At a time when this war against terrorist organizations has persisted for far too long and contributed to so many expenditures, it is nearly unfathomable that Congress would do anything to add to the expense or to create the perception that it does not stand in solidarity with the Executive on the terrorism issue. Thus, the tenured, appointed judges in the federal circuits should start providing the remedy in situations where foreign nationals are alleging torture at the hands of the United States government with the assistance of transnational corporations.

C. Private Bills

Jeppesen II next suggested that Congress could use its power to enact private bills as an alternative remedy. A private bill is a narrow law passed for one particular reason. In this context, Congress could pass a law ordering a monetary payment to a victim of the extraordinary rendition program. Several problems make private bills an unlikely fix for the human rights violations caused by the state secrets doctrine. Particularly, none of the cases cited by the Jeppesen II majority involved the state secrets doctrine. Also, the cases cited by the majority involved plaintiffs who were much more sympathetic than the Jeppesen II plaintiffs. Perhaps the most significant barrier to the private bills suggestion is the current political climate.

To enact private bills as remedies, Congress would need to set up an administrative system designed to hear the individual claims of suspected terror-

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122 Jeppesen II, 614 F.3d 1070, 1091–92 (9th Cir. 2010). The majority cited several examples of private bills, including Nixon v. Fitzgerald, 457 U.S. 731, 762 n.5 (1982) (Burger, C.J., concurring) ("For uncompensated injuries Congress may in its discretion provide separate nonjudicial remedies such as private bills."); Office of Pers. Mgmt. v. Richmond, 496 U.S. 414, 431 (1990) ("Congress continues to employ private legislation to provide remedies in individual cases of hardship."); and Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 239 n.9 (1995) ("Private bills in Congress are still common, and were even more so in the days before establishment of the Claims Court.").
ists who allege human rights violations by the Executive Branch. The majority cited Nixon v. Fitzgerald for the proposition that Congress can provide non-judicial remedies for uncompensated injuries. In Nixon, Fitzgerald was fired from his position as a management analyst for the Air Force. Fitzgerald, in turn, filed suit against former President Richard M. Nixon for retaliatory discharge. The Supreme Court agreed with Nixon that the suit was barred because Nixon had absolute immunity. In the Court’s view, absolute immunity could be upheld because the President was subject to constant scrutiny and other political checks. Acknowledging that it could not provide a remedy for Fitzgerald, the Court suggested that “alternative remedies and deterrents” existed to compensate Fitzgerald.

Jeppesen II also cited Plaut v. Spendthrift Farm as an example in which the Court suggested that a private bill would be an appropriate remedy. Plaut consisted of investors who sought to reopen a final judgment against them after Section 10(b) of the Securities and Exchange Act of 1934 was amended to allow certain final judgments to be reopened. The Court decided that the amendment to the Act was unconstitutional as a violation of the separation of powers because the judiciary’s final judgments must not be disturbed. Otherwise, Congress could simply pass legislation to change the result of disputes that are res judicata.

Another case cited by Jeppesen II regarding the use of private bills as a remedy was Office of Personnel Management v. Richmond, which involved a disabled worker who was claiming a disability annuity. The claimant received incorrect advice from a federal worker and, as a result, became ineligible for assistance under the disability statute because his earnings were too high. The Supreme Court refused to order payment of the annuity, holding that it was not

125 Id. at 733–34.
126 Id. at 739.
127 Id. at 756–57.
128 Id. at 757.
129 Id. at 758. See also Chief Justice Burger’s concurring opinion in Fitzgerald, which explicitly notes that “[f]or uncompensated injuries Congress may in its discretion provide separate nonjudicial remedies such as private bills.” Id. at 763 (Burger, C.J., concurring).
131 Id. at 231–32.
132 Id.
134 Id. at 415–18.
able to order payments that were not authorized by the statute.\textsuperscript{135} Instead, the Court stated that Congress might consider enacting a private bill to compensate the claimant.\textsuperscript{136}

Jeppesen II was quite different from Fitzgerald, Plaut, and Office of Personnel Management. None of the other cases involved the state secrets doctrine. Additionally, each of the other cases involved plaintiffs who appeared to be categorically free of any wrongdoing themselves. To the contrary, in cases like Jeppesen II, it is much more difficult to discern whether the plaintiffs are even entitled to a remedy because they are suspected affiliates of terrorist organizations. Additionally, the cases cited by the Jeppesen II majority were not likely to open the floodgates for similar claims if Congress chose to issue a private bill to compensate the plaintiffs. To the contrary, the extent of the CIA's investigation of foreign nationals is unknown. And if Congress demonstrates a willingness to compensate plaintiffs without requiring the plaintiffs to prove their allegations against the CIA, there is no telling how many new plaintiffs will emerge in similar attempts to be compensated without having to prove allegations. How will Congress know whether the new claimants are telling the truth or merely fabricating stories of torture and human rights violations? Will the Executive voluntarily hand over necessary information so a determination can be made? As stated above, this is highly unlikely.

Equally unlikely is the suggestion that Congress, comprised of elected politicians subject to losing elections, will risk the political consequences of compensating alleged terrorists. As stated above, this is especially true considering the current circumstances. In the November 2010 elections, the Republicans regained control of the House. The national debt is at an all-time high at over $14 trillion.\textsuperscript{137} Terror threats are still commonplace during a time when the wounds of September 11, 2001, are far from healed. These circumstances simply do not create an environment in which Congress is likely to pass private bills to compensate alleged terrorists who were possibly tortured at the hands of the CIA in concert with foreign governments. The judiciary needs to step in and perform its function. Thus, the private bills suggestion made in Jeppesen II and cases like it—that Congress is the appropriate forum for a remedy in state secrets cases—is actually not a viable solution. Congress is simply not in a position to use private bills to compensate foreign nationals who allege human rights violations.

\textsuperscript{135} Id. at 431–32.
\textsuperscript{136} Id. at 431.
D. Remedial Legislation

_Jeppesen II_ also suggested that Congress use its "authority to enact remedial legislation authorizing appropriate causes of action and procedures to address claims like those presented here."[138] The only case cited by _Jeppesen II_ to support this suggestion was _Halkin v. Helms_,[139] in which Executive Branch agencies successfully asserted the state secrets privilege against antiwar protesters who sought certain documents to help prove their claim against these agencies. Affirming the dismissal of the complaint, the District of Columbia Circuit Court stated:

[W]here the Constitution 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 constitutional violations that cannot be proven under existing legal standards, if there are to be such remedies, must be provided by Congress.[140]

Congress could do this in theory, but it would have to create a very friendly administrative forum for foreign nationals thought by the Executive Branch to be involved in organizations hostile to the United States. In fact, the _Jeppesen II_ majority is not the first source to suggest that administrative remedies are a tenable substitute for judicial solutions.[141] As it was stated in _Jeppesen II_, it is hard to imagine a case with similar facts that would ever overcome the state secrets doctrine. The Alien Tort Statute, on its face, appears to constitute a good remedy for plaintiffs like those in _Jeppesen II_. Thus, it's not actually the causes of action or the Article III courts that represent the hurdle; it is the state secrets privilege. Congress could form a committee to compensate foreign nationals like the plaintiffs in _Jeppesen II_, but if anything like the state secrets doctrine were to be applied as a prerequisite to granting relief, the result would be the same as it was in _Jeppesen II_. Additionally, it is worth emphasizing that each of the legislative remedies suggested by the _Jeppesen II_ majority is equally unlikely to occur because of the current political climate.

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[138] _Jeppesen II_, 614 F.3d 1070, 1092 (9th Cir. 2010) (citing Halkin v. Helms, 690 F.2d 977, 1001 (D.C. Cir. 1992)).
[140] Id. at 1001.
VI. ELABORATION ON THE DISSENT’S WORKABLE APPROACH AND FLAWS IN THE MAJORITY’S REASONING

Pointing out the procedural flaws of the majority’s construction of the state secrets doctrine, Judge Hawkins’ dissenting opinion argued for a narrower construction of both the *Totten* bar and the *Reynolds* privilege. The following subsections examine the procedure set forth by Judge Hawkins and argue that the application of a narrower state secrets doctrine would undo the total eclipse of human rights caused by an overly broad construction of the doctrine. A narrower judicial framework would include the following: (1) applying the *Totten* bar in only two narrow factual situations; (2) treating the *Reynolds* privilege as an evidentiary privilege and not as a nonjusticiability doctrine; and (3) upon an assertion of the *Reynolds* privilege, conducting an item-by-item analysis and allowing a claim to survive if the plaintiff can make a prima facie case with the use of non-privileged evidence.

A. The *Totten* Bar Should Apply in Only Two Narrow Factual Situations: Secret Agreements Between the Plaintiff and the Government and Suits Against the Government for Secret Information.

*Totten* was a case involving a secret agreement between the plaintiff and the government.142 The Supreme Court applied the *Totten* bar to two other cases involving secret agreements between the plaintiff and the government: *Tenet v. Doe*143 and *General Dynamics Corp. v. United States*.144 The plaintiffs in *Tenet* were former espionage agents who sued the United States for the government’s alleged failure to provide promised financial assistance for the agents’ espionage services.145 The Supreme Court decided that the *Totten* bar precluded the lawsuit from going to the merits because a clandestine spy relationship was a fact not to be revealed.146 Likewise, the Court applied the *Totten* bar in *General Dynamics* to a contract dispute between the Navy and two private companies that agreed to develop a stealth aircraft for the Navy. Thus, the *Totten* bar clearly applies to cases involving a secret agreement between the plaintiff and the government.

Besides the two cases involving secret agreements between the plaintiff and the government, the Supreme Court has applied the *Totten* bar to only one other factual situation. In *Weinberger v. Catholic Action of Hawaii*, the Court applied the *Totten* bar to dismiss a lawsuit for information regarding the possi-

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142 *See supra* text accompanying note 14.
144 131 S. Ct. 1900 (2011).
145 544 U.S. at 3.
146 *Id.* at 10.
ble environmental consequences of a military facility. Surprisingly, Weinberger extended Totten without even performing a Totten analysis, citing Totten and conclusively stating that "[we] confront a similar situation in the instant case." As Justice Blackmun's concurring opinion pointed out in Weinberger, the FOIA was, alone, an adequate basis for dismissal of the claims. The Supreme Court, then, has given inadequate guidance for the proper application of the Totten bar. This lack of guidance has enabled lower courts to develop a myriad of different interpretations, thereby making it nearly impossible for foreign nationals to be compensated for human rights violations. Accordingly, the Totten bar should be applied only when there is a secret agreement between the government and the plaintiff, or when the plaintiff has sued for information under the FOIA.

For two additional reasons, Totten should not be applied outside of the narrow circumstances of Totten and Tenet, or of Weinberger. First, the Totten bar has "extremely harsh consequences," is "rarely applied," and is "not clearly defined." Second, the Reynolds privilege provides a less drastic mechanism to ensure that state secrets are not disclosed in litigation. Thus, the majority of Jeppesen II was incorrect to imply that its discretion is broad in determining whether the Totten bar applies to a case in which the government asserts the state secrets doctrine. Moreover, Jeppesen II should have stated that the Totten bar was inapplicable. The majority pointed out that the "purpose of the bar . . . is to prevent the revelation of state secrets harmful to national security." On that basis, the majority argued that the Totten bar might have been applicable because the concern of revealing state secrets is "no less pressing when the plaintiffs are strangers to the espionage agreement that their litigation threatens to reveal." But the three cases in which the Supreme Court applied the Totten bar simply fail to provide an adequate basis for the expansive interpretation of the Totten bar by the majority in Jeppesen II. And considering the safety net that is the Reynolds privilege, there is no reason for courts to transform the state secrets doctrine into a doctrinal amoeba by conflating the Reynolds privilege with the Totten bar.

The majority conceded that the "absolute protection" provided by the Totten bar is "appropriate only in narrow circumstances." Nonetheless, the

147 See supra text accompanying notes 22–26.
149 See id. at 149–50 (Blackmun, J., concurring) (explaining that it was not necessary to reach the Totten issue because the FOIA exempted disclosure of a report that was necessary for the plaintiffs to litigate the claims).
150 Jeppesen II, 614 F.3d 1070, 1084 (9th Cir. 2010).
151 Id. at 1079.
152 Id.
153 Id. at 1084 (quoting Tenet v. Doe, 544 U.S. 1, 11 (2005)).
majority stated that the *Totten* bar might be applicable to *Jeppesen II* because the plaintiffs in *Weinberger* were third-party plaintiffs.\(^\text{154}\) It does not, however, necessarily follow that a court has discretion to apply *Totten* in any case in which the plaintiff is not a party to an agreement with the government. The *Totten* bar has drastic results, and the *Reynolds* privilege provides additional support to the purpose of the *Totten* bar. Thus, it is unnecessary and unwise for circuit courts to take occasion to expand the scope of *Totten* without any further support in Supreme Court precedent.

**B. The Reynolds Privilege Should Not Be Used Like the Totten Bar to Dismiss a Claim Based on a Prospective Assertion of the State Secrets Privilege.**

The *Totten* bar and the *Reynolds* privilege should not be conflated because the doctrines have a very different effect on the course of litigation. If the *Totten* bar applies, the case simply comes to an immediate end. On the other hand, if the *Reynolds* privilege is properly applied, the case is allowed to proceed slowly until the judge determines whether the claim can be proven with non-privileged evidence. Thus, when courts apply the *Reynolds* privilege like it is the *Totten* bar, alien tort plaintiffs are wrongly deprived of the opportunity to recover.

1. Ignoring its own precedent, *Jeppesen II* conflated the subject matter of the lawsuit with the facts necessary to litigate it.

Analytically, the definition of “subject matter” is important because the *Totten* bar requires dismissal of a claim in which the “very subject matter” of the lawsuit is a state secret.\(^\text{155}\) *The Jeppesen II* majority ignored its remarks in a previous Ninth Circuit case: *Al-Haramain Islamic Foundation v. Bush*.\(^\text{156}\) *Al-Haramain*, the plaintiffs alleged that President Bush was violating the Foreign Intelligence Surveillance Act by employing a Terrorist Surveillance Program (“TSP”), in which the government was intercepting telephone calls and other communications.\(^\text{157}\) *Al-Haramain* court dismissed the claims under the *Reynolds* privilege, not the *Totten* bar.\(^\text{158}\) *Al-Haramain* is an excellent illustration of the manner in which the *Reynolds* privilege ensures the preservation of state secrets, even when the narrow *Totten* bar does not apply. In declining to apply the *Totten* bar, *Al-Haramain* noted the important distinction between the “subject matter” of a case and the facts necessary to litigate the case:

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\(^{154}\) *Id.* at 1079.

\(^{155}\) *See id.* at 1099 n.14 (Hawkins, J., dissenting).

\(^{156}\) 507 F.3d 1190 (9th Cir. 2007).

\(^{157}\) *See id.* at 1193.

\(^{158}\) *See id.* at 1201–02.
In contrast, we do not necessarily view the “subject matter” of a lawsuit as one and the same with the facts necessary to litigate the case. In *Kasza*, we 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.159

In *Jeppesen II*, the subject matter of the lawsuit was Jeppesen’s involvement in an overseas detention program.160 The existence of the extraordinary rendition program was not a state secret because it was publicly acknowledged.161 In *Al-Haramain*, the public acknowledgement of the TSP was sufficient to trigger a finding by the Ninth Circuit that the very subject matter of the litigation was not a state secret.162 *Jeppesen II*, however, did not apply the logic of *Al-Haramain*. Instead, *Jeppesen II* unnecessarily expanded the scope of the *Totten* bar in the Ninth Circuit by conflating the “very subject matter” of a lawsuit with the facts necessary to litigate the case. The expansion of the bar’s scope was particularly unwarranted because *Jeppesen II* was decided under the *Reynolds* privilege, not the *Totten* bar.

2. Like the Fourth Circuit, the Ninth Circuit incorrectly applied the *Reynolds* privilege without first requiring a responsive pleading.

In a similar case, the Fourth Circuit erroneously expanded the *Reynolds* evidentiary privilege. In *El-Masri v. United States*,163 the plaintiff was a former terrorism suspect who alleged that the CIA unlawfully detained and interrogated him. Like the plaintiffs in *Jeppesen II*, El-Masri sued under the Alien Tort Statute.164 El-Masri argued that the district court erred in dismissing the complaint prior to the filing of a responsive pleading because the CIA’s extraordinary rendition program had become public knowledge.165 The court affirmed the dismissal of the claim under the *Reynolds* privilege because the claim could not be litigated without threatening the disclosure of state secrets.166 Similarly, *Jeppesen II* dismissed the plaintiffs’ claims under the *Reynolds* privilege, even though the transnational corporation had not yet answered the complaint.

159 *Id.* at 1201.
160 *Id.* at 1097 (Hawkins, J., dissenting).
161 *Id.* at 1098.
162 *Al-Haramain*, 507 F.3d at 1198 (“[T]he administration publicly acknowledged that . . . the President authorized a communications surveillance program. . . .”).
163 479 F.3d 296 (4th Cir. 2007).
164 *Id.* at 300–01.
165 *Id.* at 302.
166 *See id.* at 312–13.
Both El-Masri and Jeppesen II applied the Reynolds privilege improperly. As Judge Hawkins articulated in his Jeppesen II dissenting opinion, the Rules of Civil Procedure and the historical application of evidentiary privileges require a responsive pleading and a detailed analysis by the court before any claim is precluded on summary judgment.\(^\text{167}\) Under Federal Rules of Civil Procedure 8(b)(6), an allegation is deemed admitted unless it is denied.\(^\text{168}\) However, a defendant can assert an evidentiary privilege to prevent an allegation from being deemed admitted.\(^\text{169}\) Even when a privilege is asserted a defendant is still required to file a responsive pleading.\(^\text{170}\) And even the Fifth Amendment privilege against self-incrimination "protects an individual . . . from answering specific allegations in a complaint or filing responses to interrogatories in a civil action where the answers’ would violate his rights under the privilege."\(^\text{171}\) Other evidentiary privileges which follow this procedure include attorney/client and priest/penitent. None of these common privileges, however, warrant the automatic dismissal of a case where there is non-privileged evidence available for litigation.\(^\text{172}\)

Likewise, the Reynolds privilege should not bar the use of non-privileged evidence to prove claims involving privileged evidence, so long as the purpose of the state secrets privilege can be served as such. The purpose of the state secrets privilege is to "prevent the revelation of state secrets harmful to national security . . . ."\(^\text{173}\) Requiring a responsive pleading, however, does not endanger this purpose because the government, in its answer, can assert the privilege as to each and every allegation on the complaint. Then the court can examine the privilege claims on an item-by-item basis to determine if any of the privileged information is indispensable to the plaintiff’s claim. If so, judgment in favor of the defendant would be warranted because the plaintiff would have no feasible way to prove the allegations. In Jeppesen II, the existence of

\(^{167}\) Jeppesen II, 614 F.3d 1070, 1098 (9th Cir. 2010) (Hawkins, J., dissenting).

\(^{168}\) FED. R. CIV. P. 8(b)(6).

\(^{169}\) Jeppesen II, 614 F.3d at 1098 (Hawkins, J., dissenting) (citing N. River Ins. Co., Inc. v. Stefanou, 831 F.2d 484, 486–87 (4th Cir. 1987)).

\(^{170}\) Id.

\(^{171}\) Id.

\(^{172}\) Judge Hawkins explained as follows:


Id. at 1099 (Hawkins, J., dissenting).

\(^{173}\) Id. at 1079.
nonprivileged public information was a feasible way for the plaintiffs to prove the claims.

The Jeppesen II majority relied on an Eighth Circuit case, Black v. United States, to support the manner in which it prospectively applied the Reynolds privilege. But Black does not support prospective application of the Reynolds privilege. In Black, the plaintiff was an electrical engineer who had performed work for the government on military-related projects. The plaintiff alleged that he was approached and questioned by a CIA agent regarding the plaintiff’s contact with a Soviet national. Subsequently, the plaintiff’s government clearance was terminated, purportedly for inactivity. The Black plaintiff alleged that the government mounted a protracted psychological attack against him. Included in the defendant’s allegations was everything from being secretly drugged to having the carpet in his apartment bugged.

Ultimately, the Black court decided that the Reynolds privilege required dismissal of the case because the plaintiff had no non-privileged evidence to prove that the meeting with the CIA agent ever occurred. But Jeppesen II is distinguishable from Black. Unlike the Black plaintiffs, the Jeppesen II plaintiffs had non-privileged evidence to demonstrate that Jeppesen was performing planning and logistical services for the CIA. The Jeppesen II majority conducted no item-by-item analysis of governmental claims of privilege. Nor did it determine that privileged evidence was indispensable to all the plaintiffs’ claims. Instead, Jeppesen II simply accepted the government’s threshold objection that litigation was bound to compel the disclosure of evidence which, if disclosed, would be harmful to national security. Thus, the majority’s reliance on Black was improper.

Jeppesen II also improperly relied on the Ninth Circuit case, Kasza v. Browner, for support that a case is properly dismissed under Reynolds prior to the filing of a responsive pleading. The plaintiffs in Kasza v. Browner were former workers at a classified facility operated by the United States Air Force. The plaintiffs sought to compel compliance by the Air Force with hazardous waste inventory, inspection, and disclosure responsibilities. The court affirmed the district court’s grant of summary judgment in favor of the defendants.

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174 Black v. United States, 62 F.3d 1115 (8th Cir. 1995).
175 Id. at 1116.
176 Id.
177 Id.
178 See id. at 1116–17.
179 Id.
180 Id. at 1119.
181 See Jeppesen II, 614 F.3d 1070, 1094–95 (9th Cir. 2010) (Hawkins, J., dissenting).
182 133 F.3d 1159 (9th Cir. 1998).
183 Id. at 1162.
184 Id.
because the very subject matter of the action was a state secret. Nor could the Kasza plaintiffs make a prima facie case on any of the claims without resorting to privileged evidence.

On the contrary, the plaintiffs in Jeppesen II could very likely make out a prima facie case with non-privileged evidence on at least some of the claims. Even the majority in Jeppesen II acknowledged that “allegations based 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.” By this logic, it would seem that the majority would have chosen against dismissing those claims summarily, considering the majority’s emphasis on the Jeppesen’s secret agreement with the government. But instead, the Jeppesen II majority relied on the sweeping proposition that proceeding with the litigation would risk divulging state secrets.

There is another more fundamental problem with the majority’s reliance on Kasza for the proposition that Reynolds does not necessarily require the filing of a responsive pleading: the Kasza defendant filed a responsive pleading. In Kasza, the claims were not disposed of until the court considered the privilege claims at summary judgment. The procedural posture of Kasza was thus different from the procedural posture of Jeppesen II. The Jeppesen II majority should have thus distinguished Kasza and forced the government to file a responsive pleading. That would have allowed the majority to conduct a more detailed analysis of the privilege claims.

C. The Proper Analysis of an Assertion of the Reynolds Privilege is an Item-by-Item Inquiry After the Defendant Answers the Complaint, and the Reynolds Privilege Should Not Bar a Claim if the Underlying Facts Can be Proven with Non-Privileged Evidence.

Instead of requiring the government to assert the privilege as to individual items on the complaint, the Jeppesen II majority wiped-out the plaintiffs’ entire complaint with a sweeping preliminary assertion that there was no way any of the allegations could be proven without risking the disclosure of state secrets. But the basis of some of the allegations in the complaint was public information. And the majority could not really know that its sweeping assertion was accurate without taking a closer look at the individual allegations to which the government asserted the Reynolds privilege. Since the majority did not require the government to file a responsive pleading, the majority had no oppor-

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185 See id. at 1170.
186 Id.
187 Jeppesen II, 614 F.3d 1070, 1084–85 (9th Cir. 2010).
188 Id. at 1087.
189 Id. at 1100 n.15 (Hawkins, J., dissenting).
tunity to perform an item-by-item analysis of the claims against which the government asserted the privilege. Two cases from other circuits demonstrate the use of the item-by-item analysis for which this Note argues.

In *Crater Corp. v. Lucent Technologies, Inc.*, the plaintiff was a patentee who alleged that the defendants infringed the plaintiff's patent to an underwater coupling device called the "Crater coupler." The plaintiff also filed state law claims against one of the defendants for misappropriation of trade secrets and breach of contract. The government intervened and sought to prohibit the plaintiff from introducing into litigation any information relating to the manufacture or use of the Crater coupler by the United States government. The district court dismissed the suit under the state secrets doctrine. On appeal, the Federal Circuit reversed the dismissal of the misappropriation and breach of contract claims, holding that an understanding of the precise nature of the trade secrets and the terms of the contract was essential to the analysis of whether the claims could proceed under the *Reynolds* privilege.

*Crater Corp.* thus interpreted and applied the *Reynolds* privilege differently than did *Jeppesen II*. Unlike *Jeppesen II*, *Crater Corp.* declined to dismiss the case at the threshold, instead opting to remand the case for an item-by-item inquiry which would develop the record for the purpose of enabling a determination as to whether further litigation was feasible without divulging state secrets. *Crater Corp.* applied the *Reynolds* privilege as the evidentiary privilege that it is, while *Jeppesen II* applied the *Reynolds* privilege in a manner which had the effect of a *Totten* bar. The *Totten* bar has a drastic effect and is supposed to be used scarcely. As stated above, the *Reynolds* evidentiary privilege is morphed into a nonjusticiability doctrine when courts dismiss a case before requiring a responsive pleading.

Additionally, the trial judge should always perform a detailed inquiry of each privilege claim. In *Ellsberg v. Mitchell*, the plaintiffs were the subjects of warrantless electronic surveillance by the federal government. The plaintiffs sought damages for the warrantless surveillance. The district court dismissed the claims which pertained to surveillance of foreign communications. On appeal, the court held that the dismissal by the district court was improper.

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190 423 F.3d 1260 (Fed. Cir. 2005).
191 *Id.* at 1261.
192 *Id.* at 1261–62.
193 *Id.* at 1262–63.
194 *Id.* at 1265.
195 *Id.* at 1268–69.
196 See *id*.
197 709 F.2d 51 (D.C. Cir. 1983).
198 *Id.* at 53.
199 *Id*.
200 *Id.* at 56.
because the trial judge needed to perform a more detailed inquiry of the privilege claims before dismissing the entire suit.201 This application of the Reynolds privilege is at odds with Jeppesen II, in which the court dismissed all the claims at the threshold instead of performing an item-by-item analysis. Jeppesen II’s blind acceptance of the government’s privilege claim constituted a “complete abandonment of judicial control” and very likely enabled “intolerable abuses.”202

As discussed above, other evidentiary privileges do not bar the allegations from being proven with non-privileged evidence. The D.C. Circuit has properly applied the Reynolds privilege by considering and allowing the use of non-privileged evidence to prove underlying facts. In In re Sealed Case,203 the plaintiff was an attaché in Burma for the United States DEA.204 The plaintiff filed a Bivens complaint, alleging that the CIA engaged in electronic eavesdropping in violation of the Fourth Amendment.205 The district court dismissed both a claim against a CIA employee and a claim against a State Department employee.206 On appeal, the D.C. Circuit affirmed the dismissal of the complaint against the CIA employee because the plaintiff could not prove the allegations against the CIA employee without using privileged reports.207 In re Sealed Case reversed the dismissal of the claim against the State Department employee because the plaintiff could rely on non-privileged evidence to establish a prima facie case against the State Department employee.208 Likewise, in Jeppesen II, the court should have allowed to survive the claims which did not require proof of an agreement because those claims could conceivably be proven with the non-privileged, public evidence which was available to the plaintiffs.

Also, the Jeppesen II majority mischaracterized dicta from In re Sealed Case. The majority cited In re Sealed Case for the proposition that, “if the district court determines that the subject matter of a case is so sensitive that there is no way it can be litigated without risking national secrets, then the case must be dismissed.”209 But this portion of In re Sealed Case is merely part of a larger explanation of the state secrets doctrine.210 Although In re Sealed Case cited no authority for the previous statement, the court’s use of the clause “subject matter” indicates that it was actually referring to the Totten bar, not the Reynolds

201 See id. at 63.
202 United States v. Reynolds, 345 U.S. 1, 8 (1953).
203 494 F.3d 139 (D.C. Cir. 2007).
204 Id. at 141.
205 Id.
206 Id. at 141–42.
207 Id. at 153–54.
208 See id.
209 Jeppesen II, 614 F.3d 1070, 1083 (9th Cir. 2010) (quoting El-Masri v. United States, 479 F.3d 296, 308 (4th Cir. 2007)).
210 See In re Sealed Case, 494 F.3d 139, 153–54 (D.C. Cir. 2007).
privilege. Nonetheless, the Jeppesen II majority used that statement about the Totten bar to support its interpretation of the Reynolds privilege. Because the comment in In re Sealed Case was not referring to the Reynolds privilege, Jeppesen II cited In re Sealed Case for a proposition which is not supported by the text of In re Sealed Case.

A case from the Northern District of Illinois is a good illustration of the manner in which a court should treat non-privileged, public information as evidence. In ACLU v. National Security Agency, the plaintiffs alleged that a warrantless wiretapping program violated the First and Fourth Amendments. The plaintiffs filed a data-mining claim and claims which challenged the validity of the program. The court dismissed the data-mining claim but granted summary judgment in favor of the plaintiffs on the claims challenging the validity of the wiretapping program because the plaintiffs relied on no privileged information to prove those claims. Ultimately, the court held that the wiretapping program violated the First and Fourth Amendments, and was inconsistent with the separation of powers because the procedure for implementing the program was not followed as laid-out by the Foreign Intelligence Surveillance Act.

This application of the state secrets doctrine again demonstrates that Jeppesen II could have given more weight to the existence of public, nonprivileged information. Courts in other circuits, and even the Ninth Circuit in Al-Haramain, demonstrate time and again that state secrets can still be protected when the plaintiffs use public, non-privileged information to prove the underlying facts of their claims—even when the government properly asserts the Reynolds privilege. If information is made public, it simply is not a secret any longer. To hold otherwise is a needless expansion of the Reynolds privilege at the expense of human rights—a total eclipse of human rights.

This is not to say that the result in Jeppesen II would inevitably have been different if the court would have performed an item-by-item analysis of the privilege claims. It is entirely possible that the court would have determined that privileged evidence was essential to the plaintiffs’ claims or to the defendant’s defense of the allegations. But the determination was made prematurely, before even a responsive pleading was filed by the defendant. There was no need for the Jeppesen II majority to dismiss the case at the threshold without even allowing the plaintiffs to attempt to prove their claims with nonprivileged evidence.

211 Jeppesen II, 614 F.3d at 1083.
213 Id. at 758.
214 Id.
215 See id. at 766–67.
216 Id. at 778 (Jackson, J., concurring).
VII. CONCLUSION

Victims of the extraordinary rendition program should have a fair opportunity to be compensated under the Alien Tort Statute. Judge Hawkins put forth a viable judicial framework in his dissenting *Jeppesen II* opinion. By broadening the *Totten* bar, federal courts have completely abandoned judicial control and enabled intolerable abuses, including torture.\(^{217}\) In our age of terrorism, the balance between national security and individual rights is difficult to strike. It is a problem not easily solved. America is certainly a humanitarian country. At the same time, extremists throughout the world are a real threat to humankind. And the Executive Branch undoubtedly performs an indispensable function by fighting against extremists.

But victims of the extraordinary rendition program should receive a civil remedy after they are unlawfully tortured and discarded in their homelands by the United States government with the assistance of transnational corporations. The political climate is not right for a legislative solution, and the Executive Branch will certainly attempt to avoid doing anything that might undermine its own policies. That leaves it up to the only other branch of government—the Judicial Branch. It remains to be seen whether other federal judges will join in Judge Hawkins’s efforts to end the eclipse of human rights by compensating victims of the extraordinary rendition program for injuries they suffered at American hands.

*John P. Blanc*

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\(^{217}\) *See supra* text accompanying note 6.

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