ed in the statute." (internal quotation marks omitted)).

Rosenfeld disagrees with the arbitrator's interpretation of California law, but he has not demonstrated that the arbitrator exceeded his powers.

Conclusion

We hold that the parties agreed to arbitration under the rules provided by the CAA. We hold, further, that Rosenfeld has shown no basis for vacatur of the arbitrator's award under the CAA.

AFFIRMED.

Binyam MOHAMED; Abou Elkassim Britel; Ahmed Agiza; Mohamed Farag Ahmad Bashmilah; Bisher Al–Rawi, Plaintiffs–Appellants,

v.

JEPPESEN DATAPLAN, INC., Defendant–Appellee,

United States of America, Intervenor–Appellee.

No. 08–15693.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted En Banc Dec. 15, 2009.

Filed Sept. 8, 2010.

Background: Foreign nationals who were allegedly transferred in secret to other countries for detention and interrogation pursuant to Central Intelligence Agency's (CIA) extraordinary rendition program brought action under Alien Tort Statute against company that purportedly assisted in program. The United States District Court for the Northern District of California, James Ware, J., 539 F.Supp.2d 1128, entered order granting government's motions to intervene and to dismiss, and foreign nationals appealed. The Court of Appeals, Michael Daly Hawkins, Circuit Judge, 579 F.3d 943, entered order reversing and remanding, and rehearing was ordered.

Holding: On rehearing en banc, the Court of Appeals, Fisher, Circuit Judge, held that foreign nationals' action would be dismissed pursuant to state secrets privilege under *Reynolds*.

Affirmed.

Bea, Circuit Judge, filed concurring opinion.

Michael Daly Hawkins, Circuit Judge, filed dissenting opinion in which, Schroeder, Canby, Thomas, and Paez, Circuit Judges, joined.

1. Federal Courts ⚿776, 870.1

Court of Appeals reviews de novo the interpretation and application of the state secrets doctrine, and reviews for clear error the district court's underlying factual findings.

2. Federal Civil Procedure ⚿1741.5

The *Totten* bar requires dismissal of cases in which the very subject matter of the action is a matter of state secret.

3. Privileged Communications and Confidentiality ⚿360

The state secrets doctrine encompasses a privilege against revealing military or state secrets, a privilege that is well established in the law of evidence.

4. Privileged Communications and Confidentiality ⚿360

The state secrets privilege belongs to the government and must be asserted by it; it can neither be claimed nor waived by a private party.

5. Privileged Communications and Confidentiality ⚿360

The state secrets privilege may be raised with respect to discovery requests seeking information the government contends is privileged.

6. Privileged Communications and Confidentiality ⚿360

The government may raise the state secrets privilege to prevent the disclosure of privileged information in a responsive pleading.

7. Privileged Communications and Confidentiality ⚿360

The government may assert a state secrets privilege claim prospectively, even at the pleading stage, rather than waiting for an evidentiary dispute to arise during discovery or trial.

8. Privileged Communications and Confidentiality ⚿360

When the state secrets privilege has been properly invoked, the court must make an independent determination whether the information is privileged; the court must sustain a claim of privilege when it is satisfied, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose matters which, in the interest of national security, should not be divulged.

9. Privileged Communications and Confidentiality ⚿360

An executive decision to classify information is alone insufficient to establish that the information is privileged under the state secrets doctrine.

10. Privileged Communications and Confidentiality ⚿360

When a court sustains a claim of state secrets privilege, it must then resolve how the matter should proceed in light of the successful privilege claim; the court must assess whether it is feasible for the litigation to proceed without the protected evidence and, if so, how.

11. Privileged Communications and Confidentiality ⚿360

When the government successfully invokes the state secrets privilege, the evidence is completely removed from the case; however, whenever possible, sensitive information must be disentangled from nonsensitive information to allow for the release of the latter.

12. Federal Civil Procedure ⚿1741.5

If a plaintiff cannot prove the prima facie elements of her claim with nonprivileged evidence after the government invokes the state secrets privilege, then the court may dismiss the claim as it would with any plaintiff who cannot prove her case.

13. Federal Civil Procedure ⚿2481

If the state secrets privilege deprives the defendant of information that would otherwise give the defendant a valid defense to the claim, then the court may grant summary judgment to the defendant.

14. Federal Civil Procedure ⚿1741.5

A case may be dismissed after the government invokes the state secrets privilege when, even if the claims and defenses might theoretically be established without relying on privileged evidence, it would be impossible to proceed with the litigation because, privileged evidence being inseparable from nonprivileged information that will be necessary to the claims or defenses, litigating the case to a judgment on the merits would present an unacceptable risk of disclosing state secrets.

15. Federal Civil Procedure ⚿1741.5
Privileged Communications and Confidentiality ⚿360

Foreign nationals' action under Alien Tort Statute against company that alleged-

ly assisted in Central Intelligence Agency's (CIA) extraordinary rendition program would be dismissed pursuant to state secrets privilege under *Reynolds*; information concerning whether company assisted CIA with clandestine intelligence activities involved valid state secrets, and there was no feasible way to litigate company's alleged liability without creating unjustifiable risk of divulging such secrets, since facts underlying foreign nationals' claims were so infused with state secrets that risk of disclosing them was both apparent and inevitable. 28 U.S.C.A. § 1350.

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Wiliam J. Aceves, California Western School of Law, San Diego, California; Gerald Staberock and Carlos Lopez, International Commission of Jurists, Geneva, Switzerland; Carla Ferstman, Lorna McGregor and Lucy Moxham, REDRESS, London, United Kingdom; Denna R. Hurwitz, Human Rights Program, University of Virginia School of Law, Charlottesville, Virginia, for amici curiae REDRESS and the International Commission of Jurists.

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Andrew G. McBride, Thomas R. McCarthy and Stephen J. Obermeier, Wiley Rein LLP, Washington, D.C., for amicus curiae Foundation for the Defense of Democracies.

Daniel J. Popeo and Richard A. Samp, Washington Legal Foundation, Washington, D.C., for amici curiae Washington Legal Foundation and Allied Educational Foundation.

Richard R. Wiebe, Law Office of Richard R. Wiebe, San Francisco, California; Cindy A. Cohn, Lee Tien, Kurt Opsahl,

Kevin S. Bankston, Corynne McSherry and James S. Tyre, Electronic Frontier Foundation, San Francisco, California, for amicus curiae Electronic Frontier Foundation.

James M. Ringer, Clifford Chance US LLP, New York, New York, for amici curiae Commonwealth Lawyers Association and Justice.

Appeal from the United States District Court for the Northern District of California, James Ware, District Judge, Presiding. D.C. No. 5:07–CV–02798–JW.

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

Opinion by Judge FISHER; Concurrence by Judge BEA; Dissent by Judge MICHAEL DALY HAWKINS.

OPINION

FISHER, Circuit Judge.

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

I. Background

We begin with the factual and procedural history relevant to this appeal. In doing so, we largely draw upon the three-judge panel's language in *Mohamed v. Jeppesen Dataplan, Inc.,* 579 F.3d 943, 949–52 (9th Cir.) (*Jeppesen I*), *rehearing en banc granted,* 586 F.3d 1108 (9th Cir.2009). We emphasize that this factual background is based only on the *allegations* of plaintiffs' complaint, which at this stage in the litigation we construe "in the light most favorable to the plaintiff[s], taking all [their] allegations as true and drawing all reasonable inferences from the complaint in [their] favor." *Doe v. United States,* 419 F.3d 1058, 1062 (9th Cir.2005). Whether plaintiffs' allegations are in fact true has not been decided in this litigation, and, given the sensitive nature of the allegations, nothing we say in this opinion should be understood otherwise.

A. Factual Background

1. *The Extraordinary Rendition Program*

Plaintiffs allege that the Central Intelligence Agency ("CIA"), working in concert with other government agencies and officials of foreign governments, operated an extraordinary rendition program to gather intelligence by apprehending foreign nationals suspected of involvement in terrorist activities and transferring them in secret to foreign countries for detention and interrogation by United States or foreign officials. According to plaintiffs, this program has allowed agents of the U.S. government "to employ interrogation methods that would [otherwise have been] prohibited under federal or international law."

Relying on documents in the public domain, plaintiffs, all foreign nationals, claim they were each processed through the extraordinary rendition program. They also make the following individual allegations.

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

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

Plaintiff Binyam Mohamed, a 28–year–old Ethiopian citizen and legal resident of the United Kingdom, was arrested in Pakistan on immigration charges. Mohamed was allegedly flown to Morocco under conditions similar to those described above, where he claims he was transferred to the custody of Moroccan security agents. These Moroccan authorities allegedly subjected Mohamed to "severe physical and psychological torture," including routinely beating him and breaking his bones. He says they cut him with a scalpel all over his body, including on his penis, and poured "hot stinging liquid" into the open wounds. He was blindfolded and handcuffed while being made "to listen to extremely loud music day and night." After 18 months in Moroccan custody, Mohamed was allegedly transferred back to American custody and flown to Afghanistan. He claims he was detained there in a CIA "dark prison" where he was kept in "near permanent darkness" and subjected to loud noise, such as the recorded screams of women and children, 24 hours a day. Mohamed was fed sparingly and irregularly and in four months he lost between 40 and 60 pounds. Eventually, Mohamed was transferred to the U.S. military prison at Guantanamo Bay, Cuba, where he remained for nearly five years. He was released and returned to the United Kingdom during the pendency of this appeal.[1]

Plaintiff Bisher al-Rawi, a 39–year–old Iraqi citizen and legal resident of the United Kingdom, was arrested in Gambia while traveling on legitimate business. Like the other plaintiffs, al-Rawi claims he was put in a diaper and shackles and placed on an

1. Mohamed's allegations have been discussed in other litigation in both the United States and the United Kingdom. *See Mohammed v. Obama,* 689 F.Supp.2d 38 (D.D.C.2009); *R (Mohamed) v. Secretary of State for Foreign and Commonwealth Affairs,* [2010] EWCA (Civ) 65 (decision of the United Kingdom Court of Appeal).

airplane, where he was flown to Afghanistan. He says he was detained in the same "dark prison" as Mohamed and loud noises were played 24 hours per day to deprive him of sleep. Al–Rawi alleges he was eventually transferred to Bagram Air Base, where he was "subjected to humiliation, degradation, and physical and psychological torture by U.S. officials," including being beaten, deprived of sleep and threatened with death. Al–Rawi was eventually transferred to Guantanamo; in preparation for the flight, he says he was "shackled and handcuffed in excruciating pain" as a result of his beatings. Al–Rawi was eventually released from Guantanamo and returned to the United Kingdom.

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

2. Jeppesen's Alleged Involvement in the Rendition Program

Plaintiffs contend that publicly available information establishes that defendant Jeppesen Dataplan, Inc., a U.S. corporation, provided flight planning and logistical support services to the aircraft and crew on all of the flights transporting each of the five plaintiffs among the various locations where they were detained and allegedly subjected to torture. The complaint asserts "Jeppesen played an integral role in the forced" abductions and detentions and "provided direct and substantial services to the United States for its so-called 'extraordinary rendition' program," thereby "enabling the clandestine and forcible transportation of terrorism suspects to secret overseas detention facilities." It also alleges that Jeppesen provided this assistance with actual or constructive "knowledge of the objectives of the rendition program," including knowledge that the plaintiffs "would be subjected to forced disappearance, detention, and torture" by U.S. and foreign government officials.[2]

B. Summary of the Claims

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

With respect to the forced disappearance claim, plaintiffs assert four theories of liability: (1) direct liability for active participation, (2) conspiracy with agents of the

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

United States, (3) aiding and abetting agents of the United States and (4) direct liability "because [Jeppesen] demonstrated a reckless disregard as to whether Plaintiffs would be subjected to forced disappearance through its participation in the extraordinary rendition program and specifically its provision of flight and logistical support services to aircraft and crew that it knew or reasonably should have known would be used to transport them to secret detention and interrogation." *Id.* ¶¶ 254–57.

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

Regarding Jeppesen's alleged actual or constructive knowledge that its services were being used to facilitate "forced disappearance," plaintiffs allege that Jeppesen "knew or reasonably should have known that the flights involved the transportation of terror suspects pursuant to the extraordinary rendition program," that their "knowledge of the objectives of the rendition program" may be inferred from the fact that they allegedly "falsified flight plans submitted to European air traffic control authorities to avoid public scrutiny of CIA flights" and that a Jeppesen employee admitted actual knowledge that the company was performing extraordinary rendition flights for the U.S. government. *Id.* ¶¶ 16, 17, 56. Similarly, plaintiffs allege that Jeppesen knew or should have known that that torture would result because it should have known it was carrying terror suspects for the CIA and that "the governments of the destination countries routinely subject detainees to torture and other forms of cruel, inhuman, or degrading treatment." *Id.* ¶¶ 17, 56. They also rely on U.S. State Department country reports describing torture as "routine" in some of the countries to which plaintiffs were allegedly rendered, and note that Jeppesen claims on its website that it "monitors political and security situations" as part of its trip planning services. *Id.* ¶¶ 14, 42, 56.

C. Procedural History

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

The district court granted the motions to intervene and dismiss and entered judgment in favor of Jeppesen, stating that "at the core of Plaintiffs' case against Defendant Jeppesen are 'allegations' of covert

U.S. military or CIA operations in foreign countries against foreign nationals—clearly a subject matter which is a state secret." Plaintiffs appealed. A three-judge panel of this court reversed and remanded, holding that the government had failed to establish a basis for dismissal under the state secrets doctrine but permitting the government to reassert the doctrine at subsequent stages of the litigation. *Jeppesen I,* 579 F.3d at 953, 961–62. We took the case en banc to resolve questions of exceptional importance regarding the scope and application of the state secrets doctrine. *See* Fed. R.App. P. 35(a)(2).

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

II. Standard of Review

[1] We review de novo the interpretation and application of the state secrets doctrine and review for clear error the district court's underlying factual findings. *Al–Haramain Islamic Found., Inc. v. Bush,* 507 F.3d 1190, 1196 (9th Cir.2007).

III. The State Secrets Doctrine

The Supreme Court has long recognized that in exceptional circumstances courts must act in the interest of the country's national security to prevent disclosure of state secrets, even to the point of dismissing a case entirely. *See Totten v. United States,* 92 U.S. 105, 107, 23 L.Ed. 605 (1876). The contemporary state secrets doctrine encompasses two applications of this principle. One completely bars adjudication of claims premised on state secrets (the "*Totten* bar"); the other is an evidentiary privilege ("the *Reynolds* privilege") that excludes privileged evidence from the case and *may* result in dismissal of the claims.[3] *See United States v. Reynolds,* 345 U.S. 1, 73 S.Ct. 528, 97 L.Ed. 727 (1953). We first address the nature of these applications and then apply them to the facts of this case.

A. The Totten Bar

In 1876 the Supreme Court stated "as a *general principle* [ ] that public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential." *Totten,* 92 U.S. at 107 (emphasis added). The Court again invoked the principle in 1953, citing *Totten* for the proposition that "where the very subject matter of the action" is "a matter of state secret," an

3. Were this a *criminal* case, the state secrets doctrine would apply more narrowly. *See El–Masri v. United States,* 479 F.3d 296, 313 n. 7 (4th Cir.2007) ("[T]he Executive's authority to protect [state secrets] is much broader in civil matters than in criminal prosecutions."); *see also Reynolds,* 345 U.S. at 12, 73 S.Ct. 528.

action may be "dismissed on the pleadings without ever reaching the question of evidence" because it is "so obvious that the action should never prevail over the privilege." *Reynolds,* 345 U.S. at 11 n. 26, 73 S.Ct. 528. This application of *Totten*'s general principle—which we refer to as the *Totten* bar—is "designed not merely to defeat the asserted claims, but to preclude judicial inquiry" entirely. *Tenet v. Doe,* 544 U.S. 1, 7 n. 4, 125 S.Ct. 1230, 161 L.Ed.2d 82 (2005).

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

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

The Court more recently reaffirmed and explained the *Totten* bar in a case involving two former Cold War spies who accused the CIA of reneging on a commitment to provide financial support in exchange for their espionage services. Relying on "*Totten*'s core concern" of "preventing the existence of the plaintiffs' relationship with the Government from being revealed," the Court held that the action was, like *Totten* and *Weinberger,* incapable of judicial review. *Tenet,* 544 U.S. at 8–10, 125 S.Ct. 1230.[4]

[2] Plaintiffs contend that the *Totten* bar applies *only* to a narrow category of cases they say are not implicated here, namely claims premised on a plaintiff's espionage relationship with the government. We disagree. We read the Court's discussion of *Totten* in *Reynolds* to mean that the *Totten* bar applies to cases in which "the very subject matter of the action" is "a matter of state secret." *Reynolds,* 345 U.S. at 11, n.26, 73 S.Ct. 528. "[A] contract to perform espionage" is only an example. *Id.* This conclusion is confirmed by *Weinberger,* which relied on the *Totten* bar to hold that a case involving nuclear weapons secrets, and having nothing to do with espionage contracts, was "beyond judicial scrutiny." *See Weinberger,* 454 U.S. at 146–47, 102 S.Ct. 197; *see also Tenet,* 544 U.S. at 9, 125 S.Ct. 1230 (characterizing *Weinberger* as a case applying the *Totten* bar). Thus, although the claims in both *Totten* and *Tenet* were premised on the existence of espionage agreements, and even though the plaintiffs in both *Totten* and *Tenet* were themselves parties to the espionage agreements, the *Totten* bar rests on a general principle

4. *Tenet* also made clear that application of the *Totten* bar does not require a formal assertion of the state secrets privilege by the government that meets the procedural requirements explained in *Reynolds* and discussed below. *See Tenet,* 544 U.S. at 8–9, 125 S.Ct. 1230 (applying the *Totten* bar); *Doe v. Tenet,* 329 F.3d 1135, 1151–52 (9th Cir.2003) (underlying appellate decision noting that no formal assertion had yet been filed).

that extends beyond that specific context. We therefore reject plaintiffs' unduly narrow view of the *Totten* bar and reaffirm our holding in *Al–Haramain* that the bar "has evolved into the principle that where the very subject matter of a lawsuit is a matter of state secret, the action must be dismissed without reaching the question of evidence." *Al–Haramain,* 507 F.3d at 1197. As we explain below, the *Totten* bar is a narrow rule, but it is not as narrow as plaintiffs contend.

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.

B. The Reynolds Privilege

[3] In addition to the *Totten* bar, the state secrets doctrine encompasses a "privilege against revealing military [or state] secrets, a privilege which is well established in the law of evidence." *Reynolds,* 345 U.S. at 6–7, 73 S.Ct. 528.[5] A successful assertion of privilege under *Reynolds* will remove the privileged evidence from the litigation. Unlike the *Totten* bar, a valid claim of privilege under *Reynolds* does not automatically require dismissal of the case. In some instances, however, the assertion of privilege will require dismissal because it will become apparent during the *Reynolds* analysis that the case cannot proceed without privileged evidence, or that litigating the case to a judgment on the merits would present an unacceptable risk of disclosing state secrets.

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

The Supreme Court reversed and sustained the government's claim of privilege because "there was a reasonable danger that the accident investigation report would contain references to the secret electronic equipment which was the primary concern of the mission." *Id.* at 10, 73 S.Ct. 528. The Court also provided guidance on how claims of privilege should be analyzed and held that, under the circumstances, the district court should have sustained the privilege without even requiring the government to produce the report for in camera review. *Id.* at 10–11,

5. The two applications of the doctrine remain distinct; *Reynolds* "in no way signaled [a] retreat from *Totten*'s broader holding." *Tenet,* 544 U.S. at 9, 125 S.Ct. 1230.

73 S.Ct. 528. The Court did not, however, dismiss the case outright. Rather, given that the secret electronic equipment was unrelated to the cause of the accident, it remanded to the district court, affording plaintiffs the opportunity to try to establish their claims without the privileged accident report and witness statements. *Id.* at 11, 73 S.Ct. 528.

Analyzing claims under the *Reynolds* privilege involves three steps:

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

Al–Haramain, 507 F.3d at 1202 (citation omitted) (quoting *El–Masri v. United States,* 479 F.3d 296, 304 (4th Cir.2007)). We discuss these steps in turn.

1. Procedural Requirements

[4] *a. Assertion of the privilege.* "The privilege belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party." *Reynolds,* 345 U.S. at 7, 73 S.Ct. 528 (footnotes omitted). The privilege "is not to be lightly invoked." *Id.* This is especially true when, as in this case, the government seeks not merely to preclude the production of particular items of evidence (as in *Reynolds*) but to obtain dismissal of the entire action.

To ensure that the privilege is invoked no more often or extensively than necessary, *Reynolds* held that "[t]here must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer." *Id.* at 7–8, 73 S.Ct. 528 (footnote omitted). This certification is fundamental to the government's claim of privilege. As we have observed in a different context, the decision to invoke the privilege must "be a serious, considered judgment, not simply an administrative formality." *United States v. W.R. Grace,* 526 F.3d 499, 507–08 (9th Cir.2008) (en banc). The formal claim must reflect the certifying official's *personal* judgment; responsibility for this task may not be delegated to lesser-ranked officials. The claim also must be presented in sufficient detail for the court to make an independent determination of the validity of the claim of privilege and the scope of the evidence subject to the privilege.

In the present case, General Michael Hayden, then-Director of the CIA, asserted the initial, formal claim of privilege and submitted detailed public and classified declarations. We were informed at oral argument that the current Attorney General, Eric Holder, has also reviewed and approved the ongoing claim of privilege. Although *Reynolds* does not require review and approval by the Attorney General when a different agency head has control of the matter, such additional review by the executive branch's chief lawyer is appropriate and to be encouraged.

b. Timing. Plaintiffs contend that the government's assertion of privilege was premature, urging that the *Reynolds* privilege cannot be raised before an obligation to produce specific evidence subject to a claim of privilege has actually arisen. We disagree. The privilege may be asserted at any time, even at the pleading stage.

[5, 6] The privilege indisputably may be raised with respect to discovery requests seeking information the government contends is privileged. Courts have repeatedly sustained claims of privilege under those circumstances. *See, e.g., Reynolds,* 345 U.S. at 3, 73 S.Ct. 528 (document production requests); *Kasza v. Browner,* 133 F.3d 1159, 1170 (9th Cir. 1998) (various discovery requests); *Halkin*

v. Helms, 690 F.2d 977, 985–87 (D.C.Cir. 1982) (interrogatories, document production requests and oral depositions). In addition, the government may raise the privilege to prevent the disclosure of privileged information in a responsive pleading, as it did in *Ellsberg v. Mitchell*, 709 F.2d 51, 54 & n.6 (D.C.Cir.1983), and *Black v. United States*, 62 F.3d 1115, 1117–19 (8th Cir.1995). *See Huey v. Honeywell, Inc.*, 82 F.3d 327, 333 (9th Cir.1996) (explaining that the contents of an answer may be evidentiary); *Lockwood v. Wolf Corp.*, 629 F.2d 603, 611 (9th Cir.1980) (holding that admissions in opposing parties' pleadings are admissible as evidence).

[7] We also conclude that the government may assert a *Reynolds* privilege claim prospectively, even at the pleading stage, rather than waiting for an evidentiary dispute to arise during discovery or trial. *See, e.g., El–Masri*, 479 F.3d at 308 ("[D]ismissal at the pleading stage is appropriate if state secrets are so central to a proceeding that it cannot be litigated without threatening their disclosure."); *Black*, 62 F.3d at 1117–19 (dismissing the action at the pleading stage based on the government's assertion of privilege over certain categories of information concerning U.S. intelligence operations); *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268, 281(4th Cir.1980) (en banc) (per curiam); *see also Al–Haramain*, 507 F.3d at 1201 (recognizing that *Reynolds* may result in dismissal even without "await[ing] preliminary discovery"). In some cases, the court may be able to determine with certainty from the nature of the allegations and the government's declarations in support of its claim of secrecy that litigation must be limited or cut off in order to protect state secrets, even before any discovery or evidentiary requests have been made. In such cases, waiting for specific evidentiary disputes to arise would be both unnecessary and potentially dangerous. *See Sterling v. Tenet*, 416 F.3d 338, 344 (4th Cir.2005) ("Courts are not required to play with fire and chance further disclosure—inadvertent, mistaken, or even intentional—that would defeat the very purpose for which the privilege exists."). The showing the government must make to prevail on a claim of state secrets privilege may be especially difficult when attempted before any request for specific information or evidence has actually been made, but foreclosing the government from even trying to make that showing would be inconsistent with the need to protect state secrets.

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

[8] When the privilege has been properly invoked, "we must make an independent determination whether the information is privileged." *Al–Haramain*, 507 F.3d at 1202. The court must sustain a claim of privilege when it is satisfied, "from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose . . . matters which, in the interest of national security, should not be divulged." *Reynolds*, 345 U.S. at 10, 73 S.Ct. 528. If this standard is met, the evidence is absolutely privileged, irrespective of the plaintiffs' countervailing need for it. *See id.* at 11, 73 S.Ct. 528 ("[E]ven the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that [state] secrets are at stake."); *Halkin*, 690 F.2d at 990.

This step in the *Reynolds* analysis "places on the court a special burden to assure itself that an appropriate balance is struck between protecting national security matters and preserving an open court system." *Al–Haramain*, 507 F.3d at 1203. In evaluating the need for secrecy, "we acknowledge the need to defer to the Executive on matters of foreign policy and

national security and surely cannot legitimately find ourselves second guessing the Executive in this arena." *Id.* But "the state secrets doctrine does not represent a surrender of judicial control over access to the courts." *El–Masri,* 479 F.3d at 312. Rather, "to ensure that the state secrets privilege is asserted no more frequently and sweepingly than necessary, it is essential that the courts continue critically to examine instances of its invocation." *Ellsberg,* 709 F.2d at 58. "We take very seriously our obligation to review the[government's claims] with a very careful, indeed a skeptical, eye, and not to accept at face value the government's claim or justification of privilege," *Al–Haramain,* 507 F.3d at 1203, though we must "do so without forcing a disclosure of the very thing the privilege is designed to protect.... Too much judicial inquiry into the claim of privilege would force disclosure of the thing the privilege was meant to protect, while a complete abandonment of judicial control would lead to intolerable abuses." *Reynolds,* 345 U.S. at 8, 73 S.Ct. 528.

[9] We do not offer a detailed definition of what constitutes a state secret. The Supreme Court in *Reynolds* found it sufficient to say that the privilege covers "matters which, in the interest of national security, should not be divulged." *Id.* at 10, 73 S.Ct. 528. We do note, however, that an executive decision to *classify* information is insufficient to establish that the information is privileged. *See Ellsberg,* 709 F.2d at 57 ("[T]he privilege may not be used to shield any material not strictly necessary to prevent injury to national security."). Although classification may be an indication of the need for secrecy, treating it as conclusive would trivialize the court's role, which the Supreme Court has clearly admonished "cannot be abdicated to the caprice of executive officers." *Reynolds,* 345 U.S. at 9–10, 73 S.Ct. 528.

3. How Should the Matter Proceed?

[10] When a court sustains a claim of privilege, it must then resolve " 'how the matter should proceed in light of the successful privilege claim.' " *Al–Haramain,* 507 F.3d at 1202 (quoting *El–Masri,* 479 F.3d at 304). The court must assess whether it is feasible for the litigation to proceed without the protected evidence and, if so, how.

[11] When the government successfully invokes the state secrets privilege, "the evidence is completely removed from the case." *Kasza,* 133 F.3d at 1166. " '[W]henever possible, sensitive information must be disentangled from nonsensitive information to allow for the release of the latter.' " *Id.* (quoting *Ellsberg,* 709 F.2d at 57). However, there will be occasions when, as a practical matter, secret and nonsecret information cannot be separated. In some cases, therefore, "it is appropriate that the courts restrict the parties' access not only to evidence which itself risks the disclosure of a state secret, but also those pieces of evidence or areas of questioning which press so closely upon highly sensitive material that they create a high risk of inadvertent or indirect disclosures." *Bareford v. Gen. Dynamics Corp.,* 973 F.2d 1138, 1143–44 (5th Cir.1992); *see also Kasza,* 133 F.3d at 1166 ("[I]f seemingly innocuous information is part of a ... mosaic, the state secrets privilege may be invoked to bar its disclosure and the court cannot order the government to disentangle this information from other [i.e., secret] information.").

Ordinarily, simply excluding or otherwise walling off the privileged information may suffice to protect the state secrets and " 'the case will proceed accordingly, with no consequences save those resulting from the loss of evidence.' " *Al–Haramain,* 507 F.3d at 1204 (quoting *Ellsberg,* 709 F.2d at 64); *see, e.g., Webster v. Doe,* 486 U.S. 592, 604–05, 108 S.Ct. 2047, 100 L.Ed.2d 632

(1988) (permitting case to continue without privileged evidence); *Reynolds*, 345 U.S. at 11–12, 73 S.Ct. 528 (same).

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

[12, 13] First, if "the plaintiff cannot prove the *prima facie* elements of her claim with nonprivileged evidence, then the court may dismiss her claim as it would with any plaintiff who cannot prove her case." *Kasza*, 133 F.3d at 1166; *see also Ellsberg*, 709 F.2d at 65. Second, " 'if the privilege deprives the defendant of information that would otherwise give the defendant a valid defense to the claim, then the court may grant summary judgment to the defendant.' " *Kasza*, 133 F.3d at 1166 (quoting *Bareford*, 973 F.2d at 1141); *accord In re Sealed Case*, 494 F.3d 139, 153 (D.C.Cir.2007); *see also, e.g., Tenenbaum v. Simonini*, 372 F.3d 776, 777 (6th Cir. 2004).

[14] Third, and relevant here, even if the claims and defenses might theoretically be established without relying on privileged evidence, it may be impossible to proceed with the litigation because—privileged evidence being inseparable from nonprivileged information that will be necessary to the claims or defenses—litigating the case to a judgment on the merits would present an unacceptable risk of disclosing state secrets. *See, e.g., In re Sealed Case*, 494 F.3d at 153 ("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."); *El–Masri*, 479 F.3d at 308 ("[A] proceeding in which the state secrets privilege is successfully interposed must be dismissed if the circumstances make clear that privileged information will be so central to the litigation that any attempt to proceed will threaten that information's disclosure."); *Bareford*, 973 F.2d at 1144 ("We are compelled to conclude that the trial of this case would inevitably lead to a significant risk that highly sensitive information concerning this defense system would be disclosed."); *Fitzgerald v. Penthouse Int'l, Ltd.*, 776 F.2d 1236, 1241–42 (4th Cir.1985) ("[I]n some circumstances sensitive military secrets will be so central to the subject matter of the litigation that any attempt to proceed will threaten disclosure of the privileged matters."); *Farnsworth Cannon*, 635 F.2d at 281 (dismissing the action at the outset because "any attempt on the part of the plaintiff to establish a prima facie case would so threaten disclosure of state secrets that the overriding interest of the United States and the preservation of its state secrets precludes any further attempt to pursue this litigation"); *id.* at 279–80 (Phillips, J., specially concurring and dissenting from the three-judge panel decision) (concluding that "litigation should be entirely foreclosed at the outset by dismissal of the action" if it appears that "the danger of inadvertent compromise of the protected state secrets outweighs the public and private interests in attempting formally to resolve the dispute while honoring the privilege"). As we shall explain, this circumstance exists here and requires dismissal.

IV. Application

We therefore turn to the application of the state secrets doctrine in this case. The government contends that plaintiffs' lawsuit should be dismissed, whether under the *Totten* bar or the *Reynolds* privilege, because "state secrets are so central to this case that permitting further proceeding[s] would create an intolerable risk of disclosure that would jeopardize nation-

al security." U.S. Br. 13.[6] Plaintiffs argue that the *Totten* bar does not apply and that, even if the government is entitled to some protection under the *Reynolds* privilege, at least some claims survive. The district court appears to have dismissed the action under the *Totten* bar, making a "threshold determination" that "the very subject matter of the case is a state secret." Having dismissed on that basis, the district court did not address whether application of the *Reynolds* privilege would require dismissal.

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

A. The *Totten* Bar

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

Here, some of plaintiffs' claims might well fall within the *Totten* bar. In particular, their allegations that Jeppesen conspired with agents of the United States in plaintiffs' forced disappearance, torture and degrading treatment are premised on the existence of an alleged covert relationship between Jeppesen and the government—a matter that the Fourth Circuit has concluded is "practically indistinguishable from that categorically barred by *Totten* and *Tenet*." *El–Masri*, 479 F.3d at 309.[7] On the other hand, allegations based

6. The government's classified briefing and supporting declarations provide more specific support for the government's state secrets contentions. This information is crucial to our decision. *See El–Masri,* 479 F.3d at 312.

7. We do not decide whether any of plaintiffs' claims are cognizable under the Alien Tort Statute ("ATS"). But assuming that the conspiracy claims are cognizable, they require proof of an agreement. *See, e.g., Presbyterian Church of Sudan v. Talisman Energy, Inc.,* 582 F.3d 244, 260 (2d Cir.2009) (holding that conspiracy liability under the ATS would require either an "agreement" or " 'a criminal

on plaintiffs' theory that Jeppesen should be liable simply for what it "should have known" about the alleged unlawful extraordinary rendition program while participating in it are not so obviously tied to proof of a secret agreement between Jeppesen and the government.

We do not resolve the difficult question of precisely which claims may be barred under *Totten* because application of the *Reynolds* privilege leads us to conclude that this litigation cannot proceed further. We rely on the *Reynolds* privilege rather than the *Totten* bar for several reasons. First, the government has asserted the *Reynolds* privilege along with the *Totten* bar, inviting the further inquiry *Reynolds* requires and presenting a record that compels dismissal even on this alternate ground. Second, we have discretion to affirm on any basis supported by the record. *See Thigpen v. Roberts*, 468 U.S. 27, 29–30, 104 S.Ct. 2916, 82 L.Ed.2d 23 (1984); *Shanks v. Dressel*, 540 F.3d 1082, 1086 (9th Cir.2008). Third, resolving this case under *Reynolds* avoids difficult questions about the precise scope of the *Totten* bar and permits us to conduct a searching judicial review, fulfilling our obligation under *Reynolds* "to review the [government's claim] with a very careful, indeed a skeptical, eye, and not to accept at face value the government's claim or justification of privilege." *Al–Haramain*, 507 F.3d at 1203.[8]

B. The Reynolds Privilege

[15] There is no dispute that the government has complied with *Reynolds'* procedural requirements for invoking the state secrets privilege by filing General Hayden's formal claim of privilege in his public declaration.[9] We therefore focus on the second and third steps in the *Reynolds* analysis: *First*, whether and to what extent the matters the government contends must be kept secret are in fact matters of state secret; and *second*, if they are, whether the action can be litigated without relying on evidence that would necessarily reveal those secrets or press so closely upon them as to create an unjustifiable risk that they would be revealed. In doing so, we explain our decision as much as we can without compromising the secrets we are required to protect.

intention to participate in a common criminal design' '') (quoting *Prosecutor v. Tadic*, Case No. IT–94–1–A, Appeal Judgment, ¶ 206 (July 15, 1999)); *Cabello v. Fernandez–Larios*, 402 F.3d 1148, 1159 (11th Cir.2005) (holding that conspiracy liability under the ATS requires proof that ''two or more persons agreed to commit a wrongful act''). Plaintiffs' allegations confirm that their conspiracy claims depend on proof of a covert relationship. *See, e.g.*, First Am. Compl. ¶ 255 (''Jeppesen entered into an agreement with agents of the United States to unlawfully render Plaintiffs to secret detention in Morocco, Egypt, and Afghanistan.''); *id.* ¶ 262 (''Defendant entered into an agreement with agents of the United States to provide flight and logistical support services to aircraft and crew used in the extraordinary rendition program to unlawfully render Plaintiffs to detention and interrogation in Morocco, Egypt, and Afghanistan, where they would be subjected to acts of torture and other cruel, inhuman or degrading treatment.'').

8. This skepticism is all the more justified in cases that allege serious government wrongdoing. Such allegations heighten the risk that government officials may be motivated to invoke the state secrets doctrine not only by their obligation to protect national security but also by a desire to protect themselves or their associates from scrutiny.

9. As previously noted, the government filed declarations meeting the procedural requirements for the *Reynolds* privilege even though such declarations are not strictly necessary to support a *Totten* claim. *See Tenet*, 544 U.S. at 11, 125 S.Ct. 1230.

1. Whether and to What Extent the Evidence Is Privileged

The government asserts the state secrets privilege over four categories of evidence. In particular, the government contends that neither it nor Jeppesen should be compelled, through a responsive pleading, discovery responses or otherwise, to disclose: "[1] information that would tend to confirm or deny whether Jeppesen or any other private entity assisted the CIA with clandestine intelligence activities; [2] information about whether any foreign government cooperated with the CIA in clandestine intelligence activities; [3] information about the scope or operation of the CIA terrorist detention and interrogation program; [or 4] any other information concerning CIA clandestine intelligence operations that would tend to reveal intelligence activities, sources, or methods." U.S. Br. 7–8. These indisputably are matters that the state secrets privilege may cover. *See, e.g., Tenet,* 544 U.S. at 11, 125 S.Ct. 1230 (emphasizing the "absolute protection" the state secrets doctrine affords against revealing espionage relationships); *CIA v. Sims,* 471 U.S. 159, 175, 105 S.Ct. 1881, 85 L.Ed.2d 173 (1985) ("Even a small chance that some court will order disclosure of a source's identity could well impair intelligence gathering and cause sources to 'close up like a clam.' "); *In re Sealed Case,* 494 F.3d at 152 (prohibiting "all discussion of intelligence sources, capabilities, and the like"); *Al–Haramain,* 507 F.3d at 1204 (applying the privilege to "the means, sources and methods of intelligence gathering"); *Ellsberg,* 709 F.2d at 57 (applying the privilege to the "disclosure of intelligence-gathering methods or capabilities").

We have thoroughly and critically reviewed the government's public and classified declarations and are convinced that at least some of the matters it seeks to protect from disclosure in this litigation are valid state secrets, "which, in the interest of national security, should not be divulged." *Reynolds,* 345 U.S. at 10, 73 S.Ct. 528. The government's classified disclosures to the court are persuasive that compelled or inadvertent disclosure of such information in the course of litigation would seriously harm legitimate national security interests. In fact, every judge who has reviewed the government's formal, classified claim of privilege in this case agrees that in this sense the claim of privilege is proper, although we have different views as to the scope of the privilege and its impact on plaintiffs' case. The plaintiffs themselves "do not dispute that, during the course of litigation, there may well be relevant evidence that may be properly withheld pursuant to the privilege." Br. of Plaintiffs–Appellants 26. *See El–Masri,* 479 F.3d at 308–13 (affirming the dismissal of a case involving essentially the same types of claims on the basis of the states secrets doctrine).

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

2. Effect on the Proceedings

Having determined that the privilege applies, we next determine whether the case must be dismissed under the *Reyn-*

olds privilege.[10] We have thoroughly considered plaintiffs' claims, several possible defenses and the prospective path of this litigation. We also have carefully and skeptically reviewed the government's classified submissions, which include supplemental information not presented to the district court. We rely heavily on these submissions, which describe the state secrets implicated here, the harm to national security that the government believes would result from explicit or implicit disclosure and the reasons why, in the government's view, further litigation would risk that disclosure.

Given plaintiffs' extensive submission of public documents and the stage of the litigation, we do not rely on the first two circumstances in which the *Reynolds* privilege requires dismissal—that is, whether plaintiffs could prove a prima facie case without privileged evidence, or whether the privilege deprives Jeppesen of evidence that would otherwise give it a valid defense to plaintiffs' claims. *See Kasza*, 133 F.3d at 1166; *supra* Part III.B.3.[11] Instead, we assume without deciding that plaintiffs' prima facie case and Jeppesen's defenses may not inevitably depend on privileged evidence. Proceeding on that assumption, we hold that dismissal is nonetheless required under *Reynolds* because there is no feasible way to litigate Jeppesen's alleged liability without creating an unjustifiable risk of divulging state secrets. See *El–Masri*, 479 F.3d at 312 (coming to the same conclusion in a related and comparable case), cert. denied, 552 U.S. 947, 128 S.Ct. 373, 169 L.Ed.2d 258 (2007).[12]

10. As noted earlier, the district court did not conduct a detailed analysis of plaintiffs' several claims because it concluded that the subject matter of the entire case is a state secret and therefore dismissed under the *Totten* bar. One option, vigorously urged by the dissent, would be to remand to the district court for that court to conduct a more detailed analysis in the first instance. As the case has developed during these en banc proceedings, however, we find remand unnecessary because our own *Reynolds* analysis persuades us that the litigation cannot proceed. Although it would have been preferable for the district court to conduct this analysis first, we now have had to do it ourselves and it makes no sense to suspend our own judgment that—given the record before us and the nature of plaintiffs' claims—this case realistically cannot be litigated against Jeppesen without compromising state secrets. There is thus no point, and much risk, in remanding to the district court to go through the *Reynolds* analysis as the dissent would prefer. We accept and respect the principles that motivate the dissent, but those principles do not justify prolonging the process here.

11. As noted before, *see supra* n. 7 and related text, at least some of plaintiffs' claims would require proof of an agreement or covert relationship between the government and Jeppesen. These claims might well be barred under *Totten* and certainly would fall even under a *Reynolds* analysis. The dissent, however, suggests that plaintiffs could establish a prima facie case for at least two of their claims without relying on privileged evidence and perhaps without any discovery at all—namely, that Jeppesen recklessly provided flight and logistical support for rendition flights while it knew or should have known its support was being used for forced disappearance and torture. See Dissent Appendix. Although our holding does not require us to resolve this question, we are not so sure. Plaintiffs' reliance on information set forth in the dissent's Appendix would have to overcome evidentiary and other obstacles, such as hearsay problems and the fact that the vast majority of the media reports cited as putting Jeppesen on notice were published *after* Jeppesen's services were alleged to have occurred. In any event, our own analysis under the third aspect of *Reynolds* persuades us these "knew or should have known" claims must be dismissed as well.

12. In *El–Masri*, the Supreme Court declined to review the Fourth Circuit's dismissal of similar claims against the various United States government and corporate actors alleged to be more directly responsible for the rendition and interrogation programs at issue here. Nothing in the Supreme Court's state secrets jurisprudence suggests that plaintiffs' claims here, against an alleged provider of

We reach this conclusion because all seven of plaintiffs' claims, even if taken as true, describe Jeppesen as providing logistical support in a broad, complex process, certain aspects of which, the government has persuaded us, are absolutely protected by the state secrets privilege. Notwithstanding that some information about that process has become public, Jeppesen's alleged role and its attendant liability cannot be isolated from aspects that are secret and protected. Because the facts underlying plaintiffs' claims are so infused with these secrets, *any* plausible effort by Jeppesen to defend against them would create an unjustifiable risk of revealing state secrets, even if plaintiffs could make a prima facie case on one or more claims with nonprivileged evidence. *See Kasza*, 133 F.3d at 1170; *Black*, 62 F.3d at 1118 ("[P]roof of 'the factual allegations in the Amended Complaint are so tied to the privileged information that further litigation will constitute an undue threat that privileged information will be disclosed.' ") (quoting and affirming the district court); *Bareford*, 973 F.2d at 1144 ("[T]he danger that witnesses might divulge some privileged material during cross-examination is great because the privileged and non-privileged material are inextricably linked. We are compelled to conclude that the trial of this case would inevitably lead to a significant risk that highly sensitive information concerning this defense system would be disclosed."); *Fitzgerald*, 776 F.2d at 1243 ("In examining witnesses with personal knowledge of relevant military secrets, the parties would have every incentive to probe dangerously close to the state secrets themselves. In these circumstances, state secrets could be compromised even without direct disclosure by a witness."); *Farnsworth Cannon*, 635 F.2d at 281 ("[T]he plaintiff and its lawyers would have every incentive to probe as close to the core secrets as the trial judge would permit. Such probing in open court would inevitably be revealing. It is evident that any attempt on the part of the plaintiff to establish a prima facie case would so threaten disclosure of state secrets that the overriding interest of the United States and the preservation of its state

logistical support to those programs, should proceed where claims against the government and corporate actors who plaintiffs allege were primarily responsible failed.

As the dissent correctly notes, we have previously disapproved of *El–Masri* for conflating the *Totten* bar's ''very subject matter'' inquiry with the *Reynolds* privilege. *See Al–Haramain*, 507 F.3d at 1201. We adhere to that approach today by maintaining a distinction between the *Totten* bar on the one hand and the *Reynolds* privilege on the other. *See Tenet*, 544 U.S. at 9, 125 S.Ct. 1230 (explaining that *Reynolds* ''in no way signaled our retreat from *Totten*'s broader holding that lawsuits premised on alleged espionage agreements are altogether forbidden''). Maintaining that distinction, however, does not mean that the *Reynolds* privilege can never be raised prospectively or result in a dismissal at the pleading stage. As we explained in *Al–Haramain* (as do we in the text), the *Totten* bar and the *Reynolds* privilege form a ''continuum of analysis.'' 507 F.3d at 1201. A case may fall outside the *Totten* bar because its ''very subject matter'' is not a state secret, and yet it may become clear in conducting a *Reynolds* analysis that plaintiffs cannot establish a prima facie case, that defendants are deprived of a valid defense or that the case cannot be litigated without presenting either a certainty or an unacceptable risk of revealing state secrets. When that point is reached, including, if applicable, at the pleading stage, dismissal is appropriate under the *Reynolds* privilege. Notwithstanding its erroneous conflation of the *Totten* bar and the *Reynolds* privilege, we rely on *El–Masri* because it properly concluded—with respect to allegations comparable to those here—that ''virtually any conceivable response to [plaintiffs'] allegations would disclose privileged information,'' and, therefore, that the action could not be litigated ''without threatening the disclosure'' of state secrets. *El–Masri*, 479 F.3d at 308, 310.

secrets precludes any further attempt to pursue this litigation."); *see also In re Sealed Case*, 494 F.3d at 152–54 (acknowledging the appropriateness of dismissal when unprivileged and privileged matters are so entwined that the risk of disclosure of privileged material is unacceptably high, although concluding that the case before the court did not fall within that category).

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

Dismissal at the pleading stage under *Reynolds* is a drastic result and should not be readily granted. We are not persuaded, however, by the dissent's views that the state secrets privilege can never be "asserted during the pleading stage to excise entire allegations," or that the government must be required "to make its claims of state secrets with regard to specific items of evidence or groups of such items as their use is sought in the lawsuit." Dissent at 1094, 1097.

A case may fall outside the *Totten* bar and yet it may become clear during the *Reynolds* analysis that dismissal is required at the outset. *See Al–Haramain*, 507 F.3d at 1201 (explaining that the *Totten* bar and the *Reynolds* privilege form a "continuum of analysis," and that in some cases "the suit itself may not be barred because of its subject matter and yet ultimately, the state secrets privilege may nonetheless preclude the case from proceeding to the merits," even without "await[ing] preliminary discovery"). Here, our detailed *Reynolds* analysis reveals that the claims and possible defenses are so infused with state secrets that the risk of disclosing them is both apparent and inevitable. Dismissal under these circumstances, like dismissal under the *Totten* bar, reflects the general principle that "public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated." *Totten*, 92 U.S. at 107.

* * *

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

First, we recognize that plaintiffs have proffered hundreds of pages of publicly available documents, many catalogued in the dissent's Appendix, that they say corroborate some of their allegations con-

cerning Jeppesen's alleged participation in aspects of the extraordinary rendition program. As the government has acknowledged, its claim of privilege does not extend to public documents. Accordingly, we do not hold that any of the documents plaintiffs have submitted are subject to the privilege; rather, we conclude that even assuming plaintiffs could establish their entire case *solely* through nonprivileged evidence—unlikely as that may be—any effort by Jeppesen to defend would unjustifiably risk disclosure of state secrets. *Cf. El–Masri,* 479 F.3d at 309 (concluding that "virtually any conceivable response [by government defendants to claims based on factual allegations materially identical to this case's] ... would disclose privileged information").

Second, we do not hold that the existence of the extraordinary rendition program is itself a state secret. The program has been publicly acknowledged by numerous government officials including the President of the United States. Even if its mere existence may once have been a "matter[ ] which, in the interest of national security, should not be divulged," it is not a state secret now. *Reynolds,* 345 U.S. at 10, 73 S.Ct. 528; *cf. Al–Haramain,* 507 F.3d at 1193 (concluding "[i]n light of extensive government disclosures" that a warrantless wiretapping program was not a matter of state secret). Nonetheless, partial disclosure of the existence and even some aspects of the extraordinary rendition program does not preclude other details from remaining state secrets if *their* disclosure would risk grave harm to national security. *See Al–Haramain,* 507 F.3d at 1203 (concluding that some undisclosed details of the wiretapping program were entitled to protection under the state secrets privilege); *Halkin,* 690 F.2d at 994 ("We reject, as we have previously, the theory that 'because some information about the project ostensibly is now in the public domain, nothing about the project in which the appellants have expressed an interest can properly remain classified' or otherwise privileged from disclosure." (quoting *Military Audit Project v. Casey,* 656 F.2d 724, 752(D.C.Cir.1981)); *see also Bareford,* 973 F.2d at 1144 (explaining that in some circumstances, "disclosure of information by government officials can be prejudicial to government interests, even if the information has already been divulged from non-government sources").

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

V. Other Remedies

Our holding today is not intended to foreclose—or to pre-judge—possible *non-judicial* relief, should it be warranted for any of the plaintiffs. Denial of a judicial forum based on the state secrets doctrine poses concerns at both individual and structural levels. For the individual plaintiffs in this action, our decision forecloses at least one set of judicial remedies, and deprives them of the opportunity to prove their alleged mistreatment and obtain damages. At a structural level, terminating the case eliminates further judicial review in this civil litigation, one important check on alleged abuse by government officials and putative contractors. Other remedies may partially mitigate these concerns, however, although we recognize each of these options brings with it its own set of concerns and uncertainties.

First, that the judicial branch may have deferred to the executive branch's claim of privilege in the interest of national security does not preclude the government from honoring the fundamental principles of justice. The government, having access to the secret information, can determine whether plaintiffs' claims have merit and whether misjudgments or mistakes were made that violated plaintiffs' human rights. Should that be the case, the government may be able to find ways to remedy such alleged harms while still maintaining the secrecy national security demands. For instance, the government made reparations to Japanese Latin Americans abducted from Latin America for internment in the United States during World War II. *See Mochizuki v. United States,* 43 Fed.Cl. 97 (1999).[13]

Second, Congress has the authority to investigate alleged wrongdoing and restrain excesses by the executive branch.[14] "The power of the Congress to conduct investigations is inherent in the legislative process." *Watkins v. United States,* 354 U.S. 178, 187, 77 S.Ct. 1173, 1 L.Ed.2d 1273 (1957); *accord Eastland v. U.S. Servicemen's Fund,* 421 U.S. 491, 504, 95 S.Ct. 1813, 44 L.Ed.2d 324 (1975). "Congress unquestionably has ... broad authority to investigate, to inform the public, and, ultimately, to legislate against suspected corruption and abuse of power in the Executive Branch." *Nixon v. Adm'r of Gen. Servs.,* 433 U.S. 425, 498, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977) (Powell, J., concurring); *see also Branzburg v. Hayes,* 408 U.S. 665, 741, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972) (Stewart, J., dissenting) ("We have long recognized the value of the role played by legislative investigations....").

Third, Congress also has the power to enact private bills. *See Nixon v. Fitzgerald,* 457 U.S. 731, 762 n. 5, 102 S.Ct. 2690,

13. Other governments have committed to doing this. *See, e.g.,* Prime Minister David Cameron, A Statement Given by the Prime Minister to the House of Commons on the Treatment of Terror Suspects (July 6, 2010), http://www.number10.gov.uk/news/statements-and-articles/2010/07/statement-on-detainees–52943 ("[W]e are committed to mediation with those who have brought civil claims about their detention in Guantanamo. And wherever appropriate, we will offer compensation.").

14. In addition, Congress has constituted independent investigatory bodies within the executive branch. *See, e.g.,* 50 U.S.C. § 403q (establishing the Office of Inspector General in the Central Intelligence Agency "to initiate and conduct independently inspections, investigations, and audits relating to programs and operations of the Agency"); *see also* Office of Inspector General, Central Intelligence Agency, Special Review: Counterterrorism Detention and Interrogation Activities (September 2001–October 2003), May 7, 2004 (partially redacted), *available at* http://graphics8.nytimes.com/packages/pdf/politics/20090825–DETAIN/2004CIAIG.pdf.

73 L.Ed.2d 349 (1982) (Burger, C.J., concurring) ("For uncompensated injuries Congress may in its discretion provide separate nonjudicial remedies such as private bills."); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 n.9, 115 S.Ct. 1447, 131 L.Ed.2d 328 (1995) ("Private bills in Congress are still common, and were even more so in the days before establishment of the Claims Court."); *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 431, 110 S.Ct. 2465, 110 L.Ed.2d 387 (1990) ("Congress continues to employ private legislation to provide remedies in individual cases of hardship."). Because as a general matter the federal courts are better equipped to handle claims, *see Kosak v. United States*, 465 U.S. 848, 867–69, 104 S.Ct. 1519, 79 L.Ed.2d 860 (1984) (Stevens, J., dissenting), Congress can refer the case to the Court of Federal Claims to make a recommendation before deciding whether to enact a private bill, *see* 28 U.S.C. § 1492; *see also Banfi Prods. Corp. v. United States*, 40 Fed.Cl. 107, 109 (1997), although Congress alone will make the ultimate decision. When national security interests deny alleged victims of wrongful governmental action meaningful access to a judicial forum, private bills may be an appropriate alternative remedy.[15]

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

VI. Conclusion

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

For all the reasons the dissent articulates—including the impact on human rights, the importance of constitutional protections and the constraints of a judge-made doctrine—we do not reach our decision lightly or without close and skeptical scrutiny of the record and the government's case for secrecy and dismissal. We expect our decision today to inform district courts that *Totten* has its limits, that every effort should be made to parse claims to salvage a case like this using the *Reynolds* approach, that the standards for peremptory dismissal are very high and it is the

15. Proceedings in the Court of Federal Claims following congressional referral may pose some of the same problems that require dismissal here—the Court of Federal Claims must avoid disclosure of state secrets too. The referral proceedings might be less problematic than this lawsuit, however, because, for example, the question of third-party liability would not be the focus: a private bill addresses compensation by the government, not by third parties. In addition, Congress might tailor its referral to protect state secrets, by, for example, requiring the Court of Federal Claims to make its recommendation based solely on the plaintiffs' own testimony and nonprivileged documents in the public domain. Moreover, Congress presumably possesses the power to restrict application of the state secrets privilege in the referral proceedings. *Cf. Al–Haramain*, 507 F.3d at 1205–06 (remanding to the district court to consider whether the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1806(f), preempts the state secrets privilege).

district court's role to use its fact-finding and other tools to full advantage before it concludes that the rare step of dismissal is justified. We also acknowledge that this case presents a painful conflict between human rights and national security. As judges, we have tried our best to evaluate the competing claims of plaintiffs and the government and resolve that conflict according to the principles governing the state secrets doctrine set forth by the United States Supreme Court.

For the reasons stated, we hold that the government's valid assertion of the state secrets privilege warrants dismissal of the litigation, and affirm the judgment of the district court.[16] The government shall bear all parties' costs on appeal.

AFFIRMED.

BEA, Circuit Judge, concurring:

I concur with Judge Fisher's well-reasoned opinion and join fully in his result. I also concur with Judge Fisher's analysis with respect to *United States v. Reynolds,* 345 U.S. 1, 73 S.Ct. 528, 97 L.Ed. 727 (1953). I write separately only because I would decide this case under *Totten v. United States,* 92 U.S. 105, 107, 23 L.Ed. 605 (1876).

The *Totten* bar requires our courts to dismiss cases "where the very subject matter of the action" is "a matter of state secret." *Reynolds,* 345 U.S. at 11 n. 26, 73 S.Ct. 528. In this case, every claim in the Plaintiffs' complaint is based on the allegation that officials of the United States government arrested and detained Plaintiffs and subjected them to specific interrogation techniques. Those alleged facts, not merely Jeppesen's role in such activities, are a matter of state secret.

MICHAEL DALY HAWKINS, Circuit Judge, with whom Judges SCHROEDER, CANBY, THOMAS, and PAEZ, Circuit Judges, join, dissenting:

A Flawed Procedure

I agree with my colleagues in the majority that *United States v. Reynolds,* 345 U.S. 1, 73 S.Ct. 528, 97 L.Ed. 727 (1953), is a rule of evidence, requiring 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. I part company concerning when and where that review should take place.

The majority dismisses the case in its entirety before Jeppesen has even filed an answer to Plaintiffs' complaint. Outside of the narrow *Totten* context, the state secrets privilege has never applied to prevent parties from litigating the truth or falsity of allegations, or facts, or information simply because the government regards the truth or falsity of the allegations to be secret. Within the *Reynolds* framework, dismissal is justified if and only if specific privileged evidence is itself indispensable to establishing either the truth of the plaintiffs' allegations or a valid defense that would otherwise be available to the defendant. *See, e.g., Kasza v. Browner,* 133 F.3d 1159, 1166 (9th Cir.1998).

This is important, because an approach that focuses on specific evidence after issues are joined has the benefit of confining the operation of the state secrets doctrine so that it will sweep no more broadly than

16. We do not share the dissent's confidence that the present proceedings come within Federal Rule of Civil Procedure 12(b)(6). Dissent 1093–95, 1097. *Reynolds* necessarily entails consideration of materials outside the pleadings: at minimum, the *Reynolds* analysis requires the court to review the government's formal claim of privilege. That fact alone calls into question reliance on Rule 12(b)(6). *See Lee v. City of Los Angeles,* 250 F.3d 668, 688 (9th Cir.2001).

clearly necessary. The state secrets doctrine is a judicial construct without foundation in the Constitution, yet its application often trumps what we ordinarily consider to be due process of law. This case now presents a classic illustration. Plaintiffs have alleged facts, which must be taken as true for purposes of a motion to dismiss, that any reasonable person would agree to be gross violations of the norms of international law, remediable under the Alien Tort Statute. They have alleged in detail Jeppesen's complicity or recklessness in participating in these violations. The government intervened, and asserted that the suit would endanger state secrets. The majority opinion here accepts that threshold objection by the government, so Plaintiffs' attempt to prove their case in court is simply cut off. They are not even allowed to attempt to prove their case by the use of nonsecret evidence in their own hands or in the hands of third parties.

It is true that, judicial construct though it is, the state secrets doctrine has become embedded in our controlling decisional law. Government claims of state secrets therefore must be entertained by the judiciary. But the doctrine is so dangerous as a means of hiding governmental misbehavior under the guise of national security, and so violative of common rights to due process, that courts should confine its application to the narrowest circumstances that still protect the government's essential secrets.[1] When, as here, the doctrine is successfully invoked at the threshold of litigation, the claims of secret are necessarily broad and hypothetical. The result is a maximum interference with the due processes of the courts, on the most general claims of state secret privilege. It is far better to require the government to make its claims of state secrets with regard to specific items of evidence or groups of such items as their use is sought in the lawsuit. An official certification that evidence is truly a state secret will be more focused if the head of a department must certify that specific evidence sought in the course of litigation is

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

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

Even in *Reynolds,* avoidance of embarrassment—not preservation of state secrets—appears to have motivated the Executive's invocation of the privilege. There the Court credited the government's assertion that "this accident occurred to a military plane which had gone aloft to test secret electronic equipment," and that "there was a reasonable danger that the accident investigation report would contain references to the secret electronic equipment which was the primary concern of the mission." 345 U.S. at 10, 73 S.Ct. 528. In 1996, however, the "secret" accident report involved in that case was declassified. A review of the report revealed, not "details of any secret project the plane was involved in," but "[i]nstead, . . . a horror story of incompetence, bungling, and tragic error." Garry Wills, *Why the Government Can Legally Lie,* 56 N.Y. Rev. of Books 32, 33 (2009). Courts should be concerned to prevent a concentration of unchecked power that would permit such abuses.

truly a secret and cannot be revealed without danger to overriding, essential government interests. And when responsive pleading is complete and discovery under way, judgments as to whether secret material is essential to Plaintiffs' case or Jeppesen's defense can be made more accurately.

By refusing to examine the voluminous public record materials submitted by Plaintiffs in support of their claims,[2] and by failing to undertake an analysis of Jeppesen's ability to defend against those claims, the district court forced every judge of the court of appeals to undertake that effort. This was no small undertaking. Materials the government considers top secret had to be moved securely back and forth across the country and made available in a "cone of silence" environment to first the three-judge panel assigned the case and then the twenty-seven active judges of this court to evaluate whether the case merited en banc consideration. This quite literally put the cart before the horse, depriving a reviewing court of a record upon which its traditional review function could be carried out.[3] This is more than a matter of convenience. Making factual determinations is the particular province of trial courts and for sound reason: they are good at it. Not directing the district court to do that work sends exactly the wrong message in the handling of these critical and sensitive cases. Finding remand "unnecessary," as the majority does here, [Maj. Op. at 1087, n.10], not only rewards district courts for failing to do their job, but ensures that future appeals courts will have to do that job for them.[4]

This is an appeal from a Rule 12 dismissal, which means that the district court was required to assume that the well-pleaded allegations of the complaint are *true*, and that we "construe the complaint in the light most favorable to the plaintiff[s]." *Doe v. United States*, 419 F.3d 1058, 1062 (9th Cir.2005). The majority minimizes the importance of these requirements by gratuitously attaching "allegedly" to nearly each sentence describing what Plaintiffs say happened to them, and by quickly dismissing the voluminous publicly available evidence supporting those allegations, including that Jeppesen knew what was going on when it arranged flights described by one of its own officials as "torture flights."[5] Instead, the majority assumes that even if Plaintiffs' prima facie

2. A summary of the some 1,800 pages of that information appears as an Appendix to this dissent.

3. In another context, the Supreme Court has pointed out the structural problems created when appellate courts are presented with undeveloped records. *Johnson v. Jones*, 515 U.S. 304, 309, 316–17, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995).

4. I have confidence in the ability of district judges to make such determinations, and in the process of handling information which the government considers secret. Dismissing this suit out of fear of "compelled or inadvertent disclosure" of secret information during the course of litigation, [Maj. Op. at 1086], assumes that the government might make mistakes in what it produces, or that district courts might compel the disclosure of documents legitimately covered by the state secrets privilege.

5. According to the sworn declaration of former Jeppesen employee Sean Belcher, the Director of Jeppesen International Trip Planning Services, Bob Overby, told him, " 'We do all the extraordinary rendition flights,' " which he also referred to as " 'the torture flights' " or "spook flights." Belcher stated 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. He noted that Overby had explained, " 'that's just the way it is, we're doing them' " because "the rendition flights paid very well."

case and Jeppesen's defense did not depend on privileged evidence, dismissal is required "because there is no feasible way to litigate Jeppesen's alleged liability without creating an unjustifiable risk of divulging state secrets." [Maj. Op. at 1087]. But Jeppesen has yet to answer or even to otherwise plead, so we have no idea what those defenses or assertions might be. Making assumptions about the contours of future litigation involves mere speculation, and doing so flies straight in the face of long standing principles of Rule 12 law by extending the inquiry to what *might* be divulged in future litigation.[6]

We should have remanded this matter to district court to do the *Reynolds* work that should have been done in the first place.

Because of this fundamental defect in the posture of this matter, the remainder of the dissent focuses on the scope of the state secrets privilege rather than its application to speculative facts.

The Totten *Bar*

While it chooses not to apply it, the majority correctly recites the general interpretation of the non-justiciability bar of *Totten v. United States*, 92 U.S. 105, 23 L.Ed. 605 (1876).[7] However, its definition of *Totten*'s scope—applying to "any case in which 'the very subject matter of the action' is 'a matter of state secret' " [Maj. Op. at 1078]—and the concurrence's full-blown embrace of its application here merit response.

Courts have applied the *Totten* bar in one of two scenarios: (1) The plaintiff is party to a secret agreement with the government;[8] or (2) The plaintiff sues to solicit information from the government on a "state secret" matter.[9] *See Weinberger v.*

6. *See* 5 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1356 (3d ed. 2010) (Rule 12(b)(6) inquiries are ''essentially . . . limited to the content of the complaint''); *see also Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322–23, 127 S.Ct. 2499, 168 L.Ed.2d 179 (2007) (listing permissible evidence to consider in a 12(b)(6) motion, with no mention of prospective evidence, and with emphasis on an examination of the ''underlying facts''); *Williston Basin Interstate Pipeline Co. v. An Exclusive Gas Storage Leasehold & Easement in the Cloverly Subterranean Geological Formation*, 524 F.3d 1090, 1096 (9th Cir.2008) (the court may consider in a 12(b)(6) motion ''only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice'') (citing *Outdoor Media Grp., Inc. v. City of Beaumont*, 506 F.3d 895, 899–900 (9th Cir.2007)).

7. *See, e.g., Wilson v.Libby*, 535 F.3d 697, 710 (D.C.Cir.2008) (discussing ''the justiciability doctrine of *Totten v. United States*''); *Am. Civil Liberties Union v. Nat'l Sec. Agency*, 493 F.3d 644, 650 n. 2 (6th Cir.2007) (the *Totten* rule is a ''rule of non-justiciability''); *Al–Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1197 (9th Cir.2007) (the *Totten* rule is ''a rule of non-justiciability, akin to a political question'').

8. *Totten* itself involved the estate of a former Civil War spy seeking compensation. 92 U.S. 105, 23 L.Ed. 605. *See also Tenet v. Doe*, 544 U.S. 1, 10, 125 S.Ct. 1230, 161 L.Ed.2d 82 (2005) (suit against CIA director for failure to provide financial compensation for Cold War services).

9. This category of *Totten*-bar cases is distinct from those involving a plaintiff's attempt to solicit information from the government via the Freedom of Information Act (FOIA). *Weinberger*, which has a FOIA element, was decided on FOIA grounds and *Totten* grounds, and relevant here is the *Totten*-related decision. *See Weinberger v. Catholic Action of Hawaii/Peace Educ. Project*, 454 U.S. 139, 146, 102 S.Ct. 197, 70 L.Ed.2d 298 (1981). The FOIA cases are easily distinguishable. The FOIA cases entail litigation for the sole and independent purpose of obtaining disclosure of classified information. *See* 5 U.S.C. § 552(a)(4)(B); *see also, e.g., Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362, 1370 (4th Cir. 1975) (addressing the court's authority under FOIA to order the disclosure of classified information for publication in a book). While

Catholic Action of Hawaii/Peace Educ. Project, 454 U.S. 139, 146, 102 S.Ct. 197, 70 L.Ed.2d 298 (1981) (*Totten* bar applies to suit against the United States Navy for failure to file an environmental impact statement regarding a "nuclear capable" facility where Navy would have to admit or deny proposed storage of nuclear weapons at the facility). More generally, the *Totten* bar has been applied to suits against the government, and never to a plaintiff's suit against a third-party/non-governmental entity.

Here, the "very subject matter" of this lawsuit is Jeppesen's involvement in an overseas detention program. Plaintiffs are neither parties to a secret agreement with the government, nor are they attempting, as the result of this lawsuit, to solicit information from the government on a "state secret" matter. Rather, they are attempting to remedy "widespread violations of individual constitutional rights" occurring in a program whose existence has been made public. *See Hepting v. AT & T*, 439 F.Supp.2d 974, 993 (N.D.Cal.2006).

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.[10] Nothing Plaintiffs have done supports a conclusion that their "lips [are] to be for ever sealed respecting" the claim on which they sue, such that filing this lawsuit would in itself defeat recovery. *See Totten*, 92 U.S. at 106.

Instead of "avoid[ing] difficult questions about the precise scope of the *Totten* bar" [Maj. Op. at 1085], the majority ought to have found the *Totten* bar inapplicable, and rejected the district court's analysis.[11] *Totten* cannot and does not apply to Plaintiffs' claims.

The Reynolds *Evidentiary Privilege*

The majority correctly describes *Reynolds* as a rule of evidence, which only the government may assert. [Maj. at 1080–81]. However, *Reynolds* cannot, as the majority contends, be asserted during the pleading stage to excise entire allegations.

The majority argues that because pleadings can serve as evidence, *see Huey v. Honeywell, Inc.*, 82 F.3d 327, 333 (9th Cir.1996); *Lockwood v. Wolf Corp.*, 629 F.2d 603, 611 (9th Cir.1980), the state secrets privilege "may be asserted at any time, even at the pleading stage." [Maj. Op. at 1080].

Thus, the majority argues, this court would be incorrect to conclude that neither the Federal Rules nor *Reynolds* would permit us to dismiss this case at the *plead-*

"an informed citizenry [is] vital to the functioning of a democratic society," *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 16, 121 S.Ct. 1060, 149 L.Ed.2d 87 (2001) (internal quotations omitted), the balance of interests will more often tilt in favor of the Executive when disclosure is the primary end in and of itself. FOIA therefore predictably entails greater deference to the national classification system than does the state secrets doctrine.

10. *See Terkel v. AT & T Corp.*, 441 F.Supp.2d 899, 907 (N.D.Ill.2006) (refusing to apply *Totten* because "the plaintiffs in this case were not parties to the alleged contract nor did they agree to its terms; rather, they claim that the performance of an alleged contract entered into by others would violate their statutory rights"); *Am. Civil Liberties Union v. Nat'l Sec. Agency*, 438 F.Supp.2d 754, 763 (E.D.Mich.2006) (refusing to apply *Totten* because it "applies [only] to actions where there is a secret espionage relationship between the Plaintiff and the Government"), *vacated on other grounds*, 493 F.3d 644 (6th Cir.2007).

11. Nor can the choice to affirm the district court under *Reynolds* be justified as an affirmance on "any basis supported by the record." [Maj. Op. at 1085]. The result the majority seeks here, a dismissal of Plaintiffs' case in its entirety, is not supported by the case law.

ings stage on the basis of an evidentiary privilege that must be invoked *during discovery* or *at trial.* In the majority's view, the privilege applies at the pleadings stage in such a manner that permits it to remove from a complaint any allegations where "secret and nonsecret information cannot be separated." [Maj. Op. at 1082].

Whatever validity there may be to the idea that evidentiary privileges can apply at the pleadings stage, it is wrong to suggest that such an application would permit the removal of *entire allegations* resulting in out-and-out dismissal of the entire suit. Instead, the state secrets privilege operates at the pleadings stage to except from the implications of Rule 8(b)(6) the refusal to answer certain allegations, not, as the government contends, to permit the government or Jeppesen to avoid filing a responsive pleading at all. [Maj. Op. at 1085–86]. In the Fifth Amendment context, the Fourth Circuit has explained that the 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. *N. River Ins. Co., Inc. v. Stefanou,* 831 F.2d 484, 486–87 (4th Cir.1987). Accordingly, "when properly invoked, the fifth amendment privilege against self-incrimination . . . can avoid the operation of Rule [8(b)(6)]." *Id.* at 487.

But a proper invocation of the privilege does not excuse a defendant from the requirement to file a responsive pleading; the obligation is to answer those allegations that can be answered and to make a specific claim of the privilege as to the rest, so the suit can move forward. *Id.* (citing 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1280, at 360 (1969)).

According to this rationale, Plaintiffs are correct that the government moving forward may assert the state secrets privilege to prevent Jeppesen from answering any allegations, where the answer would constitute evidence properly protected by the privilege. But, recognizing that the privilege may apply at the pleadings stage to prevent defendants from answering certain allegations vis-a-vis operation of Rule 8(b)(6) does not mean the privilege can be used to remove altogether certain subject matters from a lawsuit. Observing that pleadings may constitute evidence, in other words, does not transform an evidentiary privilege into an immunity doctrine.[12] The

12. It is not at all clear that the *Reynolds* privilege can be asserted at the pleading stage, as the majority claims. [*See* Maj. Op. at 1080–81]. *Ellsberg v.Mitchell,* 709 F.2d 51, 52 (D.C.Cir.1983), on which the majority relies, involved the formal claim of state secrets privilege entered by the United States *in opposition to the plaintiffs' motion to compel discovery* and, while the opinion references the government's amended answer to the complaint in a footnote, it focuses centrally on the refusal of the defendants "to respond to any of the plaintiffs' remaining allegations or questions" as presented in the plaintiffs' submitted interrogatories. *Id.* at 53–54 & n.6. In *Black v. United States,* 62 F.3d 1115, 1117 (8th Cir.1995), on which the majority also relies, the Eighth Circuit dismissed a suit against the CIA by an electrical engineer with government security clearances at the pleading stage because the main information Black sought in his complaint, which would "confirm or deny Black's alleged contacts with government officers," was the basis of Black's claim. Without it, his suit could not go forward. Here, where Plaintiffs arguably have ample public information to proceed with their suit, we do not have such a cut-and-dried case of privilege. [*See* Dissent App'x].

Moreover, pleadings are not considered evidence. *See United States v. Zermeno,* 66 F.3d 1058, 1062 (9th Cir.1995) ("The government's assertions in its pleadings are not evidence."); *S. Pac. Co. v. Conway,* 115 F.2d 746, 750 (9th Cir.1940) ("[T]he office of a pleading is to state ultimate facts and not evidence of such facts."). If the government is seeking to excise entire allegations with the invocation of the privilege at the pleading stage, such an

state secrets privilege, as an evidentiary privilege, is relevant not to the sufficiency of the *complaint*, but only to the sufficiency of evidence available to later *substantiate* the complaint.

Because the *Reynolds* privilege, like any other evidentiary privilege, " 'extends only to [evidence] and not to facts,' " *Upjohn Co. v. United States*, 449 U.S. 383, 395–96, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981) (quoting *Philadelphia v. Westinghouse Elec. Corp.*, 205 F.Supp. 830, 831 (E.D.Pa.1962)), 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.[13]

Reynolds *and Rule 12(b)(6)*

The majority claims there is "no feasible way to litigate Jeppesen's alleged liability *without creating an unjustifiable risk of divulging state secrets*,"[14] [Maj. Op. at 1087], ignoring well-established principles of civil procedure which, at this stage of the litigation, do not permit the prospective evaluation of hypothetical claims of privilege that the government has yet to raise and the district court has yet to consider.

Our task in reviewing the grant of a Rule 12 motion to dismiss "is necessarily a limited one." *Scheuer v. Rhodes*, 416 U.S.

invocation would require an assertion that the *very subject matter* of the lawsuit is a state secret, and not the assertion of an evidentiary privilege. *See Molerio v. FBI*, 749 F.2d 815, 821 (D.C.Cir.1984) (where "the whole object of the suit and of the discovery is to establish a fact that is a state secret," compliance with discovery as a whole can be "excused in gross, without the necessity of examining individual documents"); *cf. Al–Haramain*, 507 F.3d at 1197 (applying *Reynolds* directly to evidence—a sealed document—where privilege was asserted in response to government's accidental disclosure of documents to the plaintiffs, and declining to find "the very subject matter" of the suit to be a state secret). Here, while the majority declines to reach the *Totten* bar question, the "very subject matter" of this lawsuit—Jeppesen's involvement in an overseas detention program—has been publicly acknowledged and is not a state secret.

13. Contrary to the majority's assertion, the *Reynolds* privilege cannot be asserted prospectively, without an examination of the evidence on an item-by-item basis. To conclude that *Reynolds*, like *Totten*, applies to prevent the litigation of allegations, rather than simply discovery of evidence, would be to erode the distinction between the two versions of the doctrine. Moreover, the Eighth Circuit case on which the majority relies, *Black*, 62 F.3d at 1117, was ultimately not a prospective assertion of the *Reynolds* privilege. While the government asserted the privilege in response to the plaintiff's amended complaint, ultimately, the privilege was asserted as to one piece of information, without which the plaintiff could not proceed; he could not bring an intentional infliction of emotional distress claim against the CIA without information about any existing contacts with government officers. *Id.* The information on his contacts, which the plaintiff attempted to solicit via his complaint, was privileged. *Id.* To say *Black* permits the assertion of the *Reynolds* privilege in the pleading stage is to misstate its holding.

14. The majority cites *El–Masri v. United States*, 479 F.3d 296, 308–13 (4th Cir.2007), as a comparable case wherein the court found further litigation risked disclosure of state secrets and threatened grave harm to American national security. [Maj. Op. at 1087, citing *El–Masri*, 479 F.3d at 312]. However, noting that the Fourth Circuit appears to have "merged the concept of 'subject matter' with the notion of proof of a prima facie case," this court in *Al–Haramain* expressly rejected *El–Masri*'s logic. 507 F.3d at 1201. In the Ninth Circuit, "the 'subject matter' of a lawsuit [is not necessarily] one and the same [as] the facts necessary to litigate the case." *Id.* Accordingly, "[b]ecause the Fourth Circuit has accorded an expansive meaning to the 'subject matter' of an action, one that we have not adopted, *El–Masri* does not support dismissal based on the subject matter of the suit." *Id.*

232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974). We are not to determine whether a particular party will ultimately prevail, but instead only whether the complaint "state[s] a claim upon which relief can be granted," Fed. R. Civ. Pro. 12(b)(6). If Plaintiffs here have stated a claim on which relief can be granted, they should have an opportunity to present evidence in support of their allegations, without regard for the likelihood of ultimate success. *See Scheuer,* 416 U.S. at 236, 94 S.Ct. 1683 (a district court acts "prematurely" and "erroneously" when it dismisses a well-pleaded complaint, thereby "preclud[ing] any opportunity for the plaintiffs" to establish their case "by subsequent proof"); *see also Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 556, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) ("[A] well-pleaded complaint may proceed even if it appears 'that a recovery is very remote and unlikely.' " (quoting *Scheuer,* 416 U.S. at 236, 94 S.Ct. 1683)).

This limited inquiry—a long-standing feature of the Rules of Civil Procedure—serves a sensible judicial purpose. We simply cannot resolve whether the *Reynolds* evidentiary privilege applies without (1) an actual request for discovery of specific evidence, (2) an explanation from Plaintiffs of their need for the evidence, and (3) a formal invocation of the privilege by the government with respect to that evidence, explaining why it must remain confidential. *See Reynolds,* 345 U.S. at 8–9, 73 S.Ct. 528 ("the principles which control the application of the privilege" require a "formal claim of privilege" by the government with respect to the challenged evidence); *id.* at 10–11, 73 S.Ct. 528 (the court must consider the litigants' "showing of necessity" for the requested evidence in determining whether "the occasion for invoking the privilege is appropriate"). Nor can we determine whether the parties will be able to establish their cases without use of privileged evidence without also knowing what non-privileged evidence they will marshal. *See Crater Corp. v. Lucent Techs., Inc.,* 423 F.3d 1260, 1267–68(Fed.Cir.2005) ("deciding the impact of the government's assertion of the state secrets privilege" before the record is "adequately developed" puts "the cart before the horse"). Thus neither the Federal Rules nor *Reynolds* would permit us to dismiss this case for "failure to state a claim upon which relief can be granted," Fed. R. Civ. Pro. 12(b)(6), on the basis of an evidentiary privilege relevant, not to the sufficiency of the complaint, but only to the sufficiency of evidence available to later substantiate the complaint.[15]

A decision to remand would have the additional benefit of conforming with "the general rule ... that a federal appellate court does not consider an issue not passed on below," and will allow the district court

15. While the government styled its motion below as a "Motion to Dismiss or, in the Alternative, for Summary Judgment," the district court did not grant summary judgment, but rather dismissal—and it could not have done otherwise. A party is entitled to summary judgment only if "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact." Fed. R. Civ. Pro. 56(c). Here, because Jeppesen has not even answered the complaint, it is uncertain which allegations are in dispute, much less which disputes might raise genuine issues of material fact.

The procedural posture of this case thus differs fundamentally from that in *Kasza,* which involved a grant of summary judgment. *See Frost v. Perry,* 919 F.Supp. 1459, 1465–67 (D.Nev.1996), *aff'd sub nom. Kasza,* 133 F.3d 1159 (granting summary judgment because "the privilege, as invoked, covered various items of discovery requested by Plaintiffs," including "various photographic exhibits" and "under seal ... affidavits," and therefore "Plaintiffs have failed to establish a genuine issue as to any material fact without running afoul of the military and state secrets privilege").

to apply *Reynolds* in the first instance. *See Singleton v. Wulff*, 428 U.S. 106, 120, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976); *see also Johnson v. California*, 543 U.S. 499, 515, 125 S.Ct. 1141, 160 L.Ed.2d 949 (2005) (citing *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 557–58, 114 S.Ct. 2396, 129 L.Ed.2d 427 (1994) (reversing and remanding for the lower court to apply the correct legal standard in the first instance)).

The majority's analysis here is premature. This court should not determine that there is no feasible way to litigate Jeppesen's liability without disclosing state secrets; such a determination is the district court's to make once a responsive pleading has been filed, or discovery requests made. We should remand for the government to assert the privilege with respect to secret evidence, and for the district court to determine what evidence is privileged and whether any such evidence is indispensable either to Plaintiffs' prima facie case or to a valid defense otherwise available to Jeppesen. Only if privileged evidence is indispensable to either party should it dismiss the complaint.

Conclusion

The majority concludes its opinion with a recommendation of alternative remedies. Not only are these remedies insufficient, but their suggestion understates the severity of the consequences to Plaintiffs from the denial of judicial relief. Suggesting, for example, that the Executive could "honor[ ] the fundamental principles of justice" by determining "whether plaintiffs' claims have merit," [*see* Maj. Op. at 1091] disregards the concept of checks and balances. Permitting the executive to police its own errors and determine the remedy dispensed would not only deprive the judiciary of its role, but also deprive Plaintiffs of a fair assessment of their claims by a neutral arbiter. The majority's suggestion of payment of reparations to the victims of extraordinary rendition, such as those paid to Japanese Latin Americans for the injustices suffered under Internment during World War II, over fifty years after those injustices were suffered [Maj. Op. at 1091], elevates the impractical to the point of absurdity. Similarly, a congressional investigation, private bill, or enacting of "remedial legislation," [Maj. Op. at 1092], leaves to the legislative branch claims which the federal courts are better equipped to handle. *See Kosak v. United States*, 465 U.S. 848, 867, 104 S.Ct. 1519, 79 L.Ed.2d 860 (1984) (Stevens, J., dissenting).

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

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

APPENDIX

APPENDIX

Mohammed v. Jeppesen, 08-15693
Public, non-secret information regarding Plaintiffs' claims

DID JEPPESEN PROVIDE FLIGHT & LOGISTICAL SUPPORT FOR RENDITION FLIGHTS?		
TYPE OF INFORMATION	DESCRIPTION OF EVIDENCE	RECORD CITE
Internal communication	Spanish prosecutors found a telex communication between Jeppesen and its agent in Mallorca, Spain (Mallorcair) in the course of a criminal investigation into the use of the Mallorca airport by the CIA as a "staging post" for rendition flights. In the telex, Jeppesen requests Mallorcair to provide ground handling services and pay airport fees for a Boeing business jet registered as N313P from Jan. 25, 2004-Jan. 27, 2004.	Smith decl., ER 25:14-23; Exh. D (ER 79 - text of telex is unclear in copy); Watt decl., ER 299:22-300:9
Internal communication	Mallorcair, *in a statement to* Spanish police, *confirmed the receipt of instructions from* Jeppesen.	Smith decl., ER 25:24-25 - 26:1-3; Exh. E (ER 81-84)

APPENDIX

Mohammed v. Jeppesen, 08-15693
Public, non-secret information regarding Plaintiffs' claims

TYPE OF INFORMATION	DESCRIPTION OF EVIDENCE	RECORD CITE
DID JEPPESEN PROVIDE FLIGHT & LOGISTICAL SUPPORT FOR RENDITION FLIGHTS? (CONTINUED)		
Public information	Council of Europe identified Jeppesen as entity responsible for filing specific flight plans because of unique code - KSFOXLDI - assigned to Jeppesen in the Aeronautical Fixed Telecommunication Network (AFTN). Every flight plan submitted by Jeppesen to air traffic control authorities notes this code as the "originator code." Attached is a copy of the Eurocontrol, Integrated Initial Flight Plan Processing System, IFPS Users manual, which notes, "The AFTN address KSFOXLDI is a collective address for Jeppesen flight planning services in San Francisco. A complete copy of the manual is at: http://www.cmfu.eurocontrol.int/cfmu/gallery/content/public/userdocs/docs/IFPS_Users_Manual_12_0_external.pdf	Watt decl., ER 297:20-298:10; Exh. FF

APPENDIX

Mohamed v. Jeppesen, 08-15693
Public, non-secret information regarding Plaintiffs' claims

TYPE OF INFORMATION	DESCRIPTION OF EVIDENCE	RECORD CITE
DID JEPPESEN PROVIDE FLIGHT & LOGISTICAL SUPPORT FOR RENDITION FLIGHTS? (CONTINUED)		
Public information	Politiken, the leading Danish newspaper, reported that the Gulfstream jet registered as N379P crossed Danish airspace before collecting Mr. Bashmilah from Amman, Jordan and transferring him to Kabul, Afghanistan.	Satterthwaite decl., ER 247:3-9
Public information	The Council of Europe 2007 report documented the role of Jeppesen in providing flight planning and logistical support to aircraft and flight crews used in rendition program, identified Jeppesen as "the aviation services provider customarily used by the CIA," and noted that Jeppesen filed "multiple 'dummy' flight plans for many of these flights."	Watt decl., Er 297:11-18; Exh. 5(b)
Public information	The Council of Europe and European Parliament linked two aircraft (Gulfstream 5 Jet N379P, and Boeing 737 N313P) to rendition of Plaintiffs.	Watt decl., ER 295:11-18; Exh. 5(a)

APPENDIX

Mohammed v. Jeppesen, 08-15693
Public, non-secret information regarding Plaintiffs' claims

TYPE OF INFORMATION	DESCRIPTION OF EVIDENCE	RECORD CITE
DID JEPPESEN PROVIDE FLIGHT & LOGISTICAL SUPPORT FOR RENDITION FLIGHTS? (CONTINUED)		
Public information	*The Broken Promise*, Part I, Kalla Fakta (May 17, 2004) (Swedish TV, English transcript available online) (discussing role of aircraft N379P owned by Premier Executive Transportation in rendition of Plaintiff Agiza from Sweden to Egypt in December 2001); http://www.hrw.org/english/docs/2004/05/17/sweden8620.htm	Watt decl., ER 295:24-296:3.
Public information	Bob Egelko, *Firm Reportedly Filed Bogus CIA Flight Plans*, S.F. Chron., June 13, 2007 (discussing Council of Europe report and Jeppesen's role in the rendition program).	Watt decl., ER 299:16-21

APPENDIX

Mohammed v. Jeppesen, 08-15693
Public, non-secret information regarding Plaintiffs' claims

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Public information	Jane Mayer, Outsourcing: the CIA's Travel Agent, The New Yorker (Oct. 30, 2006), available at http://www.newyorker.com/archive/2006/10/30/061030ta_talk_mayer (describing the role of Jeppesen in planning the CIA's extraordinary rendition flights, and quoting former Jeppesen employee's recounting of a corporate meeting at which Jeppesen's managing director, as well as another executive, told the employee that Jeppesen handled the rendition flights).	Watt decl., ER 299:1-8
Public information	Claudio Gatti, *Boeing Unit to Face Suit in CIA Seizures*, Int'l Herald Tribune, May 29, 2007, at 3, available at http://www.iht.com/articles/2007/05/29/news/rendition.php (noting that an independent investigation by an Italian newspaper *Il Sole 24 Ore* "independently found evidence that two of the three plaintiffs in the ACLU lawsuit . . . were transported . . . with the logistical support from Jeppesen").	Watt decl., Er 299:9-15
DID JEPPESEN PROVIDE FLIGHT & LOGISTICAL SUPPORT FOR RENDITION FLIGHTS? (CONTINUED)		
Public information	Stephen Grey, *Ghost Plane: The True Story of the CIA Torture Program* (2006) (identifies involvement of specific aircraft, including N379P and N313P in rendition of specific individuals, including plaintiffs).	Watt decl., ER 297:5-11.
Flight records	Flight records show on May 23, 2002, a Gulfstream V aircraft registered as N379P left Washington D.C. and flew to Frankfurt, then to Dubai (UAE), Islamabad (Pakistan), Rabat (Morocco), Porto (Portugal), and then back to Washington D.C. The originator code on the flight plans is KSFOXLDJ, a code specific to Jeppesen Dataplan.	Britel decl., ER 94:20-95:7; Exh. A (ER 100) and B (ER101-02)

APPENDIX

Mohammed v. Jeppesen, 08-15693
Public, non-secret information regarding Plaintiffs' claims

TYPE OF INFORMATION	DESCRIPTION OF EVIDENCE	RECORD CITE
DID JEPPESEN PROVIDE FLIGHT & LOGISTICAL SUPPORT FOR RENDITION FLIGHTS? (CONTINUED)		
Flight records	Invoice numbered 19122416 from Luftfartsverket Division Stockholm to Jeppesen Dataplan, and related record from the Swedish Civil Aviation Administration (SCAA) notes that on Dec. 18, 2001, Jeppesen paid for the following fees for a Gulfstream V aircraft (registration number N379P): noise, landing, terminal navigation, emission, passenger and security. SCAA also notes that the aircraft landed at Bromma airport, Sweden, at 19:54 on Dec. 18, 2001, and departed for Cairo the same day at 20:49. A total of nine passengers were on board the aircraft.	Watt decl. ER 300:16-25; Exh. GG
Flight records	Originator code for Plaintiff Agiza's, entity responsible for filing the flight plan, is KSFOXLDI, a code unique to Jeppesen Dataplan. Same code for renditions of Britel, Bashmilah, and Al-Rawi (see their respective declarations).	Watt decl., ER 301:1-11
DID JEPPESEN PROVIDE FLIGHT & LOGISTICAL SUPPORT FOR RENDITION FLIGHTS? (CONTINUED)		
Flight records	Flight records show that on Dec. 8, 2002, a Gulfstream V aircraft, registered with the FAA as N379P, flew from Banjul (Gambia), to Cairo (Egypt), to Kabul (Afghanistan). The originator code on the flight plans is KSFOXLDI, a code specific to Jeppesen Dataplan.	Al-Rawi decl., ER 119:5-18; Exh. F (ER 219-22) and G (Er 224-26
Flight records	Flight records obtained by the European Parliament and Council of Europe confirm CIA involvement in Mr. Agiza's rendition. Both institutions separately identify that a Gulfstream aircraft with the registration number N379P was involved in his transportation to Egypt, and that this aircraft was owned and operated by agents of the CIA.	Wigenmark decl., ER 499:7-15

APPENDIX

Mohammed v. Jeppesen, 08-15693
Public, non-secret information regarding Plaintiffs' claims

TYPE OF INFORMATION	DESCRIPTION OF EVIDENCE	RECORD CITE
DID JEPPESEN KNOW OR SHOULD IT HAVE REASONABLY KNOWN FLIGHTS & LOGISTICAL SUPPORT WERE BEING USED FOR EXTRAORDINARY RENDITION, WHICH RESULTED IN PLAINTIFFS BEING TORTURED?		
Internal knowledge within Jeppesen	Bob Overby, director of Jeppesen International Trip Planning Service, gave an informational talk at the Jeppesen San Jose office at a "Breakfast Club" meeting for new employees. Overby said, in describing Jeppesen's operations: "We do all the extraordinary rendition flights." He clarified by stating that these were "the torture flights," specifically using the words "torture flights." He also added "let's face it, some of these flights end up this way."	Belcher declaration, ER 19:8-25
Internal knowledge within Jeppesen	A flight plan supervisor for Jeppesen and Belcher's instructor for a training class on the use of Jeppesen's trip planning software, said "We do spook flights." Belcher specifically asked whether the instructor said "spoof" flights or "spook" flights, and he replied, "spook flights."	Belcher decl., ER 20:4-10
DID JEPPESEN KNOW OR SHOULD IT HAVE REASONABLY KNOWN FLIGHTS & LOGISTICAL SUPPORT WERE BEING USED FOR EXTRAORDINARY RENDITION, WHICH RESULTED IN PLAINTIFFS BEING TORTURED? (CONTINUED)		
Public information about private companies/Jeppesen's involvement in renditions	Council of Europe Inquiry into rendition program: includes database of aircraft involved in the program and their movements. This was based on publicly available information (flight plans, etc.) between 2001 to 2005 obtained from Eurocontrol (inter-governmental agency responsible for air traffic control in Europe) and flight data from U.S. aviation authorities. The Council identified a Gulfstream 5 Jet aircraft registered with the FAA as N379P, and a Boeing 737 registered as N313P, as two of the aircraft involved in the rendition program. Photos of the two aircraft are publicly available, along with their FAA registration details.	Watt decl., ER 294:4-26; Exh. S(a)

APPENDIX

Mohammed v. Jeppesen, 08-15693
Public, non-secret information regarding Plaintiffs' claims

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DID JEPPESEN KNOW OR SHOULD IT HAVE REASONABLY KNOWN FLIGHTS & LOGISTICAL SUPPORT WERE BEING USED FOR EXTRAORDINARY RENDITION, WHICH RESULTED IN PLAINTIFFS BEING TORTURED? (CONTINUED)		
Public information about private companies/Jeppesen's involvement in renditions	Stephen Grey, *America's Gulag*, New Statesmen (May 17, 2004) (reporting on the CIA's use of private aircraft; a worldwide network of detention facilities and their cooperation with foreign intelligence agencies in the rendition program).	Watt decl., ER 290:15-19
Public information about private companies/Jeppesen's involvement in renditions	European Parliament inquiry onto rendition program in Europe. Temporary Committee Working Document on companies linked to the CIA, aircraft used by the CIA, and the European Countries in which CIA aircraft have made stopovers (Nov. 16, 2006). Available at: http://www.europarl.europa.eu/comparl/tempcom/tdip/working_docs/pe380984_en.pdf.	Watt decl., ER 295:1-10.
DID JEPPESEN KNOW OR SHOULD IT HAVE REASONABLY KNOWN FLIGHTS & LOGISTICAL SUPPORT WERE BEING USED FOR EXTRAORDINARY RENDITION, WHICH RESULTED IN PLAINTIFFS BEING TORTURED? (CONTINUED)		
Public information about private companies/Jeppesen's involvement in renditions	Dana Priest, *Jet is an Open Secret in Terror War*, Wash. Post, Dec. 27, 2004, at A1, available at http://www.washingtonpost.com/wp-dyn/articles/A27826-2004Dec26.html (discussing generally use of CIA "front companies" in rendition program).	Watt decl., ER 296:4-8.
Public information about private companies/Jeppesen's involvement in renditions	Scott Shane, Stephen Grey, and Margot Williams, *CIA Expanding Terror Battle Under Guise of Charter Flights*, N.Y. Times, May 31, 2005, at A1, available at http://www.nytimes.com/2005/05/31/national/31planes.html (discussing history and current role of private charter air companies in the rendition program).	Watt decl., ER 296:9-13.
DID JEPPESEN KNOW OR SHOULD IT HAVE REASONABLY KNOWN FLIGHTS & LOGISTICAL SUPPORT WERE BEING USED FOR EXTRAORDINARY RENDITION, WHICH RESULTED IN PLAINTIFFS BEING TORTURED? (CONTINUED)		
Public information about private companies/Jeppesen's involvement in renditions	A.C. Thompson and Trevor Paglen, *The CIA's Torture Taxi*, S.F. Bay Guardian, Dec. 14-20, 2005, Vol. 40, No. 11, available at http://www.sfbg.com/40/11/cover_plane.html (describing the institutional structure of alleged CIA front airlines including one company's ownership of aircraft registered N44765, based upon examination of publicly available company registration documents and annual returns); see also Trevor Paglen & A.C. Thompson, *Torture Taxi: On the Trail of the CIA's Rendition Flights* (2006) (book).	Watt decl., ER 296:14-22.

APPENDIX

Mohammed v. Jeppesen, 08-15693
Public, non-secret information regarding Plaintiffs' claims

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DID JEPPESEN KNOW OR SHOULD IT HAVE REASONABLY KNOWN FLIGHTS & LOGISTICAL SUPPORT WERE BEING USED FOR EXTRAORDINARY RENDITION, WHICH RESULTED IN PLAINTIFFS BEING TORTURED? (CONTINUED)		
Public information about private companies/Jeppesen's involvement in renditions	Amnesty International, *Below the Radar: Secret Flights to Torture and Disappearance* (Apr. 5, 2006) (describing rendition program and its support network of aircraft and airports and documenting over 1000 flights linked to renditions based on several sources including FAA flight records, European flight records, actual flight logs, aircraft movements recorded by airport authorities, and airport records from parliamentary and criminal investigations).	Watt decl., ER 296:23-297:4; Satterthwaite decl., ER 243:24-244:9.
Public information about private companies/Jeppesen's involvement in renditions	Stephen Grey, *Ghost Plane: The True Story of the CIA Torture Program* (2006) (references flight logs, interviews with high level U.S. and European officials, eye-witness testimony tracing history of the CIA rendition program from its roots to its current form; identifies involvement of specific aircraft, including N379P and N313P in rendition of specific individuals, including plaintiffs).	Watt decl., ER 297:5-11.
DID JEPPESEN KNOW OR SHOULD IT HAVE REASONABLY KNOWN FLIGHTS & LOGISTICAL SUPPORT WERE BEING USED FOR EXTRAORDINARY RENDITION, WHICH RESULTED IN PLAINTIFFS BEING TORTURED? (CONTINUED)		
Public information about private companies/Jeppesen's involvement in renditions	Armen Keteylan & Phil Hirschkorn, *Muslim Says He Was Abducted by U.S.*, CBS News (Nov. 28, 2006), available at http://www.cbsnews.com/stories/2006/11/28/cbsnews_investigates/printable2213638.shtml (discussing Spanish documents unearthed by journalist Stephen Grey that link Jeppesen to rendition flights).	Watt decl., ER 300:4-9.
Public information about the rendition and torture of these particular plaintiffs	Amnesty International conducted several missions to Yemen in 2005/2006 in part to investigate the rendition and secret detention of Mr. Bashmilah. The missions resulted in a series of reports on the CIA rendition program, including *USA/Jordan/Yemen: Torture and Secret Detention: Testimony of the "Disappeared" in the "War on Terror"* (Aug. 4, 2005), available at http://web.amnesty.org/library/index/engamr511082005.	Satterthwaite decl., ER 241:26-242:7.
DID JEPPESEN KNOW OR SHOULD IT HAVE REASONABLY KNOWN FLIGHTS & LOGISTICAL SUPPORT WERE BEING USED FOR EXTRAORDINARY RENDITION, WHICH RESULTED IN PLAINTIFFS BEING TORTURED? (CONTINUED)		
Public information about private companies/Jeppesen's involvement in renditions	Swedish Parliament's Standing Committee on the Constitution, in a report on the inquiry of the Swedish government's handling of Agiza's rendition, concluded that Swedish government actions violated Swedish immigration laws that prohibited the transfer of anyone from Sweden to a country where there is a substantial likelihood of his being subjected to torture.	Wigenmark decl., ER 497:21-498:4

APPENDIX

Mohamed v. Jeppesen, 08-15693

Public, non-secret information regarding Plaintiffs' claims

TYPE OF INFORMATION	DESCRIPTION OF EVIDENCE	RECORD CITE
Public information about private companies/Jeppesen's involvement in renditions	Stephen Grey, *Missing presumed tortured*, New Statesman (Nov. 20, 2006) (commenting on Bashmilah's rendition and detention by U.S. government in Afghanistan and later in a "black site" prison).	Satterthwaite decl., ER 246:1-5

APPENDIX

Mohammed v. Jeppesen, 08-15693
Public, non-secret information regarding Plaintiffs' claims

TYPE OF INFORMATION	DESCRIPTION OF EVIDENCE	RECORD CITE
DID JEPPESEN KNOW OR SHOULD IT HAVE REASONABLY KNOWN FLIGHTS & LOGISTICAL SUPPORT WERE BEING USED FOR EXTRAORDINARY RENDITION, WHICH RESULTED IN PLAINTIFFS BEING TORTURED? (CONTINUED)		
Public information about the rendition and torture of these particular plaintiffs	Adam Siddiqui and Victoria Brittain, *Pinochet is gone, but his methods are still with us*, The Guardian (Dec. 13, 2006) (reporting on Bashmilah's experience in a U.S.-run "black site" prison).	Satterthwaite decl., ER 246:6-9
Public information about the rendition and torture of these particular plaintiffs	*U.S. Challenged over 'Secret Jails,'* BBC News, (Aug. 4, 2005), available at http://news.bbc.co.uk/2/hi/americas/4743485.stm (Bashmilah detention).	Satterthwaite decl., ER 242:12-14
Public information about the rendition and torture of these particular plaintiffs	David Mark, *U.S. Torturing Detainees in Secret Locations: Amnesty*, ABC Premium News, Aug. 4, 2005), available at http://www.abc.net.au/news/stories/2005/08/04/1429783.htm (Bashmilah detention).	Satterthwaite decl., ER 242:15-16
DID JEPPESEN KNOW OR SHOULD IT HAVE REASONABLY KNOWN FLIGHTS & LOGISTICAL SUPPORT WERE BEING USED FOR EXTRAORDINARY RENDITION, WHICH RESULTED IN PLAINTIFFS BEING TORTURED? (CONTINUED)		
Public information about the rendition and torture of these particular plaintiffs	Michelle Faul, *Report says U.S. Held Two Yemeni prisoners*, USA today, (Aug. 3, 2005), available at http://www.usatoday.com/news/world/2005-08-03-secret-detainees; *Two Yemeni Men Claim Secret Detention*, Fox News.com, Aug. 4, 2005, available at http://www.foxnews.com/story/0,122711 (Bashmilah detention).	Satterthwaite decl., ER 242:18-24
Public information about the rendition and torture of these particular plaintiffs	Richard Norton-Taylor, *Detainees 'deprived of daylight,'* The Guardian, (Aug 4, 2005), available at http://www.guardian.co.uk/usastory/0,12271,1542082,00, html (Bashmilah detention).	Satterthwaite decl., ER 242:25-28

APPENDIX

Mohammed v. Jeppesen, 08-15693
Public, non-secret information regarding Plaintiffs' claims

TYPE OF INFORMATION	DESCRIPTION OF EVIDENCE	RECORD CITE
DID JEPPESEN KNOW OR SHOULD IT HAVE REASONABLY KNOWN FLIGHTS & LOGISTICAL SUPPORT WERE BEING USED FOR EXTRAORDINARY RENDITION, WHICH RESULTED IN PLAINTIFFS BEING TORTURED? (CONTINUED)		
Public information about the rendition and torture of these particular plaintiffs	Craig Whitlock, *Courted as Spies, Held as Combatants*, Wash. Post, Apr. 2, 2006 (reporting on British and American role in rendition and detention of Plaintiff Bisher Al-Rawi).	Watt decl., ER 292:16-21
Public information about the rendition and torture of these particular plaintiffs	Stephen Grey, *Our Dirty Little Torture Secret*, Sunday Times (UK), Oct. 22, 2006 (discussing rendition of plaintiff Binyam Mohamed).	Watt decl., ER 293:8-10
Public information about the rendition and torture of these particular plaintiffs	Tim Golden, *Guantanamo Terror Suspect Mocks Tribunal*, N.Y. Times, Apr. 7, 2006, at A18 (discussing Binyam Mohamed's account of rendition and torture in Morocco and Afghanistan).	Watt decl., ER 292:22-27

APPENDIX

Mohammed v. Jeppesen, 08-15693
Public, non-secret information regarding Plaintiffs' claims

TYPE OF INFORMATION	DESCRIPTION OF EVIDENCE	RECORD CITE
DID JEPPESEN KNOW OR SHOULD IT HAVE REASONABLY KNOWN FLIGHTS & LOGISTICAL SUPPORT WERE BEING USED FOR EXTRAORDINARY RENDITION, WHICH RESULTED IN PLAINTIFFS BEING TORTURED? (CONTINUED)		
Public information about the rendition and torture of these particular plaintiffs	Jerome Taylor, *CIA Sent Me to be Tortured in Afghan Prison, Says Algerian*, Independent (U.K.), July 8, 2006, at 32 (discussing Laid Saidi's account of rendition and torture, and noting that Ahmed Agiza and Muhammed al-Zery had described the use of an "almost identical procedure" in effecting their renditions).	Watt decl., ER 293:1-7
Public information about the rendition and torture of these particular plaintiffs	Amnesty International report detailing Bashmilah's story and his detention at CIA "black site" facilities: *USA/Yemen: Secret Detention in CIA "Black Sites"* (Nov 8, 2005), available at http://web.amnesty.org/library/pdf/AM$511772005ENGLISH/$File/AMR5117705.pdf.	Satterthwaite decl., ER 243:3-9
DID JEPPESEN KNOW OR SHOULD IT HAVE REASONABLY KNOWN FLIGHTS & LOGISTICAL SUPPORT WERE BEING USED FOR EXTRAORDINARY RENDITION, WHICH RESULTED IN PLAINTIFFS BEING TORTURED? (CONTINUED)		
Public information about the rendition and torture of these particular plaintiffs	Josh White, *Prisoner Accounts Suggest Detention at Secret Facilities; Rights Group Draws Link to the CIA*, Wash. Post, Nov. 7, 2005. (Bashmilah detention).	Satterthwaite decl., ER 243:14-15
Public information about the rendition and torture of these particular plaintiffs	Tito Drago, *Human Rights-U.S.: Exporting Torture*, IPS-Inter Press Service (Nov. 9, 2005). (Bashmilah detention).	Satterthwaite decl., ER 243:16-17
Public information about the rendition and torture of these particular plaintiffs	Ian Cobain, *Seized, Held, Tortured: Six Tell Same Tale*, *The Guardian*, Dec. 6, 2005. (Bashmilah detention).	Satterthwaite decl., ER 243:18-23
Public information about the rendition and torture of these particular plaintiffs	Anthony Shadid, *In Shift, Sweden Extradites Militants to Egypt*, Boston Globe, Dec. 31, 2001 (reporting on the extradition of plaintiff Ahmed Agiza and another Egyptian asylum seeker from Sweden to Egypt).	Watt decl., ER 289:23-27
DID JEPPESEN KNOW OR SHOULD IT HAVE REASONABLY KNOWN FLIGHTS & LOGISTICAL SUPPORT WERE BEING USED FOR EXTRAORDINARY RENDITION, WHICH RESULTED IN PLAINTIFFS BEING TORTURED? (CONTINUED)		
Public information about the rendition and torture of these particular plaintiffs	Craig Whitlock, *New Swedish Documents Illuminate CIA Action: Probe Finds 'Rendition' of Terror Suspects Illegal*, Wash. Post, May 21, 2005, at A1 (reporting on ten-month investigation into rendition of Plaintiff Agiza and another Egyptian asylum seeker, Mohamed El-Zery).	Watt decl., ER 279:10-16
Public information about the rendition and torture of these particular plaintiffs	Human Rights Watch, *Empty Promises: Diplomatic Assurances No Safeguard Against Torture*, (Apr. 2004) (documenting specific rendition cases, including the rendition of Plaintiff	Watt decl., ER 275:5-9

APPENDIX

Mohammed v. Jeppesen, 08-15693

Public, non-secret information regarding Plaintiffs' claims

TYPE OF INFORMATION	DESCRIPTION OF EVIDENCE	RECORD CITE
	Agiza, and discussing use and efficacy of "diplomatic assurances" in the process).	

APPENDIX

Mohammed v. Jeppesen, 08-15693
Public, non-secret information regarding Plaintiffs' claims

TYPE OF INFORMATION	DESCRIPTION OF EVIDENCE	RECORD CITE
DID JEPPESEN KNOW OR SHOULD IT HAVE REASONABLY KNOWN FLIGHTS & LOGISTICAL SUPPORT WERE BEING USED FOR EXTRAORDINARY RENDITION, WHICH RESULTED IN PLAINTIFFS BEING TORTURED? (CONTINUED)		
Public information about the rendition and torture of these particular plaintiffs	Scott Shane and Margo Williams, *Yemenis Freed After Transfer from Secret Prisons, Report Says*, N.Y. Times (Apr. 5, 2006), available at http://www.nytimes.com/2006/04/05/world/middleeast/05detain.html. (Bashmilah detention).	Satterthwaite decl., ER 244:14-16.
Public information about the rendition and torture of these particular plaintiffs	United Nations Special Report on Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (March 21, 2006) (including a letter from the Yemeni government that Bashmilah had been transferred from the custody of the government of Yemen to the U.S. government).	Satterthwaite decl., ER 250:12-251:8
Public information about the rendition and torture of these particular plaintiffs	Josh White, *3 U.S.-Detained Yemenis Freed, Rights Group Says*, Wash. Post, Apr. 6, 2006. (Bashmilah detention).	Satterthwaite decl., ER 244:17-20
DID JEPPESEN KNOW OR SHOULD IT HAVE REASONABLY KNOWN FLIGHTS & LOGISTICAL SUPPORT WERE BEING USED FOR EXTRAORDINARY RENDITION, WHICH RESULTED IN PLAINTIFFS BEING TORTURED? (CONTINUED)		
Public information about the U.S. practice of rendition flights and torture generally	Richard Norton-Taylor, *Amnesty demands public inquiry on rendition flights*, The Guardian, Apr. 5, 2006.	Satterthwaite decl., ER 244:21-23
Public information about the U.S. practice of rendition flights and torture generally	United Nations, *Report on Torture* (Jan. 5, 2007) (Jordan "has repeatedly been mentioned in relation to the practice by the United States of America of 'extraordinary renditions'").	Satterthwaite decl., ER 251:9-252:4
Public information about the U.S. practice of rendition flights and torture generally	United Nations, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Addendum, Communications with Governments* (2005) (questioning detention procedures in Indonesia, Jordan, Yemen, and the U.S.).	Satterthwaite decl., ER 249:1-250:11
DID JEPPESEN KNOW OR SHOULD IT HAVE REASONABLY KNOWN FLIGHTS & LOGISTICAL SUPPORT WERE BEING USED FOR EXTRAORDINARY RENDITION, WHICH RESULTED IN PLAINTIFFS BEING TORTURED? (CONTINUED)		
Public information about the U.S. practice of rendition flights and torture generally	Andrew Buncombe, *Revealed: The plight of prisoners caught up in the U.S. rendition*, The Independent, Apr. 5, 2006.	Satterthwaite decl., ER 244:24-27
Public information about the U.S. practice of rendition flights and torture generally	Daniel Dombey and Demetri Sevastopulo, *Amnesty links rendition flights with torture*, Financial Times, Apr. 5, 2006.	Satterthwaite decl., ER 245:1-3

APPENDIX

Mohammed v. Jeppesen, 08-15693
Public, non-secret information regarding Plaintiffs' claims

TYPE OF INFORMATION	DESCRIPTION OF EVIDENCE	RECORD CITE
Public information about the U.S. practice of rendition flights and torture generally	*CIA Exploited Aviation Practices to Unlawfully Transfer Detainees to Countries that Torture, According to New Amnesty Int'l Report*, P.R. Newswire, Apr. 4, 2006.	Satterthwaite decl., ER 245:4-7
Public information about the U.S. practice of rendition flights and torture generally	*U.K.: Rendition report prompts probe calls*, United Press International, Apr. 5, 2006.	Satterthwaite decl., ER 245:8-9
DID JEPPESEN KNOW OR SHOULD IT HAVE REASONABLY KNOWN FLIGHTS & LOGISTICAL SUPPORT WERE BEING USED FOR EXTRAORDINARY RENDITION, WHICH RESULTED IN PLAINTIFFS BEING TORTURED? (CONTINUED)		
Public information about the U.S. practice of rendition flights and torture generally	*Amnesty Acts if CIA Held Yeminis in Djibouti, Afghanistan, and East Europe*, Agence France Presse, (Apr. 5, 2006).	Satterthwaite decl., ER 245:10-12
Public information about the U.S. practice of rendition flights and torture generally	Ruadhán Mac Cormaic, *'Rendition' Aircraft used Irish Airports – Amnesty*, The Irish Times (Apr. 5, 2006).	Satterthwaite decl., ER 245:13-15
Public information about the U.S. practice of rendition flights and torture generally	Jennifer Quinn, *'Black Site' prisons may have been in Eastern Europe; Yemeni detainees detail accounts of journeys that may have been secret CIA flights*, The Houston Chronicle (Apr. 5, 2006).	Satterthwaite decl., ER 245:16-20
Public information about the U.S. practice of rendition flights and torture generally	*Yemeni rendition prisoners shed light on secret CIA incarceration*, Belfast Telegraph (Apr. 5, 2006).	Satterthwaite decl., ER 245:21-22
DID JEPPESEN KNOW OR SHOULD IT HAVE REASONABLY KNOWN FLIGHTS & LOGISTICAL SUPPORT WERE BEING USED FOR EXTRAORDINARY RENDITION, WHICH RESULTED IN PLAINTIFFS BEING TORTURED? (CONTINUED)		
Public information about the U.S. practice of rendition flights and torture generally	*Amnesty report probes CIA jails*, Aljazeera.net (Apr. 6, 2005).	Satterthwaite decl., ER 245:23-25
Public information about the U.S. practice of rendition flights and torture generally	Nat Hentoff, *CIA Secret Prisons Exposed: The disappeared: Are they dead? Are they alive? Ask Congress. Ask the President.*, The Village Voice (May 7, 2006).	Satterthwaite decl., ER 245:25-246:2
Public information about the U.S. practice of rendition flights and torture generally	Council of Parliamentary Assembly Committee on Legal Affairs and Human Rights (Rapporteur Dick Marty), *Alleged Secret Detentions and Unlawful Interstate Transfers Involving Council of Europe Member States* (June 12, 2006).	Satterthwaite decl., ER 246:3-16.
DID JEPPESEN KNOW OR SHOULD IT HAVE REASONABLY KNOWN FLIGHTS & LOGISTICAL SUPPORT WERE BEING USED FOR EXTRAORDINARY RENDITION, WHICH RESULTED IN PLAINTIFFS BEING TORTURED? (CONTINUED)		

APPENDIX

Mohammed v. Jeppesen, 08-15693
Public, non-secret information regarding Plaintiffs' claims

TYPE OF INFORMATION	DESCRIPTION OF EVIDENCE	RECORD CITE
Public information about the U.S. practice of rendition flights and torture generally	Paul Reynolds, *Rendition and the rights of the individual*, BBC News (June 7, 2006).	Satterthwaite decl., ER 246:22-23
Public information about the U.S. practice of rendition flights and torture generally	*'Terror Flight' inquiry uncovers collusion*, The Times (London), (June 7, 2006).	Satterthwaite decl., ER 246:24-28
Public information about the U.S. practice of rendition flights and torture generally	*European governments collaborated with US on renditions: Report*, Agence France Presse (June 6, 2006).	Satterthwaite decl., ER 247:1-2
Public information about the U.S. practice of rendition flights and torture generally	*Denmark latest European government to duck rendition probe*, Malaysian Sun (Oct. 31, 2007).	Satterthwaite decl., ER 247:18-24
DID JEPPESEN KNOW OR SHOULD IT HAVE REASONABLY KNOWN FLIGHTS & LOGISTICAL SUPPORT WERE BEING USED FOR EXTRAORDINARY RENDITION, WHICH RESULTED IN PLAINTIFFS BEING TORTURED? (CONTINUED)		
Public information about the U.S. practice of rendition flights and torture generally	Sept. 26, 2006: President Bush publicly acknowledged the existence of the current rendition program and defended its utility. Confirming earlier media reports, President Bush announced: "Working with our allies, we've captured and detained thousands of terrorists and enemy fighters in Afghanistan, in Iraq, and other fronts of this war on terror." He also acknowledged that some of those captured had been "transferred to an environment where they can be held secretly, questioned by experts." He confirmed that "a small number of suspected terrorist leaders and operatives captured during the war have been held and questioned outside the United States, in a separate program operated by the CIA." See President George W. Bush, *President Discusses Creation of Military Commissions to Try Suspected Terrorists*, (Sept. 6, 2006), transcript available at http://www.whitehouse.gov/news/releases/2006/09/print/20060906-3.html.	Watt decl., ER 257:9-258:23
DID JEPPESEN KNOW OR SHOULD IT HAVE REASONABLY KNOWN FLIGHTS & LOGISTICAL SUPPORT WERE BEING USED FOR EXTRAORDINARY RENDITION, WHICH RESULTED IN PLAINTIFFS BEING TORTURED? (CONTINUED)		
Public information about the U.S. practice of rendition flights and torture generally	President's Press Conference, March 16, 2005: the President was asked why he "approved of and expanded the practice of what's called rendition, of transferring individuals out of U.S. custody to countries where human rights groups and . . . the State Department say is common for people under custody." He replied that in the "post-9/11 world, the United States must make sure we protect our people and our friends from attack . . . . And one way to do so is to arrest people and send them back to their country of origin with the promise they won't be tortured."	Watt decl., ER 258:24-259:9

APPENDIX

Mohammed v. Jeppesen, 08-15693
Public, non-secret information regarding Plaintiffs' claims

TYPE OF INFORMATION	DESCRIPTION OF EVIDENCE	RECORD CITE
DID JEPPESEN KNOW OR SHOULD IT HAVE REASONABLY KNOWN FLIGHTS & LOGISTICAL SUPPORT WERE BEING USED FOR EXTRAORDINARY RENDITION, WHICH RESULTED IN PLAINTIFFS BEING TORTURED? (CONTINUED)		
Public information about the U.S. practice of rendition flights and torture generally	Condaleeza Rice statement: "In some situations, a terrorist suspect can be extradited according to traditional judicial procedures. But there have long been many other cases where, for some reason, the local government cannot detain or prosecute a suspect, and traditional extradition is not a good option. In those cases the local government can make a sovereign choice to cooperate in a rendition." (Dec. 2005).	Watt decl., ER 260:12-15
Public information about the U.S. practice of rendition flights and torture generally	Press Briefing by Scott McClellan (Dec. 6, 2005) (acknowledging that U.S. has long engaged in renditions of terror suspects, but denying that those suspects were tortured).	Watt decl., ER 261:16-22
DID JEPPESEN KNOW OR SHOULD IT HAVE REASONABLY KNOWN FLIGHTS & LOGISTICAL SUPPORT WERE BEING USED FOR EXTRAORDINARY RENDITION, WHICH RESULTED IN PLAINTIFFS BEING TORTURED? (CONTINUED)		
Public information about the U.S. practice of rendition flights and torture generally	Condaleeza Rice, *Remarks at Town Hall Meeting with University of Sydney Students* (Mar. 15, 2006) ("the practice of rendition is something that's been practiced way before September 11th when extradition isn't an option because sometimes you have to take people off the streets.").	Watt decl., ER 261:23-262:3
Public information about the U.S. practice of rendition flights and torture generally	*Powell Raps Europe on CIA Flights*, BBC News, (Dec. 17, 2005). Former Secretary of State Colin Powell: "Well, most of our European friends cannot be shocked that this kind of thing takes place . . . . The fact that we have, over the years, had procedures in place that would deal with people who are responsible for terrorist activities, or suspected of terrorist activities, and so the thing that is called rendition is not something that is new or unknown to my European friends."	Watt decl., ER 262:4-14
DID JEPPESEN KNOW OR SHOULD IT HAVE REASONABLY KNOWN FLIGHTS & LOGISTICAL SUPPORT WERE BEING USED FOR EXTRAORDINARY RENDITION, WHICH RESULTED IN PLAINTIFFS BEING TORTURED? (CONTINUED)		
Public information about the U.S. practice of rendition flights and torture generally	White House Press Secretary Tony Snow: "rendition is not something that began with this administration, and it's certainly going to be practiced, I'm sure, in the future." *Press Gaggle by Tony Snow*, (Nov. 16, 2006), transcript available at http://whitehouse.gov/news/releases/2006/06/print/20060607-2.html	Watt decl., ER 262:15-25

APPENDIX

Mohammed v. Jeppesen, 08-15693
Public, non-secret information regarding Plaintiffs' claims

TYPE OF INFORMATION	DESCRIPTION OF EVIDENCE	RECORD CITE
DID JEPPESEN KNOW OR SHOULD IT HAVE REASONABLY KNOWN FLIGHTS & LOGISTICAL SUPPORT WERE BEING USED FOR EXTRAORDINARY RENDITION, WHICH RESULTED IN PLAINTIFFS BEING TORTURED? (CONTINUED)		
Public information about the U.S. practice of rendition flights and torture generally	Intelligence Policy and National Policy Coordination: Hearing of the National Commission on Terrorist Attacks Upon the United States, (Mar. 24, 2004) (statement by Christopher Kojm, Deputy Executive Director, National Commission on Terrorist Attacks Upon the United States, and former Deputy Assistant Secretary of State). Kojm acknowledges that the CIA liaises with foreign government intelligence agencies to effect renditions, stating that the CIA "plays an active role, sometimes calling on the support of other [government] agencies for logistical or transportation assistance" but remaining the "main player" in the process.	Warr decl., ER 263:12-264:2

APPENDIX

Mohammed v. Jeppesen, 08-15693
Public, non-secret information regarding Plaintiffs' claims

TYPE OF INFORMATION	DESCRIPTION OF EVIDENCE	RECORD CITE
DID JEPPESEN KNOW OR SHOULD IT HAVE REASONABLY KNOWN FLIGHTS & LOGISTICAL SUPPORT WERE BEING USED FOR EXTRAORDINARY RENDITION, WHICH RESULTED IN PLAINTIFFS BEING TORTURED? (CONTINUED)		
Public information about the U.S. practice of rendition flights and torture generally	George Tenet, Written Statement for the Record of the Director of Central Intelligence Before the Joint Inquiry Committee, (Oct. 17, 2002). "During the Millennium threat period . . . [o]ver a period of months, there was close, daily consultation that included Director Freeh, the National Security Adviser, and the Attorney General. We identified 36 additional terrorist agents at the time around the world. We pursued operations against them in 50 countries. Our disruption activities succeeded against 21 of these individuals, and included arrests, renditions, detentions, surveillance, and direct approaches." Tenet also elaborated upon a number of specific instances of CIA involvement in renditions.	Watt decl., ER 264:6-265:13
DID JEPPESEN KNOW OR SHOULD IT HAVE REASONABLY KNOWN FLIGHTS & LOGISTICAL SUPPORT WERE BEING USED FOR EXTRAORDINARY RENDITION, WHICH RESULTED IN PLAINTIFFS BEING TORTURED? (CONTINUED)		
Public information about the U.S. practice of rendition flights and torture generally	General Michael Hayden acknowledged the CIA flew rendition flights, albeit a fraction of the number alleged by the European Parliament investigation. He also discussed the genesis of the current program, noting that it began "with the capture of Abu Zubayadah in the spring of 2002."	Watt decl., ER 266:14-267:14
Public information about the U.S. practice of rendition flights and torture generally	General Hayden on the use of torture: the techniques used by the CIA were "different from what is contained in the Army Field Manual" and methods in the manual "did not exhaust[] the universe of lawful interrogation techniques consistent with the Geneva Convention . . . ."	Watt decl., ER 267:15-268:21
Public information about the U.S. practice of rendition flights and torture generally	General Hayden on Charlie Rose: acknowledging that the number of people who had been rendered by the CIA since 9/11 was in the double digits.	Watt decl., ER 268:22-269:15
DID JEPPESEN KNOW OR SHOULD IT HAVE REASONABLY KNOWN FLIGHTS & LOGISTICAL SUPPORT WERE BEING USED FOR EXTRAORDINARY RENDITION, WHICH RESULTED IN PLAINTIFFS BEING TORTURED? (CONTINUED)		
Public information about the U.S. practice of rendition flights and torture generally	Gen. Hayden, in a Dec. 6, 2007 press conference, confirmed the existence of the rendition program and defended its legality. Transcript available at https://www.cia.gov/news-information/press-releases-statements/taping-of-early-detainee-interrogations.html.	Watt decl., ER 269:16-270:2
Public information about the U.S. practice of rendition flights and torture generally	Interview with Michael Scheuer, a former CIA official, Chief of Bin Laden unit from 1996-1999, on PBS Frontline (Oct. 18, 2005) (transcript available online). Scheur noted that the "direction [from the politicians] was to find, apprehend and hold senior members of Al	Watt decl., ER 270:15-271:21

APPENDIX

Mohammed v. Jeppesen, 08-15693
Public, non-secret information regarding Plaintiffs' claims

TYPE OF INFORMATION	DESCRIPTION OF EVIDENCE	RECORD CITE
	Qaeda and try to find out what they know about coming attacks against the United States . . . .[T]he U.S. government is willing to hold these people at various incarceration sites around the world."	
DID JEPPESEN KNOW OR SHOULD IT HAVE REASONABLY KNOWN FLIGHTS & LOGISTICAL SUPPORT WERE BEING USED FOR EXTRAORDINARY RENDITION, WHICH RESULTED IN PLAINTIFFS BEING TORTURED? (CONTINUED)		
Public information about the U.S. practice of rendition flights and torture generally	Bills have been introduced in Congress to prevent renditions, including the *Convention Against Torture Implementation* Act 2005, S. 654, 109th Cong. (2005) (by Sen. Leahy), the *Torture Outsourcing Prevention* Act, H.R. 952, 109th Cong. (2005) (which featured a floor introduction by Representative Markey - transcript available online - discussing renditions) and *National Security With Justice Act of 2007*, S. 1876, 110th Cong., (2007) (by Senator Biden).	Watt decl., ER 273:1-22
Public information about the U.S. practice of rendition flights and torture generally	In 2007, there were public hearings by three separate Senate committees on CIA detention and treatment of detainees, the use of European countries to facilitate the transfer and detention of terror suspects, and the rendition of a Canadian citizen, Maher Arar, from the United States to Syria in 2002. See ER for links to transcripts of hearings.	Watt decl., ER 273:23-274:17
DID JEPPESEN KNOW OR SHOULD IT HAVE REASONABLY KNOWN FLIGHTS & LOGISTICAL SUPPORT WERE BEING USED FOR EXTRAORDINARY RENDITION, WHICH RESULTED IN PLAINTIFFS BEING TORTURED? (CONTINUED)		
Public information about the U.S. practice of rendition flights and torture generally	Congressional Research Service reports (2005 and 2007) detail the history of the rendition program, its current parameters, and the legal constraints on its use under domestic and international law. *Renditions and Constraints Imposed by Laws on Torture* (Oct. 12, 2007), available at http://www.fas.org/wgp/crs/natsec/RL32890.pdf.	Watt decl., ER 274:18-25
Public information about the U.S. practice of rendition flights and torture generally	International Federation for Human Rights, *Morocco: Human Rights abuses in the fight Against Terrorism* (July 2004) (documenting widespread torture and other abuse of persons detained under Moroccan anti-terror laws, and renditions to Morocco).	Watt decl., ER 275:10-15
DID JEPPESEN KNOW OR SHOULD IT HAVE REASONABLY KNOWN FLIGHTS & LOGISTICAL SUPPORT WERE BEING USED FOR EXTRAORDINARY RENDITION, WHICH RESULTED IN PLAINTIFFS BEING TORTURED? (CONTINUED)		
Public information about the U.S. practice of rendition flights and torture generally	Association of the Bar of the City of New York and Center for Human Rights and Global Justice, *Torture By Proxy: International and Domestic Law Applicable to "Extraordinary Renditions"* (2004, modified June 2006) (documenting U.S. involvement in numerous renditions).	Watt decl., ER 276:14-20

APPENDIX

Mohammed v. Jeppesen, 08-15693
Public, non-secret information regarding Plaintiffs' claims

TYPE OF INFORMATION	DESCRIPTION OF EVIDENCE	RECORD CITE
Public information about the U.S. practice of rendition flights and torture generally	All Party Parliamentary Group (UK), APPG *Measures on Rendition* (Sept. 25, 2007) (explaining UK involvement in renditions by the United States, highlighting why current UK arrangements are inadequate to prevent future renditions, and proposing new measures).	Warr decl., ER 279:5-9.

APPENDIX

Mohammed v. Jeppesen, 08-15693
Public, non-secret information regarding Plaintiffs' claims

TYPE OF INFORMATION	DESCRIPTION OF EVIDENCE	RECORD CITE
DID JEPPESEN KNOW OR SHOULD IT HAVE REASONABLY KNOWN FLIGHTS & LOGISTICAL SUPPORT WERE BEING USED FOR EXTRAORDINARY RENDITION, WHICH RESULTED IN PLAINTIFFS BEING TORTURED? (CONTINUED)		
Public information about the U.S. practice of rendition flights and torture generally	Giles Tremlett, *Spanish Police Expose More CIA Links to Secret Flights of Detainees*, The Guardian (UK), Nov. 15, 2005, at 18 (reporting that Spanish police have traced up to 42 suspected CIA operatives believed to have taken part in secret flights carrying detained or kidnapped Islamic terror suspects to interrogation centers and jails in Afghanistan, Egypt, and elsewhere).	Watt decl., ER 279:17-23
Public information about the U.S. practice of rendition flights and torture generally	Craig Whitlock, *Europeans Probe Secret CIA Flights: Questions Surround Possible Illegal Transfer of Terrorism Suspects*, Wash. Post, Nov. 17, 2005, at A22 (reporting that officials in Spain, Sweden, Norway, and European Parliament had opened formal inquiries or demanded answers from U.S. officials about CIA rendition flights within their respective jurisdictions).	Watt decl., ER 279:24-280:5
DID JEPPESEN KNOW OR SHOULD IT HAVE REASONABLY KNOWN FLIGHTS & LOGISTICAL SUPPORT WERE BEING USED FOR EXTRAORDINARY RENDITION, WHICH RESULTED IN PLAINTIFFS BEING TORTURED? (CONTINUED)		
Public information about the U.S. practice of rendition flights and torture generally	Eric Decouty, *La France Enquete Sur Les Avions de la CIA*, Le Figaro (France), (Oct. 15, 2007) (reporting that Attorney General for Bobigny had opened criminal investigation into use of Bobigny airport by CIA for rendition flights).	Watt decl., ER 280:6-12
Public information about the U.S. practice of rendition flights and torture generally	*German spy probe to include CIA "kidnap" flights*, Reuters (Mar. 10, 2006) (reporting on commencement of German parliamentary inquiry into alleged kidnapping of Khaled El-Masri by CIA).	Watt decl., ER 280:13-18
Public information about the U.S. practice of rendition flights and torture generally	Mark Landler, *German Court Challenges CIA over Abduction*, N.Y. Times, Feb. 1, 2007, at A1 (reporting on issuance of arrest warrants for 13 members of "CIA abduction team" in Munich, Germany, in connection with rendition of Khaled El-Masri).	Watt decl., ER 289:18-24
DID JEPPESEN KNOW OR SHOULD IT HAVE REASONABLY KNOWN FLIGHTS & LOGISTICAL SUPPORT WERE BEING USED FOR EXTRAORDINARY RENDITION, WHICH RESULTED IN PLAINTIFFS BEING TORTURED? (CONTINUED)		
Public information about the U.S. practice of rendition flights and torture generally	John Goetz, Marcel Rosenbach, Holger Stark, *CIA Arrest Warrants Strain U.S.-German Ties*, Spiegel Online (Germany) (June 25, 2007) (discussing progress in German investigation and identification of CIA participation in rendition of Khaled El-Masri).	
Public information about the U.S. practice of	United Nations, Written Response of the United States of America to Questions Asked by	Watt decl., ER 282:12-24

APPENDIX

Mohammed v. Jeppesen, 08-15693
Public, non-secret information regarding Plaintiffs' claims

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rendition flights and torture generally	the Committee Against Torture (2006) (United States admitted that renditions have taken place but claimed they would not take place in situations where detainees would be tortured).	

APPENDIX

Mohammed v. Jeppesen, 08-15693
Public, non-secret information regarding Plaintiffs' claims

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Public information about the U.S. practice of rendition flights and torture generally	United Nations Committee Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of Convention: Conclusions and Recommendations of the Committee Against Torture* (July 25, 2006) (expressing concern about "the occurrence of cases of extraterritorial torture of detainees," the failure of the United States to always "register persons detained in territories under its jurisdiction outside the United States," the establishment of secret detention facilities, U.S. involvement in enforced disappearances, U.S. refusal to uphold the CAT's requirement of *non-refoulement* outside the boundaries of the United States, and the use of diplomatic assurances" to justify sending detainees to countries where the United States knows there is nevertheless a high likelihood of torture).	Watt decl, ER 283:8-23
DID JEPPESEN KNOW OR SHOULD IT HAVE REASONABLY KNOWN FLIGHTS & LOGISTICAL SUPPORT WERE BEING USED FOR EXTRAORDINARY RENDITION, WHICH RESULTED IN PLAINTIFFS BEING TORTURED? (CONTINUED)		
Public information about the U.S. practice of rendition flights and torture generally	Michael Isikoff, *Exclusive: Secret Memo - Sent to Be Tortured*, Newsweek (Aug 8, 2005) at 7 (quoting unnamed senior U.S. law-enforcement official who stated that "the memo reflects concerns among many agents and lawyers about 'rendition'").	Watt decl., ER 286:17-22
Public information about the U.S. practice of rendition flights and torture generally	Dana Priest, *Wrongful Imprisonment: Anatomy of a CIA Mistake*, Wash. Post, Dec. 4, 2005, at A1 (reporting that the Inspector General of the CIA is conducting an investigation of the rendition program and instances of mistakes that have been made in its implementation).	Watt decl., ER 286:23-27. For more articles along similar lines, see ER 287:1-21.

APPENDIX

Mohammed v. Jeppesen, 08-15693

Public, non-secret information regarding Plaintiffs' claims

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Public information about the U.S. practice of rendition flights and torture generally	Egypt openly acknowledged their role in cooperating with the U.S. rendition program. NBC interview: Tim Russert interviews Egyptian Prime Minister Ahmed Nazif (May 15, 2005). "I don't know the exact number, but I know that people have been sent there. The numbers have varied. Some have the number 60 or 70. But I think that it's important - you know, when you have Egyptians that have been arrested abroad, we seek to bring them back to the country. Now to say that we're bringing them back to torture them, I think is not a very accurate statement. We shouldn't be doing that. We're not doing that. But it happens sometimes . . . ."	Warr decl., ER 287:22-188:17

APPENDIX

Mohammed v. Jeppesen, 08-15693
Public, non-secret information regarding Plaintiffs' claims

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Public information about the U.S. practice of rendition flights and torture generally	The Human Rights Watch report, *Black Hole: The Fate of Islamists Rendered to Egypt* (May 2005) (noting that US was actively involved in the rendition process and basing the report on interviews with exiled activists, Egyptian lawyers, human rights groups, family members of current detainees, reviews of English and Arab press accounts - and identifying at least 63 people who have been rendered to and from Egypt since 1995).	Watt decl., ER 288:9-17
Public information about the U.S. practice of rendition flights and torture generally	Alissa Rubin, *Pakistan Hands Over Man in Terror Probe*, L.A. Times, Oct. 28, 2001; Masood Anwar, *Mystery Man Handed Over to US Troops in Karachi*, The News International (Pakistan), Oct. 26, 2001 (reporting on the rendition of Jamil Qasim Saeed Mohammad from Pakistan in 2001 by US forces and the use of a Gulfstream aircraft registered as N379P in the process).	Watt decl., ER 289:8-15
DID JEPPESEN KNOW OR SHOULD IT HAVE REASONABLY KNOWN FLIGHTS & LOGISTICAL SUPPORT WERE BEING USED FOR EXTRAORDINARY RENDITION, WHICH RESULTED IN PLAINTIFFS BEING TORTURED? (CONTINUED)		
Public information about the U.S. practice of rendition flights and torture generally	Anthony Shadid, *US Egypt Raids Caught Militants*, Boston Globe, Oct. 7, 2001, at A1 (discussing pre-9/11 rendition program in detail and suggesting that program may be employed by U.S. to fight terrorism going forward).	Watt decl., ER 289:3-7
Public information about the U.S. practice of rendition flights and torture generally	Andrew Higgins & Christopher Cooper, *CIA-Backed Team Used Brutal Means to Crack Terror Cell: Albanian Agents Sent Egyptians Back to Cairo, Prisoners Allege They Were Tortured There*, Wall St. J., Nov. 21, 2001, at A1 (detailing pre-Sept. 11 rendition of suspected Islamic militant by the CIA from Croatia to detention and interrogation in Egypt).	Watt decl., ER 289:16-22.
DID JEPPESEN KNOW OR SHOULD IT HAVE REASONABLY KNOWN FLIGHTS & LOGISTICAL SUPPORT WERE BEING USED FOR EXTRAORDINARY RENDITION, WHICH RESULTED IN PLAINTIFFS BEING TORTURED? (CONTINUED)		
Public information about the U.S. practice of rendition flights and torture generally	Rajiv Chandrasekaran and Peter Finn, *U.S. Behind Secret Transfer of Terror Suspects*, Wash. Post, March 11, 2002 (reporting on rendition of Muhammad Saad Iqbal Madni from Indonesia to Egypt on board a Gulfstream V aircraft).	Watt decl., ER 290:1-6
Public information about the U.S. practice of rendition flights and torture generally	Don Van Natta, Jr. & Souad Mekhennet, *German's Claim of Kidnapping Brings Investigation of U.S. Link*, N.Y. Times, Jan. 9, 2005, at 11 (offering comprehensive account of story of Khaled El-Masri, describing his rendition and the alleged involvement of the CIA).	Wat decl., ER 290:20-24

APPENDIX

Mohammed v. Jeppesen, 08-15693
Public, non-secret information regarding Plaintiffs' claims

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Public information about the U.S. practice of rendition flights and torture generally	Dana Priest & Barton Gellman, *U.S. Decries Abuse But Defends Interrogations: "Stress and Duress" Tactics Used on Terrorism Suspects Held in Secret Overseas Prisons*, Wash. Post., Dec. 26, 2002, at A1 (interviewing U.S. officials involved in renditions and quoting one official as saying: "We don't kick the [expletive] out of them. We send them to other countries so they can kick the [expletive] out of them.").	Watt decl., ER 290:7-14
Public information about the U.S. practice of rendition flights and torture generally	Jane Mayer, *Outsourcing Torture*, The New Yorker (Feb. 14, 2005) (comprehensive accounting of rendition program from its initial inception through early 2005).	Watt decl. 290:25-291:2

APPENDIX

Mohammed v. Jeppesen, 08-15693
Public, non-secret information regarding Plaintiffs' claims

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Public information about the U.S. practice of rendition flights and torture generally	Michael Hirsch, Mark Hosenball, and John Barry, *Aboard Air CIA*, Newsweek (Feb. 28, 2005) (interviewing rendition victims and describing rendition program including the use of specific aircraft, including a Gulfstream V jet, registered N379P).	Watt decl., ER 291:4-8
Public information about the U.S. practice of rendition flights and torture generally	Douglas Jehl & David Johnston, *Rule Change Lets CIA Freely Send Suspects Abroad to Jails*, N.Y. Times, Mar. 6, 2005, at 11 (explaining that current rendition program was authorized by President Bush six days after Sept. 11, 2001).	Watt decl., ER 291:8-13

APPENDIX

Mohammed v. Jeppesen, 08-15693
Public, non-secret information regarding Plaintiffs' claims

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Public information about the U.S. practice of rendition flights and torture generally	CIA Flying Suspects to Torture?, 60 minutes (CBS Television Broadcast) (Mar. 6, 2005) (discussing rendition program and describing U.S. modus operandi: "masked men in an unmarked jet seize their target, cut off his clothes, put him in a blindfold and jumpsuit, tranquilize him, and fly him away").	Watt decl., ER 291:14-20
Public information about the U.S. practice of rendition flights and torture generally	Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, Washington Post, Nov. 2, 2005, at A1 (describing establishing of network of CIA-run "black site" detention facilities worldwide; explaining that prisoners held within cover system were divided into two tiers: (1) major terrorism suspects, held at black sites; and (2) prisoners with limited intelligence value, who are transferred to custody of foreign governments).	Watt decl., ER 291:21-292:2
DID JEPPESEN KNOW OR SHOULD IT HAVE REASONABLY KNOWN FLIGHTS & LOGISTICAL SUPPORT WERE BEING USED FOR EXTRAORDINARY RENDITION, WHICH RESULTED IN PLAINTIFFS BEING TORTURED? (CONTINUED)		
Public information about the U.S. practice of rendition flights and torture generally	Brian Ross & Richard Esposito, *Sources Tell ABC News Top Al Qaeda Figures Held in Secret CIA Prisons*, ABC News (Dec. 5, 2005) (reporting on the scramble to shut down secret prisons in Poland and Romania and move CIA rendition and detention operations to North Africa in advance of Secretary of State Rice's visit to Europe).	Watt decl., ER 292:9-15
Public information about the U.S. practice of rendition flights and torture generally	Stephen Grey, *Kidnapped to Order*, aired on Channel 4 News (London U.K.) (June 11, 2007) (detailing harm caused by rendition program, and featuring interviews of witnesses and participants).	Watt decl., ER 293:11-16