BYU Law Review

Volume 2012 | Issue 2 Article 3

5-1-2012

Mohamed v. Jeppesen Dataplan, Inc.: The Ninth Circuit Sends the Totten Bar Flying Away on the Jeppesen Airplane

Michael Q. Cannon

Mohamed v. Jeppesen Dataplan, Inc.: The Ninth Circuit Sends the *Totten* Bar Flying Away on the *Jeppesen* Airplane

I. INTRODUCTION

In the en banc decision of *Mohamed v. Jeppesen Dataplan, Inc.* ("*Jeppesen*"), the United States Court of Appeals for the Ninth Circuit ruled that the *Reynolds* privilege iteration of the state secrets doctrine precluded the suits of several alleged victims of the government's infamous "extraordinary rendition"[1] program from proceeding against Jeppesen Dataplan, Inc. ("Jeppesen"). Jeppesen allegedly had been complicit with the federal government in the program by providing transportation and logistical support that allowed the plaintiffs to be moved clandestinely to foreign countries, where they were subjected to torture.[2]

The state secrets doctrine is an evidentiary privilege that the federal government is permitted to invoke in the interest of national security where disclosure of sensitive information during the course of litigation "might compromise or embarrass our government in its public duties" or be detrimental to the public welfare.[3] The Supreme Court has created two distinct iterations of the doctrine—the *Totten* bar and the *Reynolds* privilege.[4] Where a court determines that the stronger iteration of the doctrine—the *Totten* bar—applies, the lawsuit at issue must categorically be dismissed.[5] Where the weaker iteration of the doctrine—the *Reynolds* privilege—applies, the lawsuit

1. *See* Victor Hansen, *Extraordinary Renditions and the State Secrets Privilege: Keeping Focus on the Task at Hand*, 33 N.C.J. INT'L L. & COM. REG. 629, 629 n.1 (2007) ("The term 'extraordinary renditions' refers to a program that began in the early 1990s and continues to this day, whereby the Central Intelligence Agency, together with other U.S. government agencies, transfer foreign nationals suspected of involvement in terrorism to detention and interrogation in countries where—in the U.S. government's view—federal and international legal safeguards do not apply. Suspects are detained and interrogated either by U.S. personnel at U.S.-run detention facilities outside U.S. sovereign territory, or, alternatively, are handed over to the custody of foreign agents for interrogation.").

2. *See* Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1075–76 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 2442 (2011).

3. Totten v. United States, 92 U.S. 105, 106–07 (1875).

4. *See infra* Parts III.B–C.

5. *See infra* Part III.A.

at issue might need to be dismissed in some circumstances, but in other circumstances the litigation may proceed forward, with the sensitive information simply being kept out of the record.[6]

Although the doctrinal existence of the state secrets doctrine is obviously controversial given that it can prevent litigants from receiving judicial redress for wrongs perpetrated against them, this Note does not focus on the advisability of the doctrine, although plenty of prior scholarly commentary has criticized the doctrine and suggested the need for its reformation.[7] This Note also does not focus on whether the Ninth Circuit was justified in applying the state secrets doctrine based on the facts at issue in *Jeppesen*. Such a critique would be very difficult. Because the choice about whether to apply the state secrets doctrine is generally premised on evidence that is never publicly disclosed,[8] it is often nearly impossible for a third-

6. *See id.*

7. *See, e.g.*, Frank Askin, *Secret Justice and the Adversary System*, 18 HASTINGS CONST. L.Q. 760, 763 (1991) (arguing that "[t]he current judicial tendency to give wide deference to government national security claims when they come into conflict with constitutional values is unjustified by the realities of governmental operations" and noting that "[t]he substantial record of abuse of the state secrets privilege by the federal government signals a need for rigorous testing of such claims in the courts" and suggesting that "unless the *Reynolds* doctrine is modified, constitutional rights will be unnecessarily sacrificed in the name of national security"); *Developments in the Law: Remedies Against the United States and Its Officials*, 70 HARV. L. REV. 827, 936 (1957) (arguing that judges should be permitted to independently review the documents allegedly containing state secrets in camera to independently determine whether they should be able to be withheld); Carrie Newton Lyons, *The State Secrets Privilege: Expanding Its Scope Through Government Misuse*, 11 LEWIS & CLARK L. REV. 99, 100 (2007) (arguing that the state secrets doctrine is "being used as a tool to prevent cases that could otherwise be brought in court from receiving review in that forum. It is effectively denying litigants their day in court and interfering with public and private rights."); Daniel C. Gardner, Comment, *The Big Bad State Secrets Privilege: Why McDonnell Douglas' Superior Knowledge Claim Was Doomed and How to Minimize the Effects of the Privilege Without Endangering National Security*, 10 FED. CIR. B.J. 549, 554, 579, 745 (2001) (referring to the state secrets doctrine as "invidious" and "drastic" and arguing that "[a]lthough the state secrets privilege is a proper exercise of the United States sovereign power, the effect of the privilege should be minimized as much as possible").

8. For example, in *Jeppesen* the government filed a classified declaration that never became part of the record in support of its assertion that the state secrets doctrine applied. The court made its determination about the appropriate applicability of the doctrine based in large part upon this classified declaration. *See* Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1086 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 2442 (2011) ("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 . . . . 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.").

party observer to assess whether a court properly dismissed a suit where the doctrine was invoked.

Instead, this Note argues that the *Jeppesen* court, having chosen to apply the state secrets doctrine, applied it in a fashion that was clearly out of harmony with relevant Supreme Court state secrets doctrine precedent. This relevant precedent recognizes that there are two, distinct iterations of the state secrets doctrine: the more robust *Totten* bar and the weaker *Reynolds* privilege. Although the Ninth Circuit's *Jeppesen* opinion, which applied the *Reynolds* privilege, stated that it recognized the independent viability of the *Totten* bar, *Jeppesen* functionally—although only implicitly—abolished that bar because the court's justifications for using the *Reynolds* privilege instead of the *Totten* bar are likely to apply in nearly all cases that implicate the state secrets doctrine. Consequently, lower courts are likely to read *Jeppesen* as a mandate to always apply the *Reynolds* privilege, effectively abolishing the *Totten* bar.

II. FACTS AND PROCEDURAL HISTORY

The five plaintiffs in *Jeppesen* alleged that they were victims of the United States government's "extraordinary rendition" program.[9] The plaintiffs claimed that the government had apprehended them because of their suspected terrorist activities and transferred them to foreign countries where they could be tortured and interrogated using methods prohibited in the United States.[10]

The first of the plaintiffs, Ahmed Agiza ("Agiza") was an Egyptian national. He claimed that he was apprehended while in Europe, given over to American authorities, and then flown to Egypt and placed into a "squalid, windowless, and frigid cell" where he endured tortures such as "severe[] and repeated[] beat[ings]" and "electric shock through electrodes attached to his ear lobes, nipples and genitals."[11] After being held for over two years, he received a fifteen-year sentence in an Egyptian prison.[12]

Agiza's experience was similar to the experiences of the other four plaintiffs. Each of the other plaintiffs, like Agiza, claimed to have suffered unspeakable tortures such as being "deprived of sleep

9. *Id*. at 1073–74.

10. *See id*. at 1073–75.

11. *Id*. at 1074 (internal quotation marks omitted).

12. *Id*.

and food and threatened with sexual torture, including sodomy with a bottle and castration,"[13] "routine[] beating . . . and breaking [of] bones," "cut[ting] with a scalpel all over [the] body including [the] penis" followed by "pour[ing] 'hot stinging liquid' into the open wounds," and "being made to 'listen to extremely loud music day and night'" and other loud noises, including "the recorded screams of women and children."[14]

The five plaintiffs brought suit against Jeppesen, a United States corporation that provides logistical transportation support services, including a full range of services catering to the military,[15] for the company's alleged involvement in transporting the plaintiffs to the sites where they were allegedly tortured.[16] The plaintiffs claimed that Jeppesen had "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."[17] The plaintiffs also claimed that Jeppesen had "actual or constructive knowledge" that these planes were a part of the extraordinary rendition program.[18]

The procedural history of *Jeppesen* is relatively complex. As soon as the plaintiffs filed their complaint, and before Jeppesen had even answered, the United States government moved to intervene in the suit and to have the complaint dismissed.[19] The United States filed two declarations in support of its motion to dismiss; one of these documents was classified and the other was public.[20] The public declaration explained that allowing for disclosure of the information claimed as privileged "could be expected to cause serious—and in some instances exceptionally grave—damage to the national security of the United States."[21] Consequently, the declaration stated that

13. *Id.* (describing the experience of "Plaintiff Abou Elkassim Britel, a 40-year-old Italian citizen of Moroccan origin").

14. *Id.* (recounting the experience of "Plaintiff Binyam Mohamed, a 28-year-old Ethiopian citizen and legal resident of the United Kingdom").

15. *See* JEPPESEN DATAPLAN, INC., http://www.jeppesen.com/industry-solutions/aviation/military/jeppesen-military-products-and-services.jsp (last visited Oct. 15, 2011) (containing a description of the military logistical services provided by Jeppesen Dataplan, Inc.).

16. *Jeppesen*, 614 F.3d at 1075.

17. *Id.*

18. *Id.*

19. *Id.* at 1076.

20. *Id.*

21. *Id.*

"because highly classified information is central to the allegations and issues in this case," the court should dismiss the case.[22] Alternatively, the United States government asserted that at the very least the "information should be excluded from any use in this case."[23]

The district court granted the government's motion for dismissal, finding that this was clearly a matter that implicated the state secrets doctrine.[24] The plaintiffs appealed, and a three-judge panel from the Ninth Circuit reversed and remanded, finding that the government had not established the applicability of the state secrets doctrine, but allowing for the possibility that the doctrine might be used later in the litigation.[25] Before the case had actually been remanded, the Ninth Circuit decided to reconsider the case "en banc to resolve questions of exceptional importance regarding the scope and application of the state secrets doctrine."[26]

III. SIGNIFICANT LEGAL BACKGROUND

After very briefly introducing the state secrets doctrine, the remainder of this section explains the jurisprudential development of the two separate iterations of the doctrine: the *Totten* bar and the *Reynolds* privilege.

A. State Secrets Doctrine

The state secrets doctrine made its first appearance in American courts directly following the Civil War in the 1875 case of *Totten v. United States.*[27] The state secrets doctrine is a privilege that may only

22. *Id.*

23. *Id.*

24. *Id.* at 1076–77.

25. *Id.* at 1077.

26. *Id.* En banc hearings are generally reserved for these exceptional circumstances. Fed. R. App. P. 35(a)(2) ("A majority of the circuit judges . . . may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless . . . the proceeding involves a question of exceptional importance.").

27. *See* Jason A. Crook, *From the Civil War to the War on Terror: The Evolution and Application of the State Secrets Privilege*, 72 ALB. L. REV. 57, 58 (2009) ("Although it would take some time for the state secrets privilege to develop its current scope and power, the case of *Totten v. United States* marks the first general instance of its use in American jurisprudence."); *c.f.* Hansen, *supra* note 1, at 631 n.8 (suggesting that dicta in the 1803 Supreme Court decision of *Marbury v. Madison* was an early application of the doctrine).

be asserted by the government, never by a private actor.[28] The doctrine is premised on the idea that courts must act to "prevent disclosure of state secrets" in a narrow class of "exceptional circumstances" where such prevention of disclosure is "in the interest of the country's national security."[29]

Because application of the state secrets doctrine may impair the rights of litigants, the Supreme Court has cautioned that the government should only be permitted to employ the state secrets doctrine in narrow circumstances.[30] Nonetheless, where necessary in the interest of national security, application of the stronger iteration of the state secrets doctrine, the *Totten* bar, can result in the "dismissing [of] a case entirely."[31] In other cases, though, a weaker iteration of the doctrine, the *Reynolds* privilege, might merely act to require exclusion of certain evidence, but still allow a case to proceed forward.[32]

B. The Totten *Bar*

As mentioned in the foregoing section, the first application of the state secrets doctrine in the United States came in the post-Civil War case of *Totten v. United States*. *Totten* involved a breach of contract claim by the executor of the estate of a former Union spy against the federal government.[33] The executor claimed that the deceased spy, William A. Lloyd, had entered into an espionage contract with President Lincoln in July 1861.[34] The executor claimed that while Lloyd fulfilled his obligation by spying throughout the duration of the war, at the close of the war he had only been paid an amount sufficient to reimburse him for his expenses, not the promised consideration under his contract.[35]

Without disputing the validity of the executor's contractual claim, the Supreme Court determined that the claim could not

28. *See* United States v. Reynolds, 345 U.S. 1, 7 (1953).

29. *Jeppesen*, 614 F.3d at 1077.

30. *See Reynolds*, 345 U.S. at 7.

31. *Jeppesen*, 614 F.3d at 1077; *see also* Totten v. United States, 92 U.S. 105, 105–06 (1875).

32. *See, e.g.*, *Reynolds*, 345 U.S. at 7–9.

33. *Totten*, 92 U.S. at 105–06.

34. *Id.* at 106.

35. *Id.*

proceed.[36] The Court noted that the employment of spies was secret and clandestine and that, in an action such as this one, allowing a suit to proceed might expose sensitive facts "to the serious detriment of the public" or "might compromise or embarrass our government in its public duties."[37] The Court noted that if this litigation were allowed to continue forward, thereby creating "liability to publicity," the government's ability to carry out the country's "indispensable" program of "secret service" would be "impossible."[38] Consequently, the Supreme Court dismissed the entire lawsuit.[39] Thus, although *Totten* did not fully define the contours of the *Totten* bar iteration of the state secrets doctrine, the case did establish that application of the *Totten* bar categorically requires case dismissal.

While a number of later cases have utilized the *Totten* bar,[40] because of space constraints, the only other *Totten* bar case that will be addressed here is the Supreme Court's most recent decision invoking the bar, the 2005 decision of *Tenet v. Doe*. Prior to *Tenet*, some commentators had suggested that the *Totten* bar had been completely eclipsed by the other iteration of the state secrets doctrine, the *Reynolds* privilege.[41] However, the Supreme Court made clear, by reversing the Ninth Circuit in *Tenet*, that the *Totten* bar is alive and well.

Tenet involved a claim by a former spy of the United States. This spy, who apparently had provided espionage services during the Cold War era, claimed that the government had promised to always provide him and his wife with financial assistance and security for life; he alleged that following the close of the Cold War, the government actually began providing the couple with monetary benefit payments. Later, the spy agreed to the cessation of such benefits because he found stable work.[42] All was well until 1997, when the former spy was laid off from the employment he had found.[43] When he could

36. *Id*. at 106–07.

37. *Id*.

38. *Id*.

39. *Id*. at 107.

40. *See* Sean C. Flynn, *The* Totten *Doctrine and Its Poisoned Progeny*, 25 VT. L. REV. 793, 793-94 (2000) (explaining that the *Totten* bar has been invoked over sixty-five times and providing citations to all of the cases that have invoked the bar).

41. *See, e.g.*, Hansen, *supra* note 1, at 633 ("The current incarnation of the state secrets privilege derives from the Cold War era case of *United States v. Reynolds.*").

42. Tenet v. Doe, 544 U.S. 1, 4 (2005).

43. *Id*.

not readily find other work, he asked the government to begin providing him with benefits once again, but the government refused.[44] He brought suit.

The Court held that his claim was prohibited from proceeding by the *Totten* bar, thereby reasserting the validity of this particular iteration of the state secrets doctrine.[45] The Court reasoned that if the suit continued, there existed the "possibility that . . . an espionage relationship may be revealed [which might] well impair intelligence gathering . . . [or] reveal classified information that may undermine ongoing covert operations," a possibility the Court deemed "unacceptable."[46] The Court stated that the Ninth Circuit was wrong to believe that *Totten* "had been recast simply as an early expression of the evidentiary 'state secrets' privilege, rather than a categorical bar to . . . claims."[47] The Court noted that it had continued to look to *Totten* in contemporary cases[48] and that the *Totten* bar prong of the state secrets doctrine still had independent viability and vitality.[49] The Court explained that *Totten* should apply as a categorical bar in all cases where "trial . . . would inevitably lead to disclosure of matters which the law itself regards as confidential,"[50] such as when prevailing in a case would require showing "the existence of [a] secret espionage relationship with the Government."[51]

C. The Reynolds *Privilege*

As previously noted, the Supreme Court has cautioned that the state secrets doctrine should not be lightly deployed by courts

44. *Id.* at 5.

45. *Id.* at 3.

46. *Id.* at 11 (citations omitted).

47. *Id.* at 8.

48. For example, the Court noted that it had relied on *Totten* in *Weinberger v. Catholic Action of Haw./Peace Educ. Project*, 454 U.S. 139, 146–47 (1981) and explained that *Weinberger* had "cite[d] *Totten* in holding that 'whether or not the Navy has complied with [§ 102(2)(C) of the National Environmental Policy Act of 1969 . . . 'to the fullest extent possible' is beyond judicial scrutiny in this case,' where '[d]ue to national security reasons,' the Navy could 'neither admit nor deny' the fact that was central to the suit, *i.e.*, 'that it propose[d] to store nuclear weapons' at a facility." *Id.* at 9.

49. *See id.* at 8–9.

50. *Id.* at 8 (citation omitted).

51. *Id.*

because it can impair the rights of litigants.[52] As the previous subsection established, there are certain state secrets cases where litigation simply cannot proceed; however, in other cases, a softer iteration of the state secrets doctrine is sufficient to protect the government's interest in nondisclosure of sensitive information. The Court first recognized this softer iteration of the doctrine in the 1953 case of *United States v. Reynolds.*[53]

In *Reynolds,* the estates of several civilians brought suit against the government after the civilians were killed in a military aircraft accident.[54] This aircraft had been testing top-secret electronic equipment.[55] Pursuant to the litigation, the victims' families sought discovery of the official accident investigation documents from the Air Force, and the government moved to quash this motion, citing the state secrets doctrine and explaining that the accident report contained secret information.[56] The Court held that a gentler iteration of the state secrets doctrine, the *Reynolds* privilege, was applicable.[57] The Court adopted a sort of "balancing test" approach for invocations of the *Reynolds* privilege[58] and noted that the strength of the privilege varies in relation to the degree to which the plaintiffs in court need the evidence. The Court also explained, however, that even where there is a great need for such evidence, if state secrets are truly implicated, such evidence must nonetheless be excluded.[59]

The Court clearly established that the *Reynolds* evidentiary privilege operated dissimilarly to the *Totten* bar. The *Reynolds* privilege operates as an evidentiary privilege during the course of litigation that allows certain suits to proceed, while the *Totten* bar

52. *See* Carrie Newton Lyons, *The State Secrets Privilege: Expanding Its Scope Through Government Misuse*, 11 LEWIS & CLARK L. REV. 99, 100 (2007) (arguing that the state secrets doctrine is "being used as a tool to prevent cases that could otherwise be brought in court from receiving review in that forum. It is effectively denying litigants their day in court and interfering with public and private rights.").

53. 345 U.S. 1 (1953). *But see* Lyons, *supra* note 52, at 101 (noting that there was a "common-law privilege" that "had a life prior to *Reynolds*").

54. *Reynolds*, 345 U.S. at 2–3.

55. *Id*. at 3.

56. *Id*. at 3–4.

57. *Id*. at 6–9.

58. Lyons, *supra* note 52, at 103 ("A critical aspect of the *Reynolds* holding is the Court's formulation of a balancing test, which should be applied on a case-by-case basis when addressing the privilege.").

59. *See Reynolds*, 345 U.S. at 11.

instead bars a suit at the pleading stage and categorically precludes further litigation.[60]

While a number of later, lower-court decisions have utilized the *Reynolds* privilege, in the interest of space, these later, lower-court decisions are not considered in this Note.[61] The Supreme Court has not provided further explication of the privilege, but it did reassert its viability in dicta in *Tenet v. Doe*.[62]

IV. THE NINTH CIRCUIT'S *JEPPESEN* DECISION

The Ninth Circuit's *Jeppesen* opinion began by noting that the decision was complex because it required the court to "address the difficult balance the state secrets doctrine strikes between fundamental principles of our liberty, including justice, transparency, accountability and national security."[63] The majority opinion further noted that "[a]lthough as judges we strive to honor *all* of these principles, there are times when exceptional circumstances create an irreconcilable conflict between them." The majority explained that *Jeppesen* was such a case.[64]

After recounting the facts and procedural history of the case, the Ninth Circuit provided a brief explanation of the *Totten* bar and a very detailed explanation of the *Reynolds* privilege.[65] The court noted that the *Totten* bar and *Reynolds* privilege are distinct iterations of the state secrets doctrine.[66] It clarified that while the *Totten* bar has

60. *See id*. at 11 n.26 (explaining that in *Totten* "where the very subject matter of the action, a contract to perform espionage, was a matter of state secret," then "[t]he action was dismissed on the pleadings without ever reaching the question of evidence, since it was so obvious that the action should never prevail").

61. *See, e.g.*, El-Masri v. United States, 479 F.3d 296, 302–03 (4th Cir. 2007) (explaining that "*Reynolds*, the Supreme Court's leading decision on the state secrets privilege, established the doctrine in its modern form," before applying the doctrine); Black v. United States, 62 F.3d 1115, 1118–19 (8th Cir. 1995) (explaining that the "state secrets privilege is defined in [*Reynolds*]"); Halkin v. Helms, 690 F.2d 977, 990 (D.C. Cir. 1982).

62. 544 U.S. 1, 8–9 (2005); *see also* Lyons, *supra* note 52 at 105 (noting that the Supreme "Court recently reaffirmed the *Reynolds* standards in dicta in *Tenet v. Doe*").

63. Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1073 (9th Cir. 2010).

64. *Id*.

65. The court's explanation of the *Totten* bar that spanned less than two pages, *id*. at 1077–79, was far less detailed than its explanation of the *Reynolds* privilege, which spanned over five pages, *id*. at 1079–1083.

66. *Id*. at 1077 ("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'). . . .").

been commonly interpreted to apply to espionage cases, it is not limited only to cases involving espionage relationships with the government because it "rests on a general principle that extends beyond that specific context."[67] Furthermore, 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."[68] The majority opinion also explained that "[t]he purpose of the bar . . . is to prevent the revelation of state secrets harmful to national security"[69] and "[i]n addition to the *Totten* bar," there is another iteration of the state secrets doctrine.[70] Instead of acting as a categorical bar, this additional iteration works as an evidentiary privilege that, "[u]nlike the *Totten* bar . . . does not automatically require dismissal of [a] case."[71] The court explained that application of the *Reynolds* privilege involves a three-step process that (1) requires certain procedural requirements be met, (2) requires the court to make an independent investigation about whether the information is privileged, and (3) requires the court to determine how to proceed if the information is deemed privileged.[72]

After explaining the differences between the *Totten* bar and the *Reynolds* privilege, the majority opinion applied both to the plaintiffs in *Jeppesen*.[73] In applying the *Totten* bar, the Ninth Circuit explained that "some of plaintiffs' claims might well fall within the *Totten* bar," but it further noted that the Supreme Court had not "offered much guidance on when the *Totten* bar" applied outside of cases "premised on secret espionage agreements or the location of nuclear weapons."[74] It added that because the *Totten* bar was infrequently invoked and because "conducting a more detailed analysis [would] tend to improve the accuracy, transparency and legitimacy of proceedings," district courts should "ordinarily undertake a detailed *Reynolds* analysis before deciding whether dismissal on the pleadings is justified."[75] The court stated it would not "resolve the difficult

67. *Id*. at 1078–79.

68. *Id*. at 1079 (quoting Al-Haramain Islamic Found., Inc. v. Bush, 507 F.3d 1190, 1197 (9th Cir. 2007)) (internal quotation marks omitted).

69. *Id*.

70. *Id*.

71. *Id*.

72. *Id*. at 1080.

73. *Id*. at 1083.

74. *Id*. at 1084.

75. *Id*.

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."[76]

The Ninth Circuit stated that it chose to rely on the *Reynolds* privilege instead of the *Totten* bar for three reasons: (1) the government had raised both a *Reynolds* privilege claim and a *Totten* bar claim so the court was at liberty to address both claims, (2) the court was at liberty to affirm on any basis supported by the record, and (3) resolving the case under *Reynolds* "avoid[ed] difficult questions about the precise scope of the *Totten* bar and permits us to conduct a searching judicial review . . . ."[77] The court then applied the *Reynolds* privilege, ultimately concluding, after "thoroughly and critically" reviewing the government's declarations, that some of the evidence was privileged and that dismissal of the case on the basis of the *Reynolds* privilege was the proper course of action because there was "no feasible way to litigate Jeppesen's alleged liability without creating an unjustifiable risk of divulging state secrets."[78] The majority opinion concluded by noting that its decision would provide guidance for lower courts who would now know that "*Totten* has its limits" and that "every effort should be made to parse claims to salvage a case like this using the *Reynolds* approach," because "the standards for peremptory dismissal are very high and it is the district court's role to use its fact-finding and other tools to full advantage before it concludes that the rare step of dismissal is justified."[79]

An extremely short, two-paragraph concurring judgment followed, with a single concurring judge suggesting that the case should have properly been decided under the *Totten* bar.[80] Five judges dissented.[81] A detailed discussion of the dissent is omitted because it is not relevant to this Note, but the dissent's main contention was that only the *Totten* bar, and never the *Reynolds* privilege, could be permissibly applied to dismiss a case at the pleadings stage.[82]

76. *Id.* at 1085.
77. *Id.*
78. *Id.* at 1086–87.
79. *Id.* at 1092–93.
80. *See id.* at 1093.
81. *Id.*
82. *See id.* at 1093–101.

V. ANALYSIS

The *Jeppesen* decision is out of sync with relevant, recent Supreme Court precedent. Although this precedent suggests that the *Totten* bar is an independently viable iteration of the state secrets doctrine, the *Jeppesen* decision nonetheless subtly and implicitly discards the *Totten* bar because the decision's justifications for resolving the case using the *Reynolds* privilege instead of the *Totten* bar are likely to apply in nearly all future cases where the state secrets doctrine is implicated. This section begins by explaining why clear and transparent legal standards are of particularly great importance in the area of state secrets doctrine jurisprudence. Then, this section explains why the Ninth Circuit's *Jeppesen* decision lacked clarity by exploring the *Jeppesen* court's justifications for resolving the case using the *Reynolds* privilege instead of the *Totten* bar. Finally, this section concludes by discussing how the application of these justifications in future cases will create a fundamental and impermissible reworking of state secrets jurisprudence that is out of sync with relevant Supreme Court precedent.

A. State Secrets Doctrine—Balance of Competing Interests

The Ninth Circuit's failure to articulate clear legal standards to guide the proper application of the state secrets doctrine is particularly troubling given the manner in which the state secrets doctrine is applied and the important interests at stake.[83] The nature of the state secrets doctrine makes it largely impossible for third-party observers to assess whether courts have properly applied the doctrine because where the *Totten* bar iteration of the doctrine applies, it completely precludes litigation from proceeding, and where the *Reynolds* privilege iteration applies, it prevents certain evidence from ever being entered into the record.[84]

In cases where a court must decide whether to apply an iteration of the state secrets doctrine, the court is essentially asked to weigh transparency, justice, and disclosure against the executive's assertion of a need to protect national security. After engaging in this balancing inquiry, the court must then decide which of these interests is paramount. Given the important interests at stake in this

83. *See supra* notes 27–32 and accompanying text.

84. *See supra* note 8.

balancing inquiry and the difficulty of critically assessing a court's decision about whether to apply the state secrets doctrine, there are few areas of the law where clear legal standards are of greater importance.

B. Totten *Bar Versus* Reynolds *Privilege*

Although the *Jeppesen* court understood that it was being asked to weigh competing interests,[85] an inquiry that should have signaled the necessity of transparent legal reasoning, the court's legal reasoning nonetheless proceeded in an opaque fashion. While the court correctly recognized that the state secrets doctrines has two distinct iterations,[86] the court decided the case under the *Reynolds* privilege without providing adequate explanation as to why the more restrictive *Totten* bar should not apply.[87]

Initially, the Ninth Circuit's application of the *Reynolds* privilege instead of the *Totten* bar appears functionally unproblematic because it produced the same ultimate result as an application of the *Totten* bar would have produced. However, such an analysis ignores the ex ante effects of the decision upon future cases where the state secrets doctrine will be implicated.

Supreme Court precedent has clearly established that the *Totten* bar and the *Reynolds* privilege are distinct iterations of the state secrets doctrine even if the application of the *Reynolds* privilege ultimately produced the same level of protection as the *Totten* bar in the specific *Jeppesen* case.[88] The *Totten* bar provides greater protection against disclosure of state secrets since it categorically requires dismissal of suits, whereas the *Reynolds* privilege is a mere evidentiary privilege that may or may not require dismissal. Therefore, from a macro viewpoint the *Totten* bar provides greater protection against disclosure of state secrets than the *Reynolds* privilege.

Given that the Ninth Circuit understood that the *Totten* bar was a more restrictive standard, why then did it still decide *Jeppesen* by using the *Reynolds* privilege? Firstly, the court reasoned that the legal

85. *See Jeppesen*, 614 F.3d at 1093 ("We also acknowledge that this case presents a painful conflict between human rights and national security.").

86. *See supra* notes 66–72 and accompanying text.

87. *See supra* notes 75–79 and accompanying text.

88. *See* Tenet v. Doe, 544 U.S. 1, 8 (2005).

standards governing the applicability of the *Totten* bar were unclear, and secondly, because the case involved a difficult decision that required the court to weigh various "competing values" that warranted a more searching inquiry.[89] Therefore, it appears that the court used the *Reynolds* privilege because the case was a hard one, and the court was uncertain whether the *Totten* bar applied. These justifications seem reasonable, but considering the likely effects of applying them in future state secrets doctrine cases illustrates why these justifications are problematic.

While the Ninth Circuit may be correct in asserting that the legal standards governing the applicability of the *Totten* bar are not as clear as they might be,[90] the court ignores the fact that the Supreme Court applied the standard as recently as 2005, suggesting that the standards are not so esoteric that they lack any meaning. Furthermore, and more importantly, the Ninth Circuit seemingly fails to recognize that nearly all cases involving potential application of the state secrets doctrine will involve "competing values"[91] similar to those implicated in *Jeppesen*. Thus, the Ninth Circuit's justifications for not using the *Totten* bar will be applicable in nearly all state secrets doctrine cases. Because this is true, although the Ninth Circuit made a paean to the *Totten* bar's continuing viability, the court simultaneously signaled its untimely death by failing to articulate legal standards that would guide lower courts in their future attempts to apply the bar in future cases and by suggesting that the bar is inapplicable in cases, like *Jeppesen*, that involve "competing values." The court's reasoning thus weakens the state secrets doctrine by functionally placing a jurisprudential thumb on the side of the balancing scale where the values of transparency, justice, and full disclosure lie. Under the new, Ninth Circuit state-secrets jurisprudential model, these values occupy a position of relative favor as compared to national security interests because the values of justice, transparency and full disclosure are omnipresent "competing values," and it will nearly always be uncertain whether the *Totten* bar should apply. Therefore, lower courts, unsure of when the *Totten* bar should apply, and weighing the many "competing values" inherent in cases involving application of the state secrets

89. *See Jeppesen*, 614 F.3d at 1084.

90. *See id.*

91. "[T]he state secrets doctrine . . . [must balance] fundamental principles of our liberty, including justice, transparency, accountability and national security." *Id.* at 1073.

doctrine, will likely always use—out of an abundance of caution—the less restrictive *Reynolds* privilege.[92]

While many commentators might see such a weakening of the state secrets doctrine as a positive legal development,[93] this Note is not focused on the advisability of the state secrets doctrine. If the *Totten* bar is going to be discarded, it should be discarded clearly, openly, and based on its merits, instead of implicitly through sleight of hand and a categorical shift. In addition, because the Supreme Court has asserted the viability of the *Totten* bar as recently as 2005, the Supreme Court is the only actor empowered to abandon the bar.

VI. CONCLUSION

Although the Ninth Circuit stated that the *Totten* bar is an independent iteration of the state secrets doctrine, because the court's justifications for resolving *Jeppesen* using the *Reynolds* privilege instead of the *Totten* bar are likely to apply in nearly all state secrets cases, the court's opinion effectively discarded the *Totten* bar, which provides greater protection for state secrets. Consequently, *Jeppesen* is out of sync with relevant Supreme Court precedent explaining that the *Totten* bar is still a viable, independent iteration of the state secrets doctrine.

Michael Q. Cannon[*]

92. *See id.* at 1084–85 (explaining that a lack of clarity and certainty meant that courts should "ordinarily undertake a detailed *Reynolds* analysis before deciding whether dismissal on the pleadings is justified").

93. *See generally, e.g.*, Christopher D. Yamaoka, *The State Secrets Privilege: What's Wrong With It, How It Got That Way, and How the Courts Can Fix It*, 35 HASTINGS CONST. L.Q. 139 (2007–08).

* J.D. candidate, April 2012, J. Reuben Clark Law School, Brigham Young University. I would like to thank my wife, Laken, for her unfailing support and encouragement.