Restoring Balance to Checks and Balances: Checking the Executive's Power Under the State Secrets Doctrine, *Mohamed v. Jeppesen Dataplan, Inc.*

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RESTORING BALANCE TO CHECKS AND BALANCES: CHECKING THE EXECUTIVE’S POWER UNDER THE STATE SECRETS DOCTRINE, MOHAMED v. JEPPESEN DATAPLAN, INC.

Jessica Slattery Karich*

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I. INTRODUCTION

Judicial application of the state secrets doctrine to cases in the post-September 11, 2001 era has become increasingly controversial and sparked much debate. The Ninth Circuit Court of Appeals ruled, in a sharply divided 6-5 en banc decision, that the state secrets doctrine applied to dismiss a lawsuit alleging egregious violations of human rights. In Mohamed v. Jeppesen Dataplan, Inc. ("Jeppesen II") the plaintiffs alleged that a private, contracted corporation knowingly participated in the Central Intelligence Agency’s ("CIA") extraordi-

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nary rendition program by providing flights and other logistical support, which facilitated the plaintiffs’ unlawful disappearance and torture.1 The United States government intervened to dismiss the case because it involved allegedly confidential state secrets. The court, faced with the difficult task of balancing national security interests with individual liberty interests, “reluctantly” concluded that the presence of state secrets required dismissal.2

_Jeppesen II_ has elevated the debate over the proper application of the state secrets doctrine and fueled discussion about its possible constitutional implications. Commentators argue that the doctrine presents a tension between the Article II Commander-in-Chief Clause giving the executive authority to take measures deemed appropriate during wartime, and the Judiciary’s Article III responsibilities to provide executive oversight and a forum for plaintiffs to exercise their due process right to pursue cases and controversies.

This case note closely examines _Jeppesen II_, gives an overview of its place on the continuum of judicial application of the state secrets doctrine, including significant post-September 11, 2001 cases, discusses pending legislative reform to the state secrets doctrine, and concludes that such reform is necessary to clarify the proper application of the doctrine and restore balance between the competing executive and judicial constitutional interests. A clear articulation of the state secrets doctrine will assist in alleviating concerns about executive overreaching, protecting the confidentiality of sensitive intelligence information, and providing a forum for judicial recourse.

Contrary to popular contention, however, reforming the state secrets doctrine is not the exclusive responsibility of Congress. To be effective, reform of the state secrets doctrine must ultimately involve a “cooperative,” checks and balances driven process in which each branch of government plays an important role. While legislative reform is necessary to change the status quo, it is within the purview of the executive to comply with such reforms, and the judiciary to hold the government accountable to these legal standards. Such cooperative reform will result in changed application of the state secrets doctrine and return the doctrine to an evidentiary rule, restoring the proper balance between protecting state secrets and individual liberty interests.

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1 Mohamed v. Jeppesen Dataplan, Inc. (_Jeppesen II_), 614 F.3d 1070, 1076–77 (9th Cir. 2010).
2 _Id._ at 1073. The American Civil Liberties Union filed a petition for a writ of certiorari to the Supreme Court on December 7, 2010, in _Jeppesen II_, presenting to the Court the question as “whether 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.” The Supreme Court denied certiorari on May 16, 2011. 131 S. Ct. 2442 (2011).
II. **JEPPESSEN II: PROCEDURAL HISTORY AND FACTUAL BACKGROUND**

A. **Procedural History**

Plaintiffs Binyam Mohamed, Abou Elkassim Britel, Ahmed Agiza, Mohamed Farag, Ahmed Bashmilah, and Bisher Al-Rawi (collectively “Plaintiffs”)—foreign nationals suspected of terrorist activities—filed a civil suit against Defendant Jeppesen Dataplan, Inc. (“Jeppesen”) under the Alien Tort Statute\(^3\) alleging that Jeppesen was either “actively participating in” or “aiding and abetting” the CIA’s extraordinary rendition program to gather intelligence by apprehending Plaintiffs and by transferring Plaintiffs in secret to foreign countries for detention and interrogation.\(^4\) Specifically, Plaintiffs asserted seven theories of liability under two claims in the complaint: one for “forced disappearance” and one for “torture and other cruel, inhuman or degrading treatment.”\(^5\)

Before Jeppesen filed an answer to the complaint, the United States government moved to intervene in the case and to dismiss Plaintiffs’ complaint based on the application of the state secrets doctrine.\(^6\) In support of the motion to dismiss, the government attached two declarations from then-CIA Director General Michael Hayden, one of which was redacted and public and the other was classified.\(^7\) The redacted, public declaration states, “[d]isclosure of the information covered by this privilege assertion reasonably could be expected to cause serious—and in some instances, exceptionally grave—damage to the national security of the United States and, therefore, the information should be excluded from any use in this case.”\(^8\) It adds that “because highly classified information is central to the allegations and issues in this case, the risk is great that further litigation will lead to disclosures harmful to United States national security and, accordingly, this case should be dismissed.”\(^9\)

Plaintiffs objected to the motion to dismiss, but did not oppose the government’s intervention.\(^10\) The district court granted the motions to intervene and

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\(^3\) 28 U.S.C. § 1350 (2006). The Alien Tort Statute gives United States courts original jurisdiction to hear cases “by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States,” whether or not that conduct is committed outside the United States. *Id.*

\(^4\) *Jeppesen II*, 614 F.3d at 1076.

\(^5\) *Id.* at 1075.

\(^6\) *Id.* at 1076.

\(^7\) *Id.*

\(^8\) *Id.* (internal quotations omitted).

\(^9\) *Id.*

\(^10\) Mohamed v. Jeppesen Dataplan, Inc., 539 F. Supp. 2d 1128, 1133 (N.D. Cal. 2008), rev’d 563 F.3d 992 (9th Cir. 2009), amended by (Jeppesen I), 579 F.3d 943, 953, 961–62 (9th Cir. 2009), rehe’g en banc granted 586 F.3d 1108 (9th Cir. 2009), aff’d on other grounds on rehe’g en banc 614 F.3d 1070 (9th Cir. 2010).
to dismiss and entered judgment in favor of Jeppesen because “at the core of Plaintiffs’ case against . . . Jeppesen are ‘allegations’ of covert U.S. military or CIA operations in foreign countries against foreign nationals—clearly a subject matter [that] is a state secret” and, therefore, categorically barred from litigation.11

On appeal to the Ninth Circuit, a three-judge panel reversed and remanded, holding that the government failed to establish a basis for wholesale dismissal under the state secrets doctrine.12 The court, however, left the government with the possibility of asserting the state secrets doctrine at subsequent stages of litigation.13

The Ninth Circuit then took the case en banc to “resolve questions of exceptional importance regarding the scope and application of the state secrets doctrine.”14 In its controversial 6-5 decision the Ninth Circuit broadly applied the state secrets doctrine to dismiss the case and deny the Plaintiffs judicial recourse.15

B. Factual Background

1. Plaintiffs

According to the complaint, the United States government subjected Plaintiffs Agiza, Britel, Mohamed, al-Rawi, and Bashmilah to the CIA’s extraordinary rendition program16 during which they faced torture, disappearance, and secret detention.17 Each Plaintiff’s particular factual circumstances are set forth below in turn.

Plaintiff Ahmed Agiza, an Egyptian national who had been in Sweden seeking asylum, alleged that Swedish authorities captured him and transferred him to United States custody.18 The United States government then allegedly flew Agiza to Egypt where he was held for five weeks, repeatedly beaten, and subjected to electric shock through electrodes attached to his “ear lobes, nipples and genitals.”19 After two and a half years of detention, Agiza was given a six-hour trial by military tribunal, convicted, and sentenced to fifteen years in an

11 Jeppesen II, 614 F.3d at 1077–78.
12 Jeppesen I, 579 F.3d at 953, 961-62, reh’g en banc granted 586 F.3d 1108 (9th Cir. 2009).
13 Id.
14 Jeppesen II, 614 F.3d at 1077 (citing Fed. R. App. P. 35(a)(2)).
15 Id. at 1073.
16 The Ninth Circuit noted that Plaintiffs alleged that the extraordinary rendition program “allowed agents of the U.S. government to employ interrogation methods that would otherwise have been prohibited” under the law. Id.
17 Id. at 1075.
18 Id. at 1074.
19 Id.
Egyptian prison. Plaintiffs’ complaint contends that Swedish government officials have publicly acknowledged virtually all aspects of Agiza’s extraordinary rendition.

Similarly, Plaintiff Abou Elkassim Britel, an Italian citizen of Moroccan origin, was arrested in Pakistan and, after several months, transferred to United States’ custody. Britel alleges that United States officials dressed him in a diaper, shackled and blindfolded him for a flight to Morocco, held him incommunicado, beat him, deprived him of food and sleep, and threatened him with “sexual torture.” Britel also alleges that the United States government coerced him into signing a false confession. Thereafter he was convicted of terrorism-related charges and sentenced to serve fifteen years in a Moroccan prison.

Plaintiff Binyam Mohamed, an Ethiopian citizen and legal resident of the United Kingdom, was arrested in Pakistan and flown to Morocco allegedly under conditions similar to Plaintiff Britel. Mohamed contends that he was repeatedly and severely beaten, had his bones broken, was cut with a scalpel all over his body, and forced to endure the pouring of “hot stinging liquid” into his open wounds. He also maintains that he was deprived of food, kept in near-darkness, and subjected to “extremely loud music day and night” and other loud noises such as the screams of women and children. Mohamed was then transferred to the United States military prison at Guantanamo Bay, Cuba where he remained for five years. During the pendency of the appeal to the Ninth Circuit, Mohamed was released to the United Kingdom.

Plaintiff Bisher al-Rawi, an Iraqi citizen and legal resident of the United Kingdom, was detained in Gambia. He alleges that the Gambian Intelligence Agency shackled and diapered him, flew him to Afghanistan, and detained him in a dark prison where loud noises played twenty-four hours per day. Al-Rawi also maintains that he was then flown to Bagram Air Base, where United States officials “subjected [him] to humiliation, degradation, and physical and psychological torture.” He also alleges that he was beaten, deprived of sleep, threat-
ened with death, and was shackled in “excruciating pain” for his flight to Guantanamo. Al-Rawi was eventually released and returned to the United Kingdom.

Plaintiff Farag Ahmed Bashmilah, a Yemeni citizen, was detained in Jordan. Bashmilah alleges that Jordanian government officials physically and psychologically abused him before handing him over to the United States government. He contends that United States government agents flew him to Afghanistan in a manner similar to the other Plaintiffs, and placed him in 24-hour dark, solitary confinement where he was deprived of sleep and shackled in painful positions. Subsequently, he was placed in 24-hour light and loud noise. Bashmilah was eventually brought to Yemen where he was tried and convicted of a petty crime, sentenced to time served, and released.

2. Defendant Jeppesen

Plaintiffs allege that it was a Jeppesen flight that carried them to the above-mentioned torture centers, often under excruciating circumstances. Jeppesen is a United States corporation wholly owned by the Boeing Company. The complaint asserts that Jeppesen played an integral role in the forced abductions and detentions and provided direct services to the United States’ extraordinary rendition program with actual or constructive “knowledge of the objectives of the rendition program.” This includes knowledge that Plaintiffs would be “subjected to forced disappearance, detention and torture” by United States and foreign government officials.

This knowledge can be inferred, Plaintiffs allege, because Jeppesen “falsified flight plans submitted to European air traffic control authorities to

4 Id. at 949.
44 Id. at 951.
45 Id. (internal quotations omitted).
avoid public scrutiny of CIA flights. Moreover, a Jeppesen former employee gave a declaration, sworn and under oath, that his supervisor admitted to him that "[w]e do all the extraordinary rendition flights" and that "the rendition flights paid very well." He also testified under oath that "there were some employees who were not comfortable with that aspect of Jeppesen's business because they knew some of these flights end up with the passengers being tortured." However, he testified, his supervisor explained "that's just the way it is, we're doing them." Plaintiffs also allege that Jeppesen knew or should have known that there was a possibility of torture or related conduct because it was carrying suspects for the CIA and the governments of the destination countries routinely subject detainees to torture, which the United States Department of State itself acknowledges.

III. STATE SECRETS DOCTRINE: LEGAL BACKGROUND

In Jeppesen II the Ninth Circuit majority outlines the history of the state secrets doctrine in its effort to interpret and apply the doctrine de novo to Plaintiffs' alleged facts. The state secrets doctrine can be applied in one of two ways to prevent the disclosure of state secrets in the interest of national security. On one hand, the Totten bar operates as a blanket prevention of the adjudication of claims premised on state secrets. The Reynolds privilege, on the other hand, is an evidentiary privilege, which can exclude evidence from a case and in some circumstances may result in dismissal of the claims. Thus, the Totten bar automatically requires dismissal of the case, whereas the Reynolds privilege removes only the privileged evidence from the litigation. In some instances application of the Reynolds privilege may lead to dismissal if the case cannot proceed without the privileged evidence, or if litigating the case to a judgment on the merits would present an "unacceptable risk of disclosing the state secrets." At this point, "the Reynolds privilege converges with the Totten bar" because both require dismissal. Both the Totten bar and the Reynolds privilege are discussed below, along with cases illustrating their post-9/11 application, which informed the Ninth Circuit in its state secrets doctrine analysis in Jeppesen II.

46 Jeppesen II, 614 F.3d at 1076.
47 Id. (internal quotations omitted).
48 Id. at 1076.
49 See Totten v. United States, 92 U.S. 105 (1875).
50 See United States v. Reynolds, 345 U.S. 1 (1953).
51 Jeppesen II, 614 F.3d 1070, 1079 (9th Cir. 2010).
52 Id. at 1083.
A. The Totten Bar

The Totten bar originated with a post-Civil War contract dispute. In Totten, the estate of an alleged spy claimed that the United States had not adequately compensated him for espionage services rendered during the Civil War, allegedly pursuant to contract.\(^\text{56}\) The spy contended that he was commissioned for $200 per month to ascertain the strength of the Confederate Army and "gain such other information as might be beneficial to the government of the United States."\(^\text{57}\) The lower court found that the spy had faithfully performed his duties under the alleged agreement during the entire period of the war, but he had not been paid for his work, only reimbursed for his expenses.\(^\text{58}\)

The Supreme Court held on appeal that the action was barred in its entirety because it was based on the existence of a "contract for secret services with the government," which was "a fact not to be disclosed."\(^\text{59}\) Moreover, a spy contract in itself contains an implied covenant that its existence will never be revealed and this covenant would be broken by bringing suit.\(^\text{60}\) Thus, the Supreme Court stated, "as a general principle[] public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters [that] the law itself regards as confidential . . . ."\(^\text{61}\) Stated differently,

Totten [stands] for the proposition that where the very subject matter of the action is a matter of state secret, an action may be dismissed on the pleadings without ever reaching the question of evidence because it is so obvious that the action should never prevail over the privilege.\(^\text{62}\)

Thus, the Totten bar not only defeats the claims, but prevents judicial inquiry entirely.\(^\text{63}\) Thus, Totten, as confirmed in Tenet v. Doe,\(^\text{64}\) recognizes that

\(^\text{56}\) Totten, 92 U.S. at 105.
\(^\text{57}\) Id. at 105–06.
\(^\text{58}\) Id. at 106.
\(^\text{59}\) Id. at 107.
\(^\text{60}\) Id. at 106 ("Both employer and agent must have understood that the lips of the other were to be for ever [sic] sealed respecting the relation of either to the matter. This condition of the engagement was implied from the nature of the employment . . . .").
\(^\text{61}\) Id. at 107.
\(^\text{62}\) Jeppesen II, 614 F.3d 1070, 1077–78 (9th Cir. 2010). (quotation omitted); see also Weinberger v. Catholic Action of Hawaii/Peace Educ. Project, 454 U.S. 139, 146–47 (1981) (applying Totten to bar lawsuit as "beyond judicial scrutiny" because allegations stemmed from failure to prepare environmental impact statement for proposed nuclear weapon storage and the government could neither admit nor deny it proposed to store said weapons due to national security).
\(^\text{63}\) Jeppesen II, 614 F.3d at 1078 (quotation omitted); see also Tenet v. Doe, 544 U.S. 1, 7, n.4 (2005) (applying Totten to dismiss case involving former Cold War spies who accused CIA of
there is a category of secret information that is essentially beyond the powers of
the judiciary to adjudicate. As most recently concluded by the majority in Jeppesen II, the Totten bar is not limited to claims premised on an espionage relationship or other secret agreement with the government, but rather can be applied in any case where the very subject matter of the action is a matter of state secret.65 Thus, the key question in determining whether Totten applies is whether the very subject matter of the action is a matter of state secret and a complete bar to litigation is necessary to prevent revelation of those secrets harmful to national security.66

Most recently, in an opinion issued on May 23, 2011, the Supreme Court relied on Totten and Tenet in the consolidated cases of General Dynamics v. United States and Boeing v. United States ("General Dynamics").67 In General Dynamics, defense contractors challenged the government’s assertion of the state secrets doctrine to block their defense in a contract dispute. The Court held that, when a court dismisses a contractor’s prima facie valid affirmative defense to the government’s allegations of breach of contract to protect state secrets, the proper remedy is to leave the parties where they were on the day they filed suit, as did the Court in Totten and Tenet.68 Thus, when full litigation “would inevitably lead to the disclosure of” state secrets, courts may not try the claims and may not award relief to either party.69 The Court was careful to focus its holding narrowly on the government contracting context, and reaffirmed that “the state secrets evidentiary privilege is not to be lightly invoked.”70

B. The Reynolds Privilege

In Reynolds, a military aircraft carrying state secret electronic equipment crashed, killing three civilians.71 The estates of the three civilians brought a lawsuit against the government and requested in discovery the Air Force’s official accident-investigation reports, among other things, to demonstrate neg-

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64 544 U.S. at 7.
65 Jeppesen II, 614 F.3d at 1078–79 (citing Al-Haramain Islamic Found., Inc. v. Bush, 507 F.3d 1190, 1197 (9th Cir. 2007)).
66 Id. at 1078–79.
68 Id. at 1906.
69 Id. at 1907–08 (noting that neither party would be happy with the result) (quoting Totten, 92 U.S. at 107).
70 Id. at 1910 (quoting United States v. Reynolds, 345 U.S. 1, 7 (1953)).
71 Reynolds, 345 U.S. at 2–3.
ligence. The Air Force refused to produce the documents on the basis that they contained national security and military secrets and because producing them "would not be in the public interest." The district court ordered production of the documents in camera to assess the validity of the government’s claim that the documents contained secrets. When the government again refused to produce the documents, the district court resolved any disputes of fact on the negligence claim in the plaintiffs’ favor.

On appeal, the Third Circuit Court of Appeals affirmed but the Supreme Court reversed, noting that courts should not “jeopardize the security which the privilege is meant to protect by insisting upon examination,” even if such examination is ex parte. Accordingly, the Court found that the government was allowed to assert a claim of privilege to prevent discovery of the evidence. The Court did, however, agree with part of the Third Circuit’s reasoning when it noted that the greater the necessity for the allegedly privileged information in presenting the case, the greater the need for the court to “probe in satisfying itself that the occasion for invoking the privilege is appropriate.” The Court noted that “[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers.”

In its analysis, the Supreme Court put forward an analytical framework for evaluating a claim of privilege, including that: the claim be asserted by the head of the department with the responsibility for the information; the court determines whether its disclosure would pose a “reasonable danger . . . to national security” while bearing in mind both the plaintiff’s need for the information to litigate its case and the risk of jeopardizing the security of the information by insisting on examination; and, if the “reasonable danger” standard is met, the privilege cannot be overcome by the plaintiff’s showing of a need for the information.

The Ninth Circuit in Jeppesen II stated the framework for asserting the Reynolds privilege as involving three steps:

First, we must “ascertain that the procedural requirements for invoking the state secrets privilege have been satisfied.” Second, we must make an independent determination whether the information is privileged. . . . Finally, “the ultimate question

72 Id. at 3.
73 Id. at 4.
74 Id. at 5.
75 Id.
76 Id. at 10.
77 Id. at 10–12.
78 Id. at 11.
79 Id. at 9–10.
80 Id.
to be resolved is how the matter should proceed in light of the successful privilege claim.”  

The Reynolds Court ultimately found that there was a “reasonable danger” that the accident-investigation report would contain references to the secret electronic equipment, which was the primary concern of the mission. It reasoned that “[t]oo much judicial inquiry into the claim of privilege would force disclosure of the thing the privilege was meant to protect . . . .” The Court opined that this “is a time of vigorous preparation for national defense” and that the “electronic devices must be kept secret if their full military advantage is to be exploited in the national interests.” Rather than dismiss the case, however, the Supreme Court noted that the electronic equipment was unrelated to the cause of the accident and remanded the case to the district court so that the plaintiffs could establish their claims without the privileged reports.

C. Significant Post-9/11 State Secrets Cases

1. El Masri v. United States

In El Masri, Khaled El-Masri, a German citizen who the United States government allegedly subjected to extraordinary rendition, contended that his detention and torture was the result of mistaken identity. In December 2003, Macedonian authorities arrested El-Masri while he was traveling in Macedonia. El-Masri spent twenty-three days in Macedonian custody, after which he was handed over to CIA operatives. According to El-Masri, CIA operatives flew him to a detention facility near Kabul, Afghanistan and held him for nearly five months before they released him in Albania. Albanian authorities took El-Masri to an airport from where he travelled home to Germany.

El-Masri’s complaint alleged that he had been held against his will, beaten, drugged, bound, and blindfolded as part of his transport and interrogation.
He also alleged that he was confined to a small, unsanitary cell and held incommunicado.92

Much like the plaintiffs in *Jeppesen II*, El-Masri brought a lawsuit against the then-director of the CIA, the airlines complicit in his rendition, and various other individuals under three causes of action, including violations of the Alien Tort Statute for violating international laws against prolonged, arbitrary detention and cruel, inhuman, or degrading treatment.93 El-Masri contended that the CIA believed they had the wrong person early on in his detention.94

The United States government intervened, asserted the state secrets doctrine, and sought dismissal of the lawsuit, arguing that interposition of the privilege precluded litigation of El-Masri’s causes of action.95 The then-director of the CIA submitted two sworn declarations in support of the state secrets claim—one that was classified and one that was public.96 These declarations described the reasons for asserting the privilege, the information the government sought to protect, how allowing the case to continue would unreasonably risk the information’s disclosure, and how the disclosure would be detrimental to national security.97 The district court found that the government’s state secrets claim was valid and required dismissal of the lawsuit before the government had filed an answer in response to El-Masri’s complaint.98

El-Masri appealed to the Fourth Circuit Court of Appeals, arguing that the state secrets doctrine did not require dismissal of his case because details about his case, including the United States government’s use of irregular rendition, were public knowledge and that any state secrets in existence were not so central to the case that any attempt at further litigation would threaten their disclosure.99 El-Masri also contended that the district court misapplied the state secrets doctrine in dismissing his complaint without requiring any responsive pleadings from the defendants or permitting any discovery.100

In what has become a highly controversial passage, the Fourth Circuit majority stated

> Although the state secrets privilege was developed at common law, it performs a function of constitutional significance, because it allows the executive branch to protect information

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92 *Id.*
93 *Id.* at 300–01.
94 *Id.* at 300.
95 *Id.* at 301.
96 *Id.*
97 *Id.*
98 *Id.* at 302.
99 *Id.*
100 *Id.*
whose secrecy is necessary to its military and foreign-affairs responsibilities . . . . The state secrets privilege that the United States has interposed in this civil proceeding thus has a firm foundation in the Constitution, in addition to its basis in the common law of evidence.\textsuperscript{101}

Using the three-part analysis set forth in \textit{Reynolds}, the court found that the government had satisfied its procedural requirements, that the information that it sought to shield was a state secret, and that there was a reasonable danger disclosure would expose military or intelligence matters which, in the interest of national security, should not be divulged.\textsuperscript{102} In doing so, the court gave the executive branch’s assessment of the risk of disclosure “utmost deference” and stated that

the Executive and the intelligence agencies under his control occupy a position superior to that of the courts in evaluating the consequences of a release of sensitive information . . . . Indeed, in certain circumstances a court may conclude that an explanation by the Executive of why a question cannot be answered would itself create an unacceptable danger of injurious disclosure. In such a situation, a court is obliged to accept the executive branch’s claim of privilege without further demand.\textsuperscript{103}

The court foreclosed the possibility of an in camera inspection, held that the facts necessary to litigate the case were state secrets, and affirmed the district court’s dismissal of the case in its entirety.\textsuperscript{104} The Supreme Court denied certiorari in 2007.\textsuperscript{105}

2. \textit{Al-Haramain Islamic Found. v. Bush}

In \textit{Al-Haramain}, a case decided shortly after \textit{El-Masri} and cited extensively in the court’s analysis in \textit{Jeppesen II}, the Ninth Circuit examined closely the state secrets doctrine as applied to a challenge against the United States government’s terrorist surveillance program (“TSP”).\textsuperscript{106} In this case, Al-
Haramain Islamic Foundation ("Al-Haramain")—a Muslim charity active in more than 50 countries—brought suit against then-President Bush and other executive branch agencies and officials claiming that they were subject to warrantless electronic surveillance in violation of the Foreign Intelligence Surveillance Act ("FISA") and constitutional and international law.\(^\text{107}\) The government moved to dismiss Al-Haramain’s case citing the state secrets doctrine and asserting that the very subject matter of the action was a state secret.\(^\text{108}\) In support of its motion, the government submitted public and classified versions of declarations from the then-Director of National Intelligence and the National Security Agency, which stated that continuing the litigation would result in the disclosure of information that could cause "grave damage to national security."\(^\text{109}\)

As a part of its privilege assertion, the government also sought to bar from discovery a top-secret, sealed document (the "Sealed Document") that had been inadvertently given to Al-Haramain in 2004.\(^\text{110}\) The district court deemed the Sealed Document a state secret, and recognized that it was essential to proving Al-Haramain’s claim that it had been subjected to warrantless surveillance, but did not bar the lawsuit altogether.\(^\text{111}\) It held that the inadvertent disclosure of the Sealed Document "did not alter its privileged nature"\(^\text{112}\) and ruled that Al-Haramain was barred from accessing the document.\(^\text{113}\) The court, however, also ordered that Al-Haramain "would be permitted to file in camera affidavits attesting to the contents of the document based on the memories of lawyers who had received copies,"\(^\text{114}\) in other words, to reconstruct the essence of the Sealed Document through memory to support Al-Haramain’s assertion of standing and its prima facie case.\(^\text{115}\)

The district court certified the order for interlocutory appeal sua sponte.\(^\text{116}\) The Ninth Circuit granted interlocutory review and consolidated the appeal with another case.\(^\text{117}\) On appeal, the government argued that the state secrets doctrine mandated the dismissal of Al-Haramain’s claims for three reasons: (1) the very subject matter of the litigation was a state secret; (2) Al-Haramain was unable to show standing to bring suit without the Sealed Document; and (3) Al-Haramain could not establish a prima facie case, and the gov-

\(^{107}\) Id. at 1193–94.

\(^{108}\) Id. at 1195.

\(^{109}\) Id.

\(^{110}\) Id. at 1193.

\(^{111}\) Id.

\(^{112}\) Id.

\(^{113}\) Id. at 1195–96.

\(^{114}\) Id. at 1193 (alteration in the original).

\(^{115}\) Id. at 1196.

\(^{116}\) Id.

\(^{117}\) Id.
ernment could not defend against Al-Haramain’s assertions, without resorting to state secrets.\textsuperscript{118}

The Ninth Circuit held that the very subject matter of the litigation—the government’s alleged warrantless surveillance program under the TSP—was not protected by the state secrets doctrine because it had already been “the subject of significant discussion and interest.”\textsuperscript{119} In the court’s analysis of the government’s invocation of the state secrets doctrine as to the Sealed Document and its assertion that Al-Haramain could not establish either standing or a prima facie case without the use of state secrets, it found that the district court was correct in concluding that the Sealed Document was privileged.\textsuperscript{120} The Ninth Circuit held that the district court erred in permitting Al-Haramain to file in camera affidavits attesting to the contents of the document.\textsuperscript{121} Such an approach “countenance[d] a back door around the privilege and would [have] eviscerate[d] the state secret itself. Once properly invoked and judicially blessed, the state secrets privilege is not a half-way proposition.”\textsuperscript{122} Thus, the court held, it was necessary to completely bar the Sealed Document, its contents, and any individuals’ memories of its contents.\textsuperscript{123}

Absent the Sealed Document, the court held, Al-Haramain could not establish standing because he could not show that he suffered an injury in fact.\textsuperscript{124} As such, the court reversed and remanded the case to the district court instructing it to dismiss Al-Haramain’s claims unless FISA were to preempt the state secrets doctrine.\textsuperscript{125}

IV. JEPESEN II: MAJORITY AND DISSENT ANALYSIS

A. Majority Analysis: State Secrets Require Dismissal

In Jeppesen II, the most recent addition to state secret doctrine jurisprudence, the Ninth Circuit agreed with the government’s argument that the state secrets were so central to the case that permitting further proceedings would create an intolerable risk of disclosure that would jeopardize national security.\textsuperscript{126}

\textsuperscript{118}Id. at 1197.
\textsuperscript{119}Id. at 1200.
\textsuperscript{120}Id. at 1204.
\textsuperscript{121}Id.
\textsuperscript{122}Id. at 1193.
\textsuperscript{123}Id. at 1204–05.
\textsuperscript{124}Id. at 1205.
\textsuperscript{125}Id. at 1206. On remand, the district court held that FISA preempted the state secrets doctrine, but that plaintiffs could not use sealed classified document to establish their status as “aggrieved persons” within meaning of FISA. \textit{In re Nat’l Sec. Agency Telecomm. Records Litig.}, 564 F. Supp. 2d 1109, 1111 (N.D. Cal. 2008). The court then dismissed the complaint but granted Al-Haramain leave to amend. \textit{Id.} at 1137.
\textsuperscript{126}Jeppesen II, 614 F.3d 1070, 1083 (9th Cir. 2010).
The court was not convinced outright, as was the district court, that the very subject matter of the dispute was a state secret requiring dismissal under Totten, but found that the district court reached the right result nonetheless because dismissal was warranted under Reynolds.\textsuperscript{127}

In its three-step analysis under the Reynolds privilege, the court first found that it was undisputed that the government met the procedural requirements for asserting the privilege.\textsuperscript{128} The privilege was asserted by General Michael Hayden, then-director of the CIA, along with public and classified declarations.\textsuperscript{129} The court noted that, at oral argument, it was informed that even Attorney General Eric Holder had reviewed and approved the privilege claim.\textsuperscript{130} The court also found that, despite Plaintiffs' argument that the government asserted the privilege prematurely because there had been no request for production of evidence, the privilege could be asserted at any time, even at the pleading stage, so the government's claim was timely.\textsuperscript{131}

Second, the court looked at whether and to what extent the evidence at issue was in fact a state secret.\textsuperscript{132} In doing so, it looked at the four categories of evidence over which the government asserted the state secrets privilege, including:

(1) information that would tend to confirm or deny whether Jeppesen or any other private entity assisted the CIA with clandestine intelligence activities; (2) information about whether any foreign government cooperated with the CIA in clandestine intelligence activities; (3) information about the scope or operation of the CIA terrorist detention and interrogation program; or (4) any other information concerning CIA clandestine intelligence operations that would tend to reveal intelligence activities, sources, or methods.\textsuperscript{133}

The court reviewed the government's public and classified declarations and was persuaded that inadvertent disclosure of the evidence would seriously

\textsuperscript{127} Id. at 1084. The court stated that district courts presented with disputes about state secrets should ordinarily undertake a Reynolds analysis before deciding whether dismissal on the pleadings is justified, "[b]ecause the Totten bar is rarely applied and not clearly defined, because it is a judge-made doctrine with extremely harsh consequences and because conducting a more detailed analysis would tend to improve the accuracy, transparency and legitimacy of the proceedings . . . ." Id. The court concluded that the district court's dismissal was correct under Reynolds without addressing Totten.

\textsuperscript{128} Id. at 1085.

\textsuperscript{129} Id. at 1080.

\textsuperscript{130} Id.

\textsuperscript{131} Id.

\textsuperscript{132} Id. at 1086.

\textsuperscript{133} Id. (quotations omitted).
harm legitimate national security interests.\textsuperscript{134} The court refused, however, to explain precisely which matters the privilege covered to prevent jeopardizing the secrets the privilege is bound to protect.\textsuperscript{135}

Third, after finding that the evidence was privileged, the court looked at whether the case required dismissal.\textsuperscript{136} The court noted that there are essentially three circumstances where the Reynolds privilege would justify terminating a case.\textsuperscript{137} These include if (1) the plaintiff cannot prove the prima facie elements of her claim with non-privileged evidence; (2) if the privilege deprives the defendant of information that would otherwise give the defendant a valid defense to the claim;\textsuperscript{138} or (3) if the privileged evidence is inseparable from non-privileged evidence necessary for the claims or defenses and litigating the case to judgment on the merits would present an unacceptable risk of disclosing state secrets.\textsuperscript{139}

The court found that there was no feasible way to litigate Jeppesen’s alleged liability without creating an unjustifiable risk of divulging state secrets.\textsuperscript{140} It reasoned that all Plaintiffs’ claims described Jeppesen as providing logistical support as part of an extraordinary rendition process, aspects of which were protected by the state secrets privilege.\textsuperscript{141} Notwithstanding the fact that some of the information about the process had been made public, Jeppesen’s alleged role and liability could not be isolated from other facts that were secret.\textsuperscript{142} Thus, the facts were so intertwined that any of Jeppesen’s attempts to defend itself would have created a risk of revealing state secrets.\textsuperscript{143} The court stated that “the relevant secrets are difficult or impossible to isolate and even efforts to define a boundary between privileged and unprivileged evidence would risk disclosure by implication” and, therefore, the case required dismissal.\textsuperscript{144}

The court offered a few “observations”, one of which was that the government certified at oral argument that its assertion of the state secrets privilege comported with the revised standards set forth in the Obama Administration’s memorandum requiring “the responsible agency to show that assertion of the privilege is necessary to protect information the unauthorized disclosure of

\textsuperscript{134} Id.
\textsuperscript{135} Id.
\textsuperscript{136} Id. at 1087.
\textsuperscript{137} Id. at 1083.
\textsuperscript{138} Id. (citing Kasza v. Browner, 133 F.3d 1159, 1166 (9th Cir. 1998)).
\textsuperscript{139} Id. (citing Kasza, 133 F.3d at 1166).
\textsuperscript{140} Id. at 1088.
\textsuperscript{141} Id.
\textsuperscript{142} Id.
\textsuperscript{143} Id.
\textsuperscript{144} Id. at 1089. Notably, on December 7, 2010, Plaintiffs filed a petition for writ of certiorari to the United States Supreme Court appealing the Ninth Circuit ruling in Jeppesen II. The Supreme Court denied certiorari on May 16, 2011. 131 S. Ct. 2442 (2011).
which reasonably could be expected to cause significant harm to the national defense or foreign relations.”\textsuperscript{145} The assertion also allegedly comported with the Department of Justice mandate to not defend an invocation of the privilege to:

(i) conceal violations of the law, inefficiency, or administrative error; (ii) prevent embarrassment to a person, organization, or agency of the United States government; (iii) restrain competition; or (iv) prevent or delay the release of information the release of which would not reasonably be expected to cause significant harm to national security.\textsuperscript{146}

The court went on to suggest four non-judicial remedies for Plaintiffs. One such remedy was that that the United States government, on its own volition, could determine whether Plaintiffs’ claims have merit and whether Plaintiffs’ human rights were violated and find a way of making reparations to Plaintiffs.\textsuperscript{147} Second, Congress could conduct investigations to determine whether the executive branch has engaged in wrongdoing.\textsuperscript{148} Third, Congress could enact a private bill permitting compensation for any injury.\textsuperscript{149} Finally, the court suggested that Congress could enact remedial legislation authorizing causes of action and procedures to address claims like that of the Plaintiffs.\textsuperscript{150}

B. Dissent Analysis: Remand for Review of Evidence

The dissenting judges in \textit{Jeppesen II} agreed with the majority that the \textit{Reynolds} privilege requires courts to undertake a careful review of evidence that might support a claim or defense to determine whether either could be made without resort to legitimate state secrets.\textsuperscript{151} Where the dissent disagreed, however, was the nature of the review of such evidence.\textsuperscript{152}

The dissent stated that the state secrets doctrine should “sweep no more broadly than clearly necessary.”\textsuperscript{153} It made the important distinction that, although the state secrets doctrine is merely a judicial construct, with no foundation in the Constitution, courts often apply the doctrine to trump due process of law.\textsuperscript{154} The dissent accused the majority of blindly accepting the government’s

\begin{itemize}
\item \textsuperscript{145} Id. at 1090 (internal quotations omitted).
\item \textsuperscript{146} Id. (internal quotations omitted).
\item \textsuperscript{147} Id. at 1091.
\item \textsuperscript{148} Id.
\item \textsuperscript{149} Id. at 1092.
\item \textsuperscript{150} Id.
\item \textsuperscript{151} Id. at 1093 (Hawkins, J., dissenting).
\item \textsuperscript{152} Id.
\item \textsuperscript{153} Id. at 1093–94.
\item \textsuperscript{154} Id. at 1094.
\end{itemize}
threshold objection, which cut Plaintiffs off without an opportunity to even attempt to prove their case using non-secret evidence.\textsuperscript{155}

The dissent noted that "the [state secrets] doctrine is so dangerous as a means of hiding government misbehavior under the guise of national security, and so violative of common rights to due process, that courts should confine its application to the narrowest circumstances that still protect the government’s essential secrets."\textsuperscript{156} Here, the dissent asserted, the privilege was invoked at the inception of litigation and the claims of secret were "broad and hypothetical[.]" Therefore, there had been "maximum of interference" with due process while only a general claim of privilege.\textsuperscript{157}

The dissent chastised the district court for refusing to examine the "voluminous public record" materials supplied by Plaintiffs in support of their claims and for "failing to undertake" any analysis of Jeppesen's ability to defend against the claims.\textsuperscript{158} Similarly, the dissent chastened the majority for rewarding such behavior by refusing to remand the case for factual determinations by the district court.\textsuperscript{159} The majority failed to give the Plaintiffs' allegations set forth in their complaint proper weight under the rules and dismissed the claims under the premise that, even if Plaintiffs could have made a prima facie case, there was "no feasible way" to litigate Jeppesen's liability without risking the divulsion of state secrets.\textsuperscript{160} But, the dissent noted, Jeppesen had not yet answered the complaint so it had not yet put forward any claims or defenses and the court's conclusion constituted pure conjecture and extended the inquiry to what "might be divulged in future litigation."\textsuperscript{161}

The dissent then addressed the scope of the state secrets doctrine generally, rather than inappropriately engaging in "application to speculative facts."\textsuperscript{162} In doing so, the dissent noted that the Totten bar has only ever been applied to suits against the government, and never to a plaintiff's suit against a third-party/non-governmental entity as here.\textsuperscript{163} Thus, Totten's logic "simply cannot be stretched to encompass the claims here, as they are brought by third-party plaintiffs against non-government defendant actors for their involvement in tortious activities."\textsuperscript{164}

\textsuperscript{155} Id.
\textsuperscript{156} Id.
\textsuperscript{157} Id.
\textsuperscript{158} Id. at 1095.
\textsuperscript{159} Id.
\textsuperscript{160} Id. at 1095–96 (citing Majority at 1087).
\textsuperscript{161} Id. at 1096.
\textsuperscript{162} Id.
\textsuperscript{163} Id. at 1097.
\textsuperscript{164} Id.
Moreover, the Reynolds privilege cannot, as the majority contended, “be asserted during the pleading stage to excise entire allegations.”\textsuperscript{165} Rather, the dissent reasoned, the state secrets privilege can operate at the pleadings stage to allow a defendant’s refusal to answer certain allegations as an exception from the pleading requirements under the rules,\textsuperscript{166} not, as the government contends, to permit a defendant to avoid filing a responsive pleading at all.\textsuperscript{167} Thus, proper invocation of the privilege still obligates a defendant “to answer the allegations that can be answered and to make a specific claim of privilege as to the rest so that the suit can move forward.”\textsuperscript{168} Because the Reynolds privilege, like any other evidentiary privilege, extends only to evidence and not to facts, “it 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.”\textsuperscript{169}

The dissent, therefore, concluded that the majority’s analysis was premature.\textsuperscript{170} A determination that there was no feasible way to litigate Jeppesen’s liability without disclosing state secrets should only have been made once a responsive pleading was filed, or discovery requests were made.\textsuperscript{171} The dissent would have remanded the case to the district court for the government to assert the state secrets privilege with respect to specific evidence, and for the district court to determine “what evidence is privileged and whether any such evidence is indispensable to the claims or defenses.”\textsuperscript{172} And only if the district court finds the privileged evidence to be indispensable to either party should it dismiss the case.\textsuperscript{173}

As for the majority’s proposed non-judicial remedies, the dissent found fundamental fault with each one. Suggesting that the executive determine whether Plaintiffs’ claims have merit, the dissent contended, disregards checks and balances and permits the executive to “police its own errors,” which deprives Plaintiffs of a “fair assessment of their claims by a neutral arbiter.”\textsuperscript{174} Similarly, the majority’s suggestion of payment of reparations to the victims of extraordinary rendition, such as those paid to Japanese Americans for injustices suffered as a result of internment during World War II, over fifty years after those injustices were suffered, “raises the impractical to the point of absurd-
Lastly, a congressional investigation, private bill, or other remedial legislation, "leaves to the legislative branch claims which the federal courts are better equipped to handle." Thus, the dissent would have remanded to the district court to determine whether the case could proceed without resort to state secret evidence.

V. PROPOSED LEGISLATIVE REFORMS TO THE STATE SECRETS DOCTRINE

Although the state secrets doctrine has been judicially created, Congress has the power to preempt or modify the doctrine by statute. Specifically, Congress "retains the ultimate authority to modify or set aside any judicially created rules of evidence and procedure that are not required by the Constitution," and "has plenary authority over the promulgation of evidentiary rules for the federal courts."

The state secrets doctrine has, however, never been clarified by statute. Congress undertook reform efforts in 2008 out of concerns that the Bush Administration may have overreached in its claims of privilege by seeking more dismissals during the pleadings stage, and that courts have not used a uniform standard to assess those claims. A bipartisan group of senators introduced the State Secrets Protection Act, which called for a "safe, fair, and responsible state secrets privilege." In March 2008, members of the House of Representatives introduced their own State Secrets Protection Act. Representative Jerrold Nadler, Chairman of the House Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties, described the need to reform the privilege as follows:

If you have an Administration that is abusing civil liberties . . . improperly arrests someone . . . improperly tortures that person . . . one presumes that that Administration will not prosecute itself [or] . . . its own agents for those terrible acts.

The normal remedy in American law—the only remedy I know of—is for that person, once recovered from the torture, to sue

175 Id.
176 Id.
177 Id.
for various kinds of damages and in court elucidate the facts... and get some justice and perhaps bring [] to light what happened so that the Administration would not do it again or the next one wouldn’t.

If, however, that lawsuit can be dismissed right at the pleadings stage by the assertion of state secrets, and if the court doesn’t look behind the assertion... and simply takes it at face value... the government says state secrets would be revealed and it would harm the national security if this case went forward, therefore case dismissed, which seems to be the current state of the law—if that continues and we don’t change that, what remedy is there ever to enforce any of our constitutional rights?\(^{184}\)

During the pendency of the appeal in *Mohamed v. Jeppesen Dataplan, Inc.*, President Barack Obama succeeded President George W. Bush. The Obama Administration announced via a memorandum from the Attorney General effective October 1, 2009, that it would employ a new policy mandating a more rigorous internal review prior to invoking the state secrets doctrine.\(^{185}\) As applied to *Mohamed v. Jeppesen Dataplan, Inc.*, however, the government certified that the “highest levels of the Department of Justice” had reviewed the assertion of the doctrine and determined that it was appropriate notwithstanding the newly articulated policies.\(^{186}\)

The 2008 and 2009 proposed reforms marked Congress’ first legitimate attempt to clarify the state secrets doctrine and to allow courts greater flexibility in evaluating and applying the state secrets doctrine. Under the proposed legislation, courts would have the ability to conduct hearings on the documents claimed to be privileged in camera, ex parte, or through the participation of attorneys and legal experts with “appropriate security clearances” to review the materials.\(^{187}\)

These reform bills also require the government to produce an affidavit from the head of an agency,\(^{188}\) in addition to the evidence it claims is protected, for in camera review.\(^{189}\) Additionally, the Senate bill requires the government to


\(^{186}\) *Jeppesen II*, 614 F.3d 1070, 1077 (9th Cir. 2010).

\(^{187}\) S. 417, 111th Cong. § 4052 (2009).

\(^{188}\) *Id.* § 4053(d).

\(^{189}\) *Id.* § 4052(b)(1) (providing for in camera hearings except when the hearing relates solely to a question of law).
make efforts to produce a non-privileged alternative for any piece of evidence that the court has held to be privileged.\textsuperscript{190}

The current state of the law, conversely, permits the government to rely on affidavits alone to assert the state secrets doctrine. And, as shown by the cases discussed supra, has led to the government routinely moving for dismissal on the basis of the state secrets doctrine as early as the pleading stage. The proposed reforms to the state secrets doctrine would generally prevent dismissal before plaintiffs have had the opportunity to request discovery.\textsuperscript{191}

Moreover, instead of giving the executive branch the “utmost deference” in their claims of privilege, under the reform legislation, judges would give “substantial weight” to such claims.\textsuperscript{192} Additionally, the reforms require the Attorney General to report to Congress within 30 calendar days “on any case in which . . . the state secrets privilege” has been invoked, and members of the House and Senate Intelligence and Judiciary Committees would have the opportunity to examine evidence deemed protected by a court.\textsuperscript{193} Thus, the legislative reforms to the state secrets doctrine would bring about many changes that would, likely, result in far fewer dismissals during the pleading stage as was seen in \textit{Jeppesen II} and would instead provide more opportunities for litigants to pursue judicial recourse.

\section*{VI. Resolving Executive and Judicial Tensions: An Analysis}

In the post-September 11, 2001 era, the state secrets doctrine has become increasingly controversial and sparked much debate among legal scholars. The Ninth Circuit’s ruling in \textit{Jeppesen II} has served to amplify the debate over the proper application of the state secrets doctrine, which essentially turns on a balance between national security and individual liberty interests. Put another way, although most courts have found the state secrets doctrine to be an evidentiary privilege, rather than having constitutional roots, the doctrine’s inherent tension lies between the Article II Commander-in-Chief Clause giving the executive authority to take measures deemed appropriate during wartime, and the Judiciary’s Article III responsibility to provide executive oversight and a forum for plaintiffs to exercise their due process right to pursue cases and controversies.

Some commentators argue that, despite the alleged shocking conduct to which the plaintiffs in recent state secrets cases have been subjected, permitting the adjudication of their claims bears too significant a cost for United States

\textsuperscript{190} \textit{Id.} § 4054(e)(2)(B).
\textsuperscript{191} \textit{Id.} § 4055 (“After reviewing all pertinent evidence, privileged and non-privileged, a Federal court may dismiss a claim or counterclaim on the basis of the state secrets privilege . . . .”).
\textsuperscript{192} See S. 2533, 110th Cong. § 4054(e)(3) (2008).
\textsuperscript{193} \textit{Id.} § 4058(a)(1).
national security and foreign policy. Where the state secrets doctrine is properly invoked, there should be no remediation through judicial intervention. Protecting national security is within the executive’s power, and subversion by Congress or the judiciary is unconstitutional. Moreover, not every litigant with a colorable complaint against government action should be able to find civil redress in federal court—there is no general constitutional right to be able to go to federal court.

Other commentators, conversely, argue that improper use of the state secrets doctrine interferes with constitutional rights to due process, “prevents public scrutiny of the government’s actions,” and harms the system of separation of powers because courts are not performing their important role as a check on executive decision-making in the name of national security. They believe that the Reynolds balance has been entirely “subsumed by a judicial tendency to uphold claims of privilege without engaging in a meaningful analysis of the underlying evidence or the government’s claimed need for disclosure.” These scholars argue that the notion that the doctrine has roots in the executive’s Article II powers means “that the state secrets privilege, as a constitutional doctrine, trumps any consideration of a plaintiff’s interests or need for evidence and crowds out any meaningful role for the courts.” Thus, transforming the state secrets doctrine from an evidentiary privilege to a constitutional right, as was done in El-Masri, represents an unwarranted, dangerous, and “breathtaking expansion” of the doctrine.

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195 Id. at 518.
196 At least one legal scholar has recently argued that, on the whole, the Obama Administration has been far less unilateral in its approach to executive power than had the Bush Administration. See Stephen I. Vladeck, The Unreviewable Executive: Kiyemba, Maqaleh, and the Obama Administration, 26 CONST. COMMENT. 603, 604 (2010). He believes that the Obama Administration has “all-but abandoned” the Bush Administration’s hallmark argument that the executive has inherent power under the Commander-in-Chief Clause of Article II “to take measures he deems appropriate during wartime, and that congressional attempts to constrain that authority, to the extent they even apply, are unconstitutional.” Id. Although the current Obama Administration has “vigorously defended the scope of the state secrets doctrine,” he argues, it has not done so on constitutional grounds—an objection that the Bush Administration raised repeatedly. Id. at 605.
197 For example, in the case of political questions federal courts decline to rule in a case. See Marbury v. Madison, 5 U.S. 137 (1803) (articulating first use of political question terminology).
198 Christina E. Wells, State Secrets and Executive Accountability, 26 CONST. COMMENT. 625–26 (2010).
201 Id.
More recently, some scholars have gone as far as to characterize the contemporary use of the state secrets doctrine to dismiss claims of egregious human rights violations as “fighting terror with terror” with an aim of keeping the United States’ own human rights abuses and extreme interrogation practices out of public view so the executive can maintain political favor. In other words, the government’s use of the state secrets doctrine to block public exposure to its participation human rights abuses is intended to control public perception and ensure that the executive will maintain favor and approval for its involvement in war. These scholars further contend that this reinforces power hierarchies that promote the unchecked and unpunished subjugation of “foreign enemies” through torture. Litigating Jeppesen II in a public forum would, therefore, have revealed the government’s participation in the extraordinary rendition program and its involvement in the torture of suspected terrorists, many of whom were later released or convicted of only minor offenses.

While it is certainly rational to conclude that the executive would have an interest in maintaining public favor and approval for its actions, this is not likely the solitary or even the primary motivation behind its invocation of the state secrets doctrine. There is no evidence that the Obama Administration repeatedly has invoked the state secret doctrine with the intention of “hid[ing] grave human rights abuses, and deny[ing] access to the courts to individuals who have legitimate claims,” but has instead used the state secrets doctrine to make blanket assertions of privilege to avoid dissemination of what it conservatively deems sensitive intelligence information, which has resulted in repeated dismissal.

Reversing the troubling trend of wholesale case dismissal, and protecting individuals’ rights to have their allegations of human rights violations heard in a court of law, is not, as many scholars have contended, within the exclusive purview of any single branch of government. Rather, reforming the state secrets doctrine will take age-old, time-tested principles of checks and balances, drawing on legislative reform, executive compliance, and judicial scrutiny.

It is axiomatic that the state secrets doctrine has been increasingly invoked to terminate litigation where the plaintiffs have alleged human rights violations in the post-9/11 era. The proper balance of national security and public safety with individual rights, liberty interests, and the preservation of the rule of law and government accountability has become increasingly uncertain, as dem-

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203 See id. at 634–36.
204 Id. at 633 (citing Dorothy Roberts, Torture and the Biopolitics of Race, 62 U. Miami. L. Rev. 229, 244 (2008) (explaining that the United States’s history of maintaining a racial hierarchy through physical domination normalizes torture to maintain the dominant power structure, which is again reinforced through torture of suspected terrorists abroad)).
205 Id. at 637–38.
onstrated by the controversial court split in *Jeppesen II* as well as in the initial court split between the Ninth Circuit in *Jeppesen I* and the Fourth Circuit in *El-Masri*. While the task of regulating or overseeing executive action is primarily within the hands of Congress in making and reforming law and policy, it is also within the purview of the executive to properly comply with these laws, and the judicial branch must perform its important role of hearing “cases and controversies” and making determinations as to whether the executive has failed to follow the law or engaged in overreaching. Thus, the legislative, the executive, and the judiciary each have important roles to play in the effort to properly balance state security with individual liberty by reforming the state secrets doctrine to allow for proper court access.

First, it is imperative that the law be clear with regard to the interests at stake and the proper method of balancing those interests. Because of the law’s current imprecision, Congress must continue to press for legislative reform to the state secrets doctrine to clarify the rule of law for the adjudication of national security litigation. A clear articulation of the proper balance between the competing interests will assist in the important task of alleviating concerns about executive over-reaching, protecting the dissemination of sensitive intelligence information, and providing a forum for judicial recourse.206

Moreover, the proposed legislation reforms the state secrets doctrine by permitting for increased judicial scrutiny on executive claims of privilege by requiring courts to examine the actual evidence that the government is asserting the privilege against to determine whether the claim of privilege is valid. Such reforms would likely reverse the troubling trend of wholesale dismissal before a plaintiff even has the opportunity to engage in discovery, and strengthen individual liberty protections by permitting an increased chance at redress for alleged violations of human rights.

In addition to legislative reform, executive compliance is an important feature of the efforts to alter the state secret doctrine’s current bar to judicial recourse for alleged human rights victims. The government alone asserts the state secrets doctrine to protect what it alone deems to be sensitive intelligence information. Rather than being permitted to make a general, blanket claim that secrets would eventually be disclosed from the outset of a case, the government must be compelled to make a formal claim of privilege as to specific, identifiable evidence. By putting forth such evidence, piece by piece, for the court to

206 It should be noted, however, that the Classified Information Procedures Act ("CIPA"), which regulates the release of classified information in criminal prosecutions, requires the defense to notify prosecutors and the court of classified evidence it intends to introduce. Then courts determine if the classified evidence is admissible. If so, the government may propose an unclassified substitution that does not involve classified information, but if the court finds that the unclassified substitution is inadequate to preserve the defendant’s right to a fair trial, and if the Attorney General objects to disclosure of the classified version, then the indictment may be dismissed. Classified Information Procedures Act, Pub. L. No. 96-456 (1980) (codified as amended at 18 U.S.C. app. §§ 1-16 (2006)). Thus, like in the CIPA context, modification of the state secrets doctrine is more complicated than just another rule of evidence.
assess for privilege in the discovery stage, it creates a better balance between the government's interest in protecting state secrets and the alleged victim's individual right to have his or her case heard. Executive compliance with such a legal requirement would prevent wholesale dismissal at the pleading stage where no discovery has yet taken place.

Lastly, for meaningful reform in the use of the state secrets doctrine, the courts themselves must take a prominent role. The courts have the important job of determining whether the evidence at issue is in fact secret, whether disclosing that evidence will reasonably cause harm to national security, and whether dismissal, which will foreclose any the opportunity for any judicial recourse, can be justified. These are tough questions and require a close, case-by-case analysis. In camera review of the evidence put forth as privileged would facilitate judicial assessment of whether the state secrets doctrine applies to bar its use. Such increased judicial review would provide an important, independent check on the executive's overbroad invocation of the privilege or failure to comply with the law. With in camera inspection it is, thus, the judiciary assessing the evidence for privilege, and not merely the party that raised the privilege. Once the evidence has been evaluated in camera, if appropriate, the claims may proceed in the absence of the specific, privileged evidence. Such a judicial function would return the state secrets doctrine to its roots as an evidentiary rule, and return the proper balance between protecting state secrets and the individual liberty interests. Like legislative reform and executive compliance with such reforms, judicial scrutiny of the assertion of privilege provides an important step in the efforts to reform the current, troubling applications of the state secrets doctrine to foreclose recourse to alleged human rights victims.

Thus, as Jeppesen II demonstrates, the status quo of the state secrets doctrine has resulted in limited judicial check on executive powers to withhold information deemed a state secret. The executive should not be permitted to continually and increasingly avoid judicial scrutiny by blankety asserting the state secrets privilege. Such blanket assertions have resulted in a troubling trend of wholesale dismissal of cases alleging grave human rights violations in the initial pleading stage, leaving the alleged victims without redress. Reversing this trend and properly protecting individuals' rights to have their allegations heard is not within the purview of one single branch of government, but rather will take legislative reform, executive compliance, and judicial scrutiny; simply put, effective reform requires the proper application of good, old-fashioned checks and balances.

VII. CONCLUSION

In sum, as most recently demonstrated in the Ninth Circuit court split in Jeppesen II, judicial opinion as to the proper application of the state secrets doctrine remains sharply divided. In this post-September 11, 2001 era, the doctrine has been regularly applied to dismiss plaintiffs' allegations of egregious violations of human rights, leaving them with no judicial recourse. Given the impor-
tant and competing legislative, executive, and judicial constitutional implications underlying the state secrets doctrine, it is imperative that continued efforts are undertaken to clarify and reform its proper breadth and application. Such reform will go a long way in alleviating concerns about executive overreaching, protecting the confidentiality of sensitive intelligence information, and providing a forum for judicial recourse.

Contrary to popular contention, reforming the state secrets doctrine is not the exclusive responsibility of Congress or the Supreme Court. Rather, to reverse the trend in application of the state secrets doctrine to bar access to courts for alleged victims of human rights abuses, each of the three branches of government plays an important role. Congress must continue efforts to reform the law so that the state secrets doctrine operates to protect national security, but not permit executive overreaching. The executive must comply with such reforms by invoking the doctrine to protect specific, identifiable pieces of privileged evidence in the discovery phases of litigation, rather than blanket assertions of privilege in the pleading stage. And finally, it is the judiciary’s responsibility to independently check the executive’s privilege assertion by conducting an in camera review and then to determine whether the claims can move forward without the privileged evidence. Such cooperative reform to the application of the state secrets doctrine would return the doctrine to an evidentiary rule and restore the proper balance between protecting state secrets and the individual liberty interest in redress. State secrets doctrine reform would go a long way in providing long-overdue access to the courts for many alleged human rights victims.