Fordham International Law Journal

Volume 34, *Issue* 5 2011 *Article* 10

Over Before it Even Began: Mohamed v. Jeppesen Dataplan and the Use of the State Secrets Privilege in Extraordinary Rendition Cases

Benjamin Bernstein*

*

Over Before it Even Began: Mohamed v. Jeppesen Dataplan and the Use of the State Secrets Privilege in Extraordinary Rendition Cases

Benjamin Bernstein

Abstract

This Comment analyzes the expansive holding of Mohamed. Part I discusses the history of both the state secrets privilege and the Totten bar. Part I also addresses the history of the extraordinary rendition program as well as two recent US circuit court cases, Arar v. Ashcroft and El-Masri v. United States, that involved both extraordinary rendition and the state secrets privilege. Part II details the factual and procedural background of the Mohamed litigation, the arguments put forth by both the plaintiffs and the intervening US government in their briefs, and the majority and dissenting opinions. Part III argues that the Mohamed majority inappropriately expanded the Reynolds state secrets privilege to render it essentially equivalent to the Totten bar.

COMMENTS

OVER BEFORE IT EVEN BEGAN: *MOHAMED v. JEPPESEN DATAPLAN* AND THE USE OF THE STATE SECRETS PRIVILEGE IN EXTRAORDINARY RENDITION CASES

Benjamin Bernstein *

* J.D. Candidate, 2012, Fordham University School of Law; B.A., 2009, University of Pennsylvania. The author would like to thank Professor Joseph Landau and his parents and brother.

INTRODUCTION

On September 8, 2010 the US Court of Appeals for the Ninth Circuit, sitting en banc, dismissed the claims of five non-US citizens who were victims of the US government's extraordinary rendition program.[1] Plaintiffs sued Jeppesen Dataplan, Inc. ("Jeppesen"), a wholly owned, Boeing Company subsidiary that, plaintiffs argued, knowingly facilitated the plaintiffs' transportation to their torture destinations.[2] The court dismissed the case at the pleading stage on the grounds that the state secrets privilege established in *United States v. Reynolds*[3] mandated dismissal when continuing the litigation would create an unreasonable risk that state secrets would be exposed.[4]

The *Mohamed v. Jeppesen Dataplan Inc.* decision was the subject of much disdain.[5] Most of the derision was focused on the US government's continual ability to avoid publicly addressing its role in committing torture abroad through its extraordinary rendition program.[6] The decision, however, is troublesome for another reason. The holding expands the *Reynolds* state secrets privilege far beyond its original intent.[7] As such, it authorizes the dismissal of a suit before the defendant even answers the complaint.[8] This expansion has essentially made the *Reynolds*

---

1. *See* Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1073 (9th Cir. 2010) (en banc).

2. *See id.* at 1075.

3. United States v. Reynolds, 345 U.S. 1, 10 (1953) (holding that evidence deemed privileged may be removed and rendered unusable to protect military secrets).

4. *See Mohamed*, 614 F.3d at 1087 (holding "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" (emphasis omitted)).

5. *See* Editorial, *Torture Is a Crime, Not a Secret*, N.Y. TIMES, Sept. 9, 2010, at A30 (expressing disappointment with the *Mohamed* decision); *see also* Marc Ambinder, *Fears for Tears: Everybody Wants to Rule the World*, ATLANTIC (Sept. 8, 2010, 7:30 PM), http://www.theatlantic.com/politics/archive/2010/09/fears-for-tears-everyone-wants-to-rule-the-world/62683 (asserting that *Mohamed* decision ensures torture program will remain secret).

6. *See Torture Is a Crime*, *supra* note 5 (noting that "secrecy privileges have been used to avoid embarrassing the government, not to protect real secrets"); *see also* Ambinder, *supra* note 5 (explaining that privilege provides government with a method of avoiding prosecution for intolerable acts).

7. *See infra* notes 206–12 and accompanying text (detailing the Ninth Circuit's expansion of the *Reynolds* state secrets privilege).

8. *See Mohamed*, 614 F.3d at 1076 (explaining that Jeppesen Dataplan, Inc. ("Jeppesen") had yet to file answer).

privilege equivalent to the nonjusticiability rule of *Totten v. United States.*[9]

US courts have interpreted the *Totten* bar to call for the dismissal of any suit where the very subject matter of the action is a state secret.[10] The *Totten* bar is thought to be the precursor to the evidentiary, state secrets privilege articulated in *Reynolds.*[11] Unwilling to dismiss the suit under *Totten,* the majority in *Mohamed* expanded the *Reynolds* privilege in an effort to dismiss the lawsuit on the pleadings, the foreseeable result under *Totten.*[12]

This Comment analyzes the expansive holding of *Mohamed.* Part I discusses the history of both the state secrets privilege and the *Totten* bar. Part I also addresses the history of the extraordinary rendition program as well as two recent US circuit court cases, *Arar v. Ashcroft*[13] and *El-Masri v. United States,*[14] that involved both extraordinary rendition and the state secrets privilege. Part II details the factual and procedural background of the *Mohamed* litigation, the arguments put forth by both the plaintiffs and the intervening US government in their briefs, and the majority and dissenting opinions. Part III argues that the *Mohamed* majority inappropriately expanded the *Reynolds* state secrets privilege to render it essentially equivalent to the *Totten* bar.

---

9. Totten v. United States, 92 U.S. 105, 107 (1875) (holding that any suit revolving around confidential government agreement should be dismissed at outset); *see infra* Part I.A (discussing the *Totten* decision and its relationship to the state secrets privilege).

10. *See Mohamed,* 614 F.3d at 1078 (explaining that "the *Totten* bar applies to cases in which 'the very subject matter of the action' is 'a matter of state secret'"(quoting United States v. Reynolds, 345 U.S. 1, 11 n.26 (1953))).

11. *See* Rita Glasionov, Note, *In Furtherance of Transparency and Litigants' Rights: Reforming the State Secrets Privilege,* 77 GEO. WASH. L. REV. 458, 462 (2009) (noting that *Totten v. United States* is "considered to be the main precursor" to the state secrets privilege); *see also* LOUIS FISHER, THE CONSTITUTION AND 9/11: RECURRING THREATS TO AMERICA'S FREEDOMS 255 (2008) (observing that *Totten* is credited as establishing the state secrets privilege).

12. *See Mohamed,* 614 F.3d at 1085 ("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.").

13. Arar v. Ashcroft, 585 F.3d 559, 563 (2d Cir. 2009) (en banc).

14. El-Masri v. United States, 479 F.3d 296, 302 (4th Cir. 2007), *cert. denied* 552 U.S. 947 (2007).

I. *STATE SECRETS PRIVILEGE AND EXTRAORDINARY RENDITION*

In *Mohamed*, the Ninth Circuit applied the state secrets privilege to a lawsuit involving the US government's extraordinary rendition program. This Part provides background information on both the state secrets privilege and the extraordinary rendition program. Section A provides a history of the state secrets privilege and examines its recent evolution. Section B discusses the history of the US extraordinary rendition program. Finally, Section C examines how US circuit courts of appeals have adjudicated claims concerning extraordinary rendition.

A. *State Secrets Privilege*

The majority in *Mohamed* dismissed the case pursuant to the *Reynolds* state secrets privilege.[15] This common law, evidentiary privilege allows the US government to request that evidence be removed because the material contains military secrets.[16] The US Supreme Court established this privilege in *Reynolds*.[17] In that case, three civilian observers were killed in the crash of a US Air Force B-29 bomber in Waycross, Georgia.[18] The aircraft was testing secret electronic equipment when one of its engines caught fire.[19] The widows of the three deceased observers brought suits against the United States under the Federal Tort Claims Act.[20]

During discovery, the widows asked the US Air Force to produce the official accident report and the statements of the three surviving crew members taken during the crash investigation.[21] The US government moved to quash the motion for production on the grounds that US Air Force regulations categorized such materials as privileged.[22] The district court

15. *See Mohamed*, 614 F.3d at 1073 (holding that the case should be dismissed because plaintiffs cannot overcome state secrets privilege articulated in *Reynolds*).

16. *See* United States v. Reynolds, 345 U.S. 1, 10 (1953) (articulating that the US government may invoke a privilege to remove evidence containing state secrets).

17. *See id.*

18. *Id.* at 2–3.

19. *Id.* at 3.

20. *Id.* at 2–3; *see* 28 U.S.C. § 2674 (2006).

21. *Reynolds*, 345 U.S. at 3.

22. *Id.* at 3–4.

judge denied the government's motion.[23] The court granted a rehearing on this issue, at which time the Secretary of the US Air Force filed a formal "Claim of Privilege," in which the government asserted that it could not produce the requested documents because the aircraft, at the time of the fire, was engaged in a highly secret mission.[24] The district court ordered the government to produce the requested documents so it could determine whether they contained privileged information.[25] When the government refused, the court ordered the facts to be recognized as establishing a claim of negligence in the plaintiffs favor and entered final judgment for them.[26] The Court of Appeals affirmed this decision.[27]

The US Supreme Court reversed, and held that the government asserted a valid claim of privilege.[28] The Court acknowledged the existence of a privilege against producing evidence that would reveal military secrets.[29] It explained that the privilege could only be asserted by the US government through a formal claim of privilege invoked by "the head of the department which has control over the matter."[30] The Court further noted that the district court alone was charged with the responsibility to evaluate the claim of privilege, "yet do so without forcing a disclosure of the very thing the privilege is designed to protect."[31]

The Court explained that, to determine whether a claim of privilege was valid, the judges were to also consider the plaintiff's need for the requested evidence.[32] Nevertheless, even the strongest showing of necessity would not prevail over a valid

---

23. *Id.* at 4.

24. *Id.*

25. *Id.* at 5.

26. *See id.* (explaining that according to FED. R. CIV. P. 37(b)(2)(i), facts can be established for a party if the opposing party fails to comply with an order related to those facts).

27. *See id.*; Reynolds v. United States, 192 F.2d 987, 998 (3d Cir. 1951) (upholding the district court's decision for the same reasons).

28. *Reynolds*, 345 U.S. at 6.

29. *See id.* at 7 ("The existence of the privilege is conceded by the court below, and, indeed, by the most outspoken critics of governmental claims of privilege.").

30. *Id.* at 7–8.

31. *Id.* at 8.

32. *See id.* at 11 ("In each case, the showing of necessity which is made will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate.").

claim of privilege to protect military secrets.[33] Furthermore, the Court pointed out that a valid assertion of the state secrets privilege does not automatically trigger dismissal of a case.[34] Rather, plaintiffs would simply be prevented from using the privileged evidence to prove their claim.[35]

Commentators believe that the state secrets privilege, as articulated in *Reynolds*, is rooted in the *Totten* bar.[36] Established in *Totten v. United States*,[37] the *Totten* bar differs from that articulated in *Reynolds*. The *Totten* bar is not merely an evidentiary privilege; rather it is a bar to justiciability.[38] In *Totten*, the intestate of William Lloyd brought suit to recover wages owed Lloyd under a contract with President Abraham Lincoln.[39] During the Civil War, President Lincoln hired Lloyd to spy on the Confederate Army for the Union.[40] For these services Lloyd was to receive US$200 a month, but instead he was only reimbursed his expenses.[41]

The US Supreme Court affirmed the Court of Claims' dismissal of suit,[42] explaining that Lloyd's contract with the government was for clandestine services.[43] As such, it was understood that neither the employer nor the employee would ever discuss this relationship.[44] A lawsuit to enforce the secret

---

33. *See id.* ("[E]ven the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake.").

34. *See id.* (noting there was plenty of nonprivileged, available evidence of which plaintiffs could avail themselves).

35. *See id.*; *see also* Carrie Newton Lyons, *The State Secrets Privilege: Expanding Its Scope through Government Misuse*, 11 LEWIS & CLARK L. REV. 99, 101 (2007) ("[T]he privilege was designed simply to prevent some information from reaching discovery while allowing the case to proceed.").

36. *See* Glasionov, *supra* note 11, at 462 (explaining that the state secrets privilege can trace its roots to *Totten*); *see also* FISHER, *supra* note 11, at 255 (remarking that *Totten* is recognized as originating the state secrets privilege).

37. 92 U.S. 105 (1875).

38. *See id.* at 107 (prohibiting "the maintenance of any suit" that falls within the scope of *Totten*).

39. *Id.* at 105.

40. *See id.* at 105–06 (explaining that Lloyd "was to proceed South and ascertain the number of troops stationed at different points in the insurrectionary States, procure plans of forts and fortifications, and gain such other information as might be beneficial to the government of the United States").

41. *Id.* at 106.

42. *Id.* at 107. The suit was dismissed by the Court of Claims because the court was unsure if the president could in fact bind the government to such a contract. Lloyd's intestate appealed the dismissal. *Id.* at 106.

43. *Id.* at 106.

44. *Id.*

contract could not be maintained, as such a proceeding would inevitably lead to the disclosure of the very matters intended to be confidential.[45] The Court asserted that any lawsuit predicated on the enforcement of a confidential agreement must be dismissed at the outset.[46]

Commentators have asserted that, in recent years, the *Totten* bar has often been conflated with the state secrets privilege established in *Reynolds*.[47] As a result, judges cite the *Reynolds* state secrets privilege to completely dismiss cases, instead of simply excluding privileged evidence.[48] More than likely, such actions are due to a footnote in *Reynolds* that cites *Totten*, explaining that where the subject matter of an action is a state secret, the case should be dismissed on the pleadings.[49] As such, US courts have interpreted the state secrets privilege to stand for the proposition that if the "very subject matter" of a suit is deemed a state secret, the case must be dismissed.[50]

Following the September 11, 2001 terrorist attacks on the United States ("9/11"), the US government often asserted this misinterpretation of the *Reynolds* state secrets privilege in an

---

45. *See id.* at 106–07.

46. *See id.* at 107 ("It may be 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, and respecting which it will not allow the confidence to be violated.").

47. *See* Glasionov, *supra* note 11, at 469 (explaining that changes to application of *Reynolds* privilege has been attributed to "judicial conflation" of *Reynolds* and *Totten*); *see also* Jeffrey L. Vagle, Note, *A Kind of Hydraulic Pressure: Extraordinary Rendition, State Secrets, and the Limits of Executive Power*, 22 TEMP. INT'L & COMP. L.J. 523, 540 (2008) (suggesting that courts are conflating *Reynolds* and *Totten*).

48. *See, e.g.*, Steven D. Schwinn, *The State Secrets Privilege in the Post-9/11 Era*, 30 PACE L. REV. 778, 790 (2010) (noting a trend among courts to treat state secrets privilege as a "rule of justiciability"); Henry Lanman, *Secret Guarding*, SLATE (May 22, 2006), http://www.slate.com/id/2142155 (articulating that courts are deferring to expanded assertion of state secrets privilege, thereby dismissing entire lawsuits).

49. *See* United States v. Reynolds, 345 U.S. 1, 11 n.26 (1953) (arguing that it was appropriate to dismiss the claim in *Totten* because the subject matter of the suit, the contract to perform espionage, was itself a state secret and would never prevail over the privilege); *see also* Glasionov, *supra* note 11, at 470 (noting that commentators reference the footnote in *Reynolds* as support when noting that courts mistakenly cite *Reynolds* when dismissing cases).

50. *See* Schwinn, *supra* note 48, at 801–02 (explaining that when *Reynolds* and *Totten* are misconstrued, courts dismiss cases in which very subject matter of action is state secret); *see also* Lyons, *supra* note 35, at 109–10 (asserting that courts dismiss cases when "the very question upon which the case turns" is a state secret, or when "secrets are so central to the subject matter").

effort to dismiss suits involving national security issues, such as the potential mistreatment of non-US citizen, terrorist suspects.[51] The problem with this interpretation, according to commentators, is that *Reynolds* does not stand for this proposition.[52] *Reynolds* is an evidentiary privilege and, therefore, should be used only to limit the production of certain pieces of evidence.[53] These scholars maintain that the *Reynolds* Court never intended for the state secrets privilege to completely dismiss a case, at least not at the outset of the litigation before any evidence is even requested.[54] As such, courts and the government have been invoking the *Reynolds* state secrets privilege to support procedures that seem to be more rooted in *Totten*.[55]

Moreover, there is some doubt regarding whether *Totten* even supports the "very subject matter" bar to litigation, given the US Supreme Court's subsequent ruling in *Tenet v. Doe*.[56] In *Tenet*, the Court clarified the distinction between *Reynolds* and *Totten*.[57] The *Totten* bar, according to the Court, prevents judicial review of any lawsuit where a plaintiff's case is premised upon the

---

51. *See* Scott Shane, *Invoking Secrets Privilege Becomes a More Popular Legal Tactic by U.S.*, N.Y. TIMES, June 4, 2006, at A32 ("While the privilege, defined by a 1953 Supreme Court ruling, was once used to shield sensitive documents or witnesses from disclosure, it is now often used to try to snuff out lawsuits at their inception . . . ."); *see also* Lanman, *supra* note 48 ("[T]he administration has been routinely asserting the privilege to dismiss the suits in their entirety.").

52. *See* Lyons, *supra* note 35, at 110 (asserting that this understanding of the state secrets privilege is inconsistent with *Reynolds*); *see also* Schwinn, *supra* note 48, at 825 (opining that *Reynolds* does not support the very subject matter test).

53. *See Reynolds*, 345 U.S. at 11; *see also* Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 FORDHAM L. REV. 1931, 1937 (2007) (articulating that in *Reynolds*, the Court limited the state secrets privilege to evidence removal); Glasionov, *supra* note 11, at 471 (noting that *Reynolds* is meant to limit discovery).

54. *See* Lyons, *supra* note 35, at 118 (explaining that *Reynolds* was careful not to take any extreme measures, only wanting to exclude evidence, not dismiss a case at outset); *see also* Schwinn, *supra* note 48, at 825–26 (concluding that *Reynolds* was only focused on evidence, so that dismissal could only result following a review of privileged and nonprivileged evidence).

55. *See* Glasionov, *supra* note 11, at 470 (articulating that if a case is to be dismissed at the outset based on the subject matter of suit, the rationale for dismissal should be based on *Totten*); *see also* Lyons, *supra* note 35, at 120 (arguing that expansion of the state secrets privilege "is treading into the realm of *Totten*").

56. *See* Schwinn, *supra* note 48, at 826 (noting that *Totten* only applies to "secret spy contracts"); *see also* Frost, *supra* note 53, at 1941 (agreeing that the "*Totten* bar precludes judicial review of any claim based on a covert agreement to engage in espionage for the United States").

57. *See* Tenet v. Doe, 544 U.S. 1, 8–9 (2005) (explaining the difference between *Totten* and *Reynolds* doctrines).

existence of a secret espionage affiliation with the United States.[58] Any action that is based on an alleged espionage agreement is not justiciable under any circumstance.[59] On the other hand, the Court explained that *Reynolds* is a much narrower holding. It merely articulates an evidentiary privilege, not a "categorical bar" to claims.[60] The Court further clarified this by specifically stating that *Reynolds* does not replace *Totten.*[61]

B. *Extraordinary Rendition*

Mohamed involved the application of the state secrets privilege to the US government's extraordinary rendition program.[62] The extraordinary rendition program involves the transfer, by US intelligence officials, of non-US citizens suspected of terrorism to a state that will detain and interrogate them outside the bounds of international law.[63] Upon capture by intelligence operatives, suspected terrorists are hooded, handcuffed, and flown on a Gulfstream jet to other countries whose own officials subject the captured individuals to harsh interrogations.[64]

The Clinton Administration initially established the extraordinary rendition program.[65] The program, as it was

---

58. *See id.* at 8 ("No matter the clothing in which alleged spies dress their claims, *Totten* precludes judicial review in cases such as respondents' where success depends upon the existence of their secret espionage relationship with the Government.").

59. *See id.* at 9 ("[L]awsuits premised on alleged espionage agreements are altogether forbidden.").

60. *See id.* at 8–9 (explaining that the state secrets privilege in *Reynolds* was an evidentiary privilege, which is different from a rule of justiciability).

61. *See id.* at 9–10 ("*Reynolds* therefore cannot plausibly be read to have replaced the categorical *Totten* bar . . . .").

62. *See* Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1073 (9th Cir. 2010) (en banc).

63. *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 (2008) (explaining the extraordinary rendition program); *see also* Jane Mayer, *Outsourcing Torture: The Secret History of America's "Extraordinary Rendition" Program,* NEW YORKER, Feb. 14, 2005, at 106 (defining the extraordinary rendition program).

64. *See* Mayer, *supra* note 63, at 107 (explaining mechanics of the extraordinary rendition program); *see also* Louis Fisher, *Extraordinary Rendition: The Price of Secrecy,* 57 AM. U. L. REV. 1405, 1421 (2007) (discussing published reports of the extraordinary rendition program).

65. *See* FISHER, *supra* note 11, at 330 (describing formation of the extraordinary rendition program); *see also* Lucien J. Dhooge, *The State Secrets Privilege and Corporate*

conceived, was not focused on interrogation.[66] Rather, it sought to capture a suspect that was wanted in another country for trial or detention and send the suspect to that country to face prosecution or serve the existing sentence.[67] After 9/11, however, the nature of the extraordinary rendition program was expanded to include capture and transfer for interrogation.[68] This expansion progressed despite the United States being a signatory to the Convention against Torture, a treaty that bars the transfer of an individual to another state for the purpose of torture.[69]

In 2006, President George W. Bush acknowledged the existence of the extraordinary rendition program.[70] He admitted that the Central Intelligence Agency ("CIA") was running a program that took certain terrorist suspects outside the United States for detention and questioning.[71] In January 2009, President Barack Obama established a task force to review the practices of the extraordinary rendition program.[72]

Complicity in Extraordinary Rendition, 37 GA. J. INT'L & COMP. L. 469, 472 (2009) (articulating the origins of the extraordinary rendition program).

66. *See* FISHER, *supra* note 11, at 330–31 (explaining the purpose of the extraordinary rendition program); *see also* Dhooge, *supra* note 65, at 472 (describing the goal of the extraordinary rendition program as initially conceived).

67. *See* Dhooge, *supra* note 65, at 472 (explaining process of the original extraordinary rendition program); *see also* Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249, 1254–55 (2007) (describing how the extraordinary rendition program under President Bill Clinton worked).

68. *See* Chesney, *supra* note 67, at 1255 ("Since 9/11, the rendition program has grown beyond these initial parameters . . . ."); *see also* Dhooge, *supra* note 65, at 473 ("The rendition program was significantly modified after September 11.").

69. *See* Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, 112 Stat. 2681, 1465 U.N.T.S. 85 ("No State Party shall expel, return . . . or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.").

70. *See* Fisher, *supra* note 64, at 1433 ("On September 6, 2006, in a lengthy statement, President Bush provided details of the CIA rendition program."); *see also* Dhooge, *supra* note 65, at 474 ("The existence of the program was disclosed by President Bush on September 6, 2006.").

71. *See* Remarks on the War on Terror, 42 WEEKLY COMP. PRES. DOC. 1569, 1570 (Sept. 6, 2006) ("In addition to the terrorists held at Guantanamo, 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 Central Intelligence Agency.").

72. *See* Exec. Order No. 13,491, 3 C.F.R. 199, 202 (2010) (specifying that the task force is "to study and evaluate the practices of transferring individuals to other nations in order to ensure that such practices comply with the domestic laws, international obligations, and policies of the United States and do not result in the transfer of

C. *Other Extraordinary Rendition Cases*

In addition to *Mohamed*, US circuit courts of appeals have heard two other cases involving victims of the extraordinary rendition program. In *Arar v. Ashcroft*, the US Court of Appeals for the Second Circuit dismissed the case on the merits,[73] while in *El-Masri v. United States*, the Fourth Circuit dismissed the case on the grounds that the state secrets privilege barred the litigation.[74]

1. *Arar v. Ashcroft*

Maher Arar is a Canadian citizen who in 2002 flew back to Canada from a vacation in Tunisia.[75] Arar's complaint alleged that upon making a stop at New York's John F. Kennedy International Airport he was detained and questioned by the Federal Bureau of Investigation regarding his alleged terrorist affiliations.[76] Arar was subsequently detained in a Manhattan correctional facility for about ten days.[77] The Immigration and Naturalization Service ("INS") questioned Arar several times during his detention.[78] On October 8, 2002, INS ordered Arar to be removed to Syria, his birthplace.[79] While in Syrian custody, Arar was subjected to harsh interrogation techniques and forced to live in a tiny cell.[80] On October 5, 2003, after almost a year in Syrian custody, Arar was released to Canadian officials and returned home to Canada.[81]

---

individuals to other nations to face torture or otherwise for the purpose, or with the effect, of undermining or circumventing the commitments or obligations of the United States to ensure the humane treatment of individuals in its custody or control").

73. Arar v. Ashcroft, 585 F.3d 559 (2d Cir. 2009) (en banc) (holding that Arar failed to state a claim under the Torture Victim Prevention Act and that the *Bivens* doctrine did not apply to extraordinary rendition).

74. El-Masri v. United States, 479 F.3d 296, 302 (4th Cir. 2007), *cert. denied* 552 U.S. 947 (2007) (affirming district court's dismissal of case on grounds that "state secrets are so central to this matter that any attempt at further litigation would threaten their disclosure").

75. *Arar*, 585 F.3d at 565.

76. *Id.*

77. *Id.*

78. *Id.* at 565–66.

79. *Id.*

80. *Id.* at 566.

81. *Id.* at 566–67.

Arar filed suit in the United States District Court for the Eastern District of New York, seeking damages from US officials for harms suffered as a result of his detentions in both New York and Syria.[82] The court dismissed the claim and a three-judge panel of the Second Circuit affirmed.[83] The court, sitting en banc, similarly dismissed the case on the merits.[84] The majority explained that a *Bivens* action had never been entertained in the context of the extraordinary rendition program.[85] The *Bivens* remedy is a private action brought against federal officers for violations of an individual's constitutional rights.[86] The US Supreme Court has only applied *Bivens* in two contexts: a Due Process Clause violation in employment discrimination and an Eighth Amendment violation by prison officials.[87] The Second Circuit declined to apply *Bivens* to claims involving the extraordinary rendition program to avoid issuance of a ruling that would resonate in the national security and foreign policy arenas.[88]

Judge Robert Sack authored a dissenting opinion, joined by three other judges, asserting that the court should have instead resolved the case in light of the state secrets privilege.[89] Doing so, he posited, would allow the court to avoid issuing a holding with broad ramifications and instead resolve the case on its particular facts.[90] Furthermore, a state secrets privilege analysis would address the issues that caused the majority to decline the extension of a *Bivens* remedy to extraordinary rendition.[91]

---

82. *Id.* at 567.

83. *Id.*

84. *Id.*

85. *See id.* at 572 ("[N]o court has previously afforded a *Bivens* remedy for extraordinary rendition.").

86. *See id.* at 571; *see also* Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971) (establishing the *Bivens* action).

87. *Arar*, 585 F.3d at 571.

88. *See id.* at 574 ("Here, we need not decide categorically whether a *Bivens* action can lie against policymakers because in the context of extraordinary rendition, such an action would have the natural tendency to affect diplomacy, foreign policy, and the security of the nation, and that fact counsels hesitation.").

89. *See id.* at 583 (Sack, J., dissenting) ("Such a holding is unnecessary inasmuch as the government assures us that this case could likely be resolved quickly and expeditiously in the district court by application of the state-secrets privilege.").

90. *Id.* at 605.

91. *See id.* at 606 (outlining the majority's reasons for not applying *Bivens* and noting that the state secrets privilege "was designed to address" these factors).

2. *El-Masri v. United States*

In advocating for the application of the state secrets privilege in *Arar*, Judge Sack noted that the Fourth Circuit applied the state secrets privilege to a claim involving extraordinary rendition in *El-Masri*.[92] In *El-Masri*, Macedonian law enforcement officials detained plaintiff Khaled El-Masri, a German citizen of Lebanese descent, in Macedonia, in December 2003.[93] In January 2004, CIA operatives took El-Masri to a detention facility in Kabul, Afghanistan where he remained until May 28, 2004, when he was transported to Albania and ultimately returned to his home in Germany.[94] El-Masri claimed that his detention in Afghanistan was part of the US extraordinary rendition program[95] and that he was subjected to harsh interrogation techniques and substandard living conditions while in detention in Afghanistan.[96]

In December 2005, El-Masri filed suit against former CIA Director George Tenet and several corporations accused of partaking in his transfer to Afghanistan.[97] The United States intervened and moved to dismiss the lawsuit on grounds that the state secrets privilege prohibited the litigation.[98] Despite El-Masri's assertion that he could provide ample public information to corroborate his claims,[99] the district court dismissed the suit.[100]

The Fourth Circuit affirmed the district court's dismissal due to the US government's successful assertion of the state secrets privilege.[101] The court explained that both *Reynolds* and *Totten* support the proposition that dismissal is warranted when the "very subject matter" of a suit is itself a state secret.[102] The

92. *See id.* at 606–07 (citing *El-Masri* to support claim that the state secrets privilege is appropriate for claims involving extraordinary rendition).

93. El-Masri v. United States, 479 F.3d 296, 300 (4th Cir. 2007), *cert. denied*, 552 U.S. 947 (2007).

94. *Id.*

95. *Id.*

96. *Id.* (detailing that El-Masri was allegedly beaten, drugged, and confined to a small, unsanitary cell).

97. *Id.*

98. *Id.* at 301.

99. *Id.* at 301–02.

100. *Id.* at 302.

101. *Id.*

102. *See id.* at 306 (relying on *Totten* and *Reynolds* by stating, "The Supreme Court has recognized that some matters are so pervaded by state secrets as to be incapable of

very subject matter of a lawsuit, under a state secrets analysis, is comprised of the "central facts" that are essential to a plaintiff's claim.[103] The essential facts in El-Masri's case would have to demonstrate that all defendants were aware of and participated in his detention and interrogation.[104] Evidence to illustrate such facts would undoubtedly be privileged as state secrets.[105] Therefore, the very subject matter of the lawsuit was a state secret requiring the claim to be dismissed.[106]

This Part laid out the history of both the state secrets privilege and the extraordinary rendition program. This Part further addressed recent US court dispositions of cases in this area. With this contextual background in mind, Part II examines the *Mohamed* case, including the circumstances leading to the litigation, the arguments asserted by all parties, and the Ninth Circuit's ruling.

II. MOHAMED v. JEPPESEN DATAPLAN, INC.

Similar to *El-Masri*, *Mohamed* was dismissed on state secrets grounds.[107] Unlike *El-Masri*, however, the Ninth Court, sitting en banc, invoked only the state secrets privilege as articulated in *Reynolds* and found the *Totten* bar inapplicable.[108] The court understood the *Reynolds* state secrets privilege to require the dismissal of a case when further litigation would present an unjustifiable risk of disclosing state secrets.[109] This Part examines the *Mohamed* en banc decision in greater depth. Section A discusses the factual and procedural history of the litigation.

---

judicial resolution once the privilege has been invoked."). The Court also asserted that *Tenet v. Doe*, 544 U.S. 1 (2005), stands for this proposition as well. *Id.*

103. *Id.* at 308 ("[F]or purpose of the state secrets analysis, the 'central facts' and 'very subject matter' of an action are those facts that are essential to prosecuting that action or defending against it.").

104. *See id.* at 309 (explaining that the central facts to this litigation "would be the roles, if any, that the defendants played in the events he alleges").

105. *See id.* (suggesting that evidence of this kind "would implicate privileged state secrets" and may even be barred under *Totten* as it would involve "CIA espionage contracts").

106. *See id.*

107. Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1073 (9th Cir. 2010) (en banc) (holding that claim should be dismissed because plaintiffs cannot overcome state secrets privilege).

108. *See id.* at 1085 (choosing not to rule on the basis of the *Totten* bar).

109. *See id.* at 1089 ("[F]urther litigation presents an unacceptable risk of disclosure of state secrets").

Section B outlines the arguments put forth by both the plaintiffs and the intervening US government in their briefs. Section C details the majority decision and Section D discusses the dissenting opinion.

A. *Factual and Procedural History*

The plaintiffs in this case are five non-US citizens who claimed to be subjects of the CIA's extraordinary rendition program.[110] Each plaintiff underwent a slightly different extraordinary rendition experience, yet each one contended that Jeppesen provided various support services to the flights that transported them to their destinations of detention and torture.[111] According to the plaintiffs, Jeppesen provided these services even though the company knew, or should have known, that the flights were part of the extraordinary rendition program.[112]

Plaintiff Binyam Mohamed is an Ethiopian citizen who was living in Pakistan but was a legal resident of the United Kingdom. Pakistani officials arrested him in 2002 on immigration charges.[113] While detained in Pakistan, CIA agents interrogated Mohamed for several months before transferring him to Morocco.[114] Mohamed further alleged that after eighteen months of torture and harsh interrogations in Morocco, the CIA once

---

110. *Id.* at 1073.

111. *Id.* at 1075 (describing plaintiffs' allegations 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"); *see* Mohamed v. Jeppesen Dataplan, Inc., 539 F. Supp. 2d 1128, 1132 (N.D. Cal. 2008) (noting that Jeppesen is "a wholly owned subsidiary of Boeing Company").

112. *Mohamed*, 614 F.3d at 1075 ("Jeppesen provided this assistance with actual or constructive 'knowledge of the objective 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."). Plaintiffs cited statements of a former Jeppesen employee made to the press, explaining that the company knew it was facilitating flights for the extraordinary rendition program. *See* Jane Mayer, *The CIA's Travel Agent*, NEW YORKER, Oct. 30, 2006, at 34 (citing a former Jeppesen employee, who stated that a Jeppesen executive remarked at a meeting, "We do all the extraordinary rendition flights . . . .").

113. *Mohamed*, 614 F.3d at 1074.

114. *Id.*

again transferred him, this time to Afghanistan.[115] After several months of detention and torture, Mohamed was sent to the US military prison at Guantánamo Bay, Cuba.[116] Mohamed remained at Guantánamo for five years before earning a release and returning to the United Kingdom.[117]

Plaintiff Abou Elkassim Britel is an Italian citizen who was also arrested in Pakistan on immigration charges.[118] Britel was subsequently turned over to CIA officials who, similarly to Mohamed, transferred Britel to Morocco.[119] While detained in Morocco, according to Britel, he was repeatedly tortured.[120] Although he was eventually released, Britel was re-arrested shortly thereafter, forced to sign a confession, and sentenced to prison in Morocco for terrorist-related activities.[121]

Plaintiff Ahmed Agiza is an Egyptian national who, at the time of his rendition, was living in Sweden.[122] Agiza was apprehended by Swedish officials, transferred to CIA custody, and flown to Egypt, where he was detained, tortured, and interrogated.[123] Agiza eventually received a trial in Egypt, where he was convicted and sentenced to prison.[124] The Swedish government has publicly acknowledged the circumstances of Agiza's rendition.[125]

---

115. *Id.* (detailing that Moroccan authorities allegedly beat Mohamed, broke his bones, "cut him with a scalpel all over his body," "poured 'hot stinging liquid' into the open wounds," and forced Mohamed "to listen to extremely loud music day and night").

116. *Id.* (explaining that while in Afghanistan, Mohamed was allegedly forced to listen to "the recorded screams of women and children, 24 hours a day," and "was fed sparingly and irregularly").

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* (noting that Moroccan officials allegedly beat Britel, deprived him of sleep and food, and threatened Britel with sexual torture).

121. *Id.*

122. *Id.*

123. *Id.* (stating that in Egypt, Agiza was allegedly beaten, forced to live in a small, cold cell, and subjected to electric shock treatments).

124. *Id.*

125. *Id.* ("According to plaintiffs, '[v]irtually every aspect of Agiza's rendition, including his torture in Egypt, has been publicly acknowledged by the Swedish government.'"); *see* Craig Whitlock, *New Swedish Documents Illuminate CIA Action*, WASH. POST, May 21, 2005, at A1 (reporting on Swedish government report that details the specifics of Agiza's rendition).

Plaintiff Mohamed Farag Ahmad Bashmilah is a Yemini citizen who was taken into custody by Jordanian officials while visiting his mother in Jordan.[126] Bashmilah alleged that he was transferred to CIA custody and flown to several locations where he was repeatedly tortured.[127] Eventually, the CIA returned Bashmilah to Yemen, where he was tried in a Yemeni court, convicted of an inconsequential crime, and released.[128]

Lastly, plaintiff Bishar Al-Rawi, an Iraqi citizen and legal resident of the United Kingdom, was arrested in Gambia while traveling there on business.[129] According to Al-Rawi, he was also sent to Afghanistan were he was repeatedly tortured.[130] Similarly to Mohamed, Al-Rawi was later transferred to the Guantánamo Bay prison.[131] Eventually, Al-Rawi was released from Guantánamo and returned to the United Kingdom.[132]

All five plaintiffs brought suit against Jeppesen under the Alien Tort Statute for the company's contribution to their detentions and tortures.[133] Before Jeppesen filed an answer to the complaint, the United States moved to intervene and to dismiss the suit under the state secrets privilege.[134] The United States District Court for the Northern District of California granted both motions.[135] The court dismissed the case because the very subject matter of the action was a state secret, making the case nonjusticiable.[136] A three-judge panel of the Ninth Circuit reversed, holding that the case was not barred under *Totten*[137]

126. *Mohamed*, 614 F.3d at 1075.

127. *Id.* (articulating that Bashmillah was allegedly subjected to sleep deprivation, painful shackling, and light and loud noise for twenty-four hours).

128. *Id.*

129. *Id.* at 1074.

130. *Id.* at 1074–75 (noting that Al-Rawi was allegedly beaten, deprived of sleep, and forced to listen to loud noises twenty-four hours a day).

131. *Id.* at 1075.

132. *Id.*

133. *Id*; *see* 28 U.S.C. § 1350 (2006) ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.").

134. *Mohamed*, 614 F.3d at 1076.

135. *Id.*

136. Mohamed v. Jeppesen Dataplan, Inc., 539 F. Supp. 2d 1128, 1135 (N.D. Cal. 2008) (finding "that the issues involved in this case are non-justiciable because the very subject matter of the case is a state secret").

137. Mohamed v. Jeppesen Dataplan, Inc., 579 F.3d 943, 953 (9th Cir. 2009), *reh'g en banc granted*, 586 F.3d 1108 (9th Cir. 2009) (determining that *Totten* did not bar the claims asserted by plaintiffs).

and that the *Reynolds* state secrets privilege could only be asserted to remove certain pieces of evidence.[138] The Ninth Circuit granted the US government's motion to rehear the case en banc.[139]

B. *Arguments from the Briefs*

1. Plaintiffs' Briefs

Plaintiffs asserted in their moving and reply briefs that the *Totten* bar and the *Reynolds* state secrets privilege were two different constructs and the lawsuit could not be dismissed under either doctrine.[140] They argued that the state secrets privilege, as defined in *Reynolds*, is an evidentiary privilege that the government can invoke to remove certain pieces of evidence that may expose military secrets.[141] Therefore, under *Reynolds*, a lawsuit can only be dismissed if, after removing the privileged evidence, a plaintiff cannot make out a prima facie case, or a defendant cannot appropriately defend against a claim.[142] It is impossible to know at the pleading stage of litigation what evidence, privileged or nonprivileged, a plaintiff will introduce.[143]

---

138. *Id.* at 957 ("*Reynolds* applies to evidence, not information.").

139. *Mohamed*, 614 F.3d at 1077.

140. *See* Reply Brief of Plaintiffs-Appellants on Rehearing En Banc at 8, Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070 (9th Cir. 2010) (No. 08–15693) ("[T]he government continues to conflate the justiciability doctrine articulated in *Totten* with the evidentiary privilege recognized in *Reynolds*—even though the Supreme Court could not be any clearer that they are distinct doctrines that serve distinct purposes.").

141. *See* Brief of Plaintiffs-Appellants at 29, Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070 (9th Cir. 2010) (No. 08–15693) ("The state secrets privilege is a 'common-law evidentiary privilege that permits the government to bar the disclosure of information if there is a "reasonable danger" that disclosure will "expose military matters which, in the interest of national security, should not be divulged."'" (quoting Al-Haramain Islamic Found. Inc., v. Bush, 507 F.3d 1190, 1196 (9th Cir. 2007))); *see also id.* at 31 ("[T]he privilege must be invoked with respect to discrete and specific evidence—not asserted as a sweeping justification for dismissing a suit on its pleadings.").

142. *See* Reply Brief of Plaintiffs-Appellants on Rehearing En Banc, *supra* note 141, at 10 (articulating that "it may be dismissed only if successful invocation of the privilege deprives plaintiffs of evidence necessary to make out a prima facie case, or defendant of evidence indispensable to a valid defense").

143. *See id.* at 13–14 ("[I]t simply cannot be determined '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.'" (quoting Mohamed v. Jeppesen Dataplan Inc., 579 F.3d 943, 961 (9th Cir. 2009)) (emphasis in original)).

Thus, the lawsuit could not be dismissed under the *Reynolds* state secrets privilege at the pleading stage.[144] The case should continue and the government should be allowed to invoke the state secrets privilege at the discovery stage.[145]

Additionally, the case could not be dismissed under a strict reading of *Totten,* which bars lawsuits pertaining only to the enforceability of an espionage contract.[146] Plaintiffs argued that not every one of their claims requires proof of a contract between Jeppesen and the US government that was supposed to remain secret.[147] For example, plaintiffs noted that in trying to prove that Jeppesen acted recklessly with regard to whether the plaintiffs would be tortured, they would only have to show that the company had actual or constructive knowledge that the plaintiffs might be tortured.[148]

Likewise, they argued, the case could not be dismissed under the broader, "very subject matter" interpretation of *Totten.*[149] The very subject matter of this case was not a state secret.[150] The plaintiffs cited to another Ninth Circuit case where the court established that the very subject matter of a case cannot be considered a state secret when the government has disclosed the existence of the subject matter of the suit.[151] Therefore, the

144. *See id.* at 12 (noting that the case should not be dismissed because the required determination "could not be made at this stage").

145. *See id.* at 14–15 (arguing that the case should continue and contending that "[t]here will be no shortage of opportunities for the government to protect its legitimate interests with respect to specific privileged evidence").

146. *See id.* at 9 (defining *Totten* as a "narrow doctrine pertaining to enforceability of espionage contracts").

147. *See id.* at 10 (quoting the original Ninth Circuit opinion, which asserted that "not all of plaintiffs' theories of liability require proof of a relationship between Jeppesen and the government" (quoting *Mohamed,* 579 F.3d at 953)).

148. *See id.* at 11 ("For example, plaintiffs' claim 'that Jeppesen acted with reckless disregard for whether the passengers it helped transport would be tortured' at their destinations requires no evidence that Jeppesen 'entered into a secret agreement with the government,' but only that Jeppesen acted despite 'actual or imputed knowledge' that plaintiffs might face torture." (quoting *Mohamed,* 579 F.3d at 953–54)).

149. *See* Brief of Plaintiffs-Appellants, *supra* note 142, at 34–35 (noting that a very subject matter dismissal is "inapplicable").

150. *See id.* at 35 (showing that the heading of section A of the plaintiffs' brief states, "Under this Court's Jurisprudence, the 'Very Subject Matter' of this Suit Is Not a State Secret").

151. *See id.* at 39 (citing Al-Haramain Islamic Found., Inc., v. Bush, 507 F.3d 1190 (9th Cir. 2007) as establishing principle that "when the government has publicly confirmed the existence of an intelligence program—and publicly defended its

extensive comments of the CIA and Bush Administration officials about the extraordinary rendition program establish that the subject matter of the suit was not a state secret.[152] Moreover, statements of non-US government officials regarding their countries' participation in extraordinary rendition further establish that the very subject matter of the case, the extraordinary rendition program, is not a state secret.[153]

2. The US Government's Brief

The US government contended that the case should be dismissed under both *Totten* and *Reynolds*. Regarding the *Totten* bar, the government asserted that the case involved a confidential government agreement similar to the contract in *Totten*.[154] As such, confidential secrets would inevitably be disclosed, contrary to the public interest.[155] Therefore, the case should be dismissed and deemed nonjusticiable.[156]

According to the US government, the case could also be dismissed under the state secrets privilege because military secrets were central to the litigation.[157] Therefore, continuing to litigate the case would risk disclosure of sensitive matters, contrary to the purpose of the state secrets privilege as articulated in *Reynolds*.[158] To support this assertion, the

---

legality—it cannot thereafter secure dismissal of a suit challenging that program on the ground that its very subject matter is a state secret").

152. *See id.* at 40–47 (citing various public disclosures from government officials on the extraordinary rendition program); *see also* Reply Brief of Plaintiffs-Appellants on Rehearing En Banc, *supra* note 141, at 19–22 (citing additional US government disclosures including those from Obama Administration officials).

153. *See* Reply Brief of Plaintiffs-Appellants on Rehearing En Banc, *supra* note 141, at 22–28 (noting various disclosures by assorted governments and intergovernmental organizations, including several pertaining specifically to plaintiffs in this litigation).

154. *See* Redacted, Unclassified Brief for United States on Rehearing En Banc at 25–26, Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070 (9th Cir. 2010) (No. 08-15693) (comparing agreements in *Totten* with the alleged contracts between Jeppesen and the CIA, and noting that they are similar).

155. *See id.* at 25–26 (explaining that agreement is confidential and as such is protected).

156. *See id.* at 31 ("[A] complaint alleging on its face that the plaintiff entered into a secret espionage relationship with the Government is properly dismissed at the outset as nonjusticiable.").

157. *See id.* at 19 ("State secrets are so central to this case that, as the district court correctly concluded, no further litigation can proceed . . . .").

158. *See id.* at 18–19 (explaining that when there is a risk of disclosing secrets, a case can be dismissed); *see also id.* at 29 (citing to portion of *Reynolds* that explains that a

government cited to the other extraordinary rendition case previously dismissed on state secrets grounds, *El-Masri*.[159] The government contended that the court should hold, just as the Fourth Circuit did in *El-Masri*, that state secrets are so central to this case that any evidence necessary to prove the alleged facts would undoubtedly be privileged.[160] As such, the case should be dismissed.

Finally, the government asserted that the *Reynolds* state secrets privilege is not designed merely to protect evidence.[161] It argued that in *Reynolds*, the Court did not specifically state that the state secrets privilege could not be considered prior to discovery.[162] That Court did not have the opportunity to consider that point because in *Reynolds*, the government did not invoke the privilege until the discovery stage.[163] The absence of a specific articulation with regard to invoking the state secrets privilege during the pleading stage should not be deemed a rejection of such an assertion. Furthermore, the purpose of the state secrets privilege is to prevent the disclosure of sensitive information with national security implications.[164] Requiring the government to invoke the state secrets privilege only with regard to certain pieces of evidence allowed such sensitive information to be disclosed in pre-discovery documents.[165] This was contrary to the

---

court must be careful in its inquiry to not disclose the very matters which the privilege is designed to protect).

159. *See id.* at 22–23 ("The claims in this case are strikingly similar to those in *El-Masri v. United States* . . . .").

160. *See id.* (comparing case to *El-Masri* and noting that dismissal is appropriate for the exact same reasons).

161. *See id.* at 29 ("[T]he characterization of the state secrets doctrine as a narrow 'evidentiary privilege' is incorrect.").

162. *See id.* at 30 ("[N]othing in the Supreme Court's decision supports the panel's refusal to consider the privilege prior to discovery.").

163. *See id.* ("In *Reynolds*, the state secrets privilege was not raised until the discovery phase of a proceeding, where it was claimed with respect to an accident investigation report prepared by the Air Force and related statements by crew members. The *Reynolds* Court thus had no occasion to consider whether the state secrets privilege can be invoked at an earlier stage of proceedings . . . .").

164. *See id.* at 40 (defining the privilege's "basic purpose" as "protection against public disclosure of information that would damage national security").

165. *See id.* at 22 ("[T]here is no reasonable doubt that any further proceeding in this case, including any attempt by Jeppesen to present defenses or an answer, or to conduct discovery, would seriously risk disclosure of privileged material and threaten substantial harm to the United States." (emphasis omitted)).

very purpose of the state secrets privilege.[166] Therefore, because national security would be jeopardized regardless of whether the secrets are disclosed via evidence or information, it is incorrect to characterize the state secrets privilege as merely evidentiary.[167]

C. *The Majority Opinion*

In a six to five decision, the Ninth Circuit dismissed the plaintiffs' suit.[168] It did so only on the basis of the *Reynolds* state secrets privilege.[169] The majority concluded there was no possible way to litigate the case without "creating an unjustifiable risk of divulging state secrets."[170]

The majority began by defining both the *Totten* bar and the *Reynolds* state secrets privilege, as they understood them, and explaining the difference between the two.[171] The court explained that the *Totten* bar prevents the litigation of a case where the very subject matter of the action is a state secret.[172] On the other hand, the *Reynolds* state secrets privilege is an evidentiary privilege that, when successfully invoked, will remove certain pieces of evidence from the litigation.[173]

The majority noted the procedural requirements for a successful invocation, as articulated in *Reynolds*.[174] Furthermore, the state secrets privilege may be asserted at either the pleading or the discovery stage.[175] If a privilege claim is successfully

166. *See id.* at 42 ("[T]he panel's approach to state secrets privilege would greatly undermine the effectiveness of the privilege.").

167. *See id.* at 40 ("The national security is harmed when state secrets information is disclosed, regardless of whether the disclosure comes in the form of a particular item of 'evidence.'").

168. Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1073 (9th Cir. 2010) (en banc) ("After much deliberation, we reluctantly conclude this is such a case, and the plaintiffs' action must be dismissed.").

169. *See id.* at 1085 (explaining that dismissal is based on *Reynolds*).

170. *Id.* at 1087.

171. *See id.* at 1077 (explaining that the court will define the two different state secrets doctrines).

172. *See id.* at 1078 ("[T]he *Totten* bar applies to cases in which 'the very subject matter of the action' is 'a matter of state secret.'" (quoting United States v. Reynolds, 345 U.S. 1, 11 n.26 (1953))).

173. *See id.* at 1079 ("A successful assertion of privilege under *Reynolds* will remove the privileged evidence from the litigation.").

174. *See id.* at 1080 (discussing procedures for invoking the privilege explained in *Reynolds*).

175. *See id.* ("The privilege may be asserted at any time, even at the pleading stage.").

invoked and subsequently granted, the case may then be dismissed in any one of three scenarios: the plaintiff cannot make out a prima facie claim with nonprivileged evidence; the defendant is deprived of information that is necessary to mount a valid defense; or litigating the claim even with nonprivileged evidence results in an unreasonable risk of disclosing state secrets.[176] The majority believed that the third scenario was applicable to *Mohamed*.[177]

Before articulating the reasons for dismissing the suit under *Reynolds*, the court noted that it decided not to resolve the case under the *Totten* bar.[178] The majority was not convinced that the very subject matter of the suit was a state secret.[179] This was not to say, however, that the *Mohamed* case was not barred under *Totten*.[180] Rather, the court simply decided not to attempt to resolve the case under the *Totten* bar.[181] The majority relied instead solely on the *Reynolds* state secrets privilege.

For its *Reynolds* analysis, the majority noted first that the government followed the correct procedures for invoking the state secrets privilege.[182] Next, the court explained that the materials that the government sought to remove were in fact privileged, because their disclosure would threaten national security.[183] This was not to say that extraordinary rendition itself was a state secret, as the existence of the program was public

176. *See id.* at 1083 (noting that *Reynolds* state secrets privilege can result in the termination of a suit in three instances).

177. *See id.* at 1087 ("[T]here is no feasible way to litigate Jeppesen's alleged liability without creating an unjustifiable risk of divulging state secrets." (emphasis omitted)).

178. *See id.* at 1085 ("We rely on the *Reynolds* privilege rather than the *Totten* bar . . . .").

179. *See id.* at 1084 ("We do not find it quite so clear that the very subject matter of this case is a state secret.").

180. *See id.* ("Here, some of plaintiffs' claims might well fall within the *Totten* bar.").

181. *See id.* at 1085 ("We do not resolve the difficult question of precisely which claims may be barred under *Totten* . . . .").

182. *See id.* ("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.").

183. *Id.* at 1086 ("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.").

knowledge.[184] Rather, disclosure of certain aspects of the program that were not yet public could in fact harm national security.[185] For example, Jeppesen would have to address its role in certain aspects of the program that had, until the *Mohamed* case, remained a secret.[186] The company could not explain its role in the extraordinary rendition program without articulating how the United States performs operations that are intended to remain a secret.[187] Therefore, the case had to be dismissed to avoid the risk of revealing state secrets, even if only nonprivileged evidence was used in the litigation.[188]

In concluding the opinion, the court acknowledged the grave effect this decision would have on victims of human rights violations.[189] Therefore, the majority proposed four alternative methods by which the plaintiffs could receive redress for their injuries. First, the government, knowing all the facts concerning the experiences of each of the plaintiffs, could evaluate their claims and privately award reparations in the event of a human rights violation.[190] Second, Congress could conduct its own investigation of the government's role in the plaintiffs' renditions.[191] Third, Congress could enact a private bill to

184. *See id.* at 1090 ("[W]e do not hold the existence of the extraordinary rendition program is itself a state secret. The program has been publicly acknowledged . . . .").

185. *See id.* ("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." (emphasis omitted)).

186. *See id.* at 1088 (noting that Jeppesen would be required to reveal secret information when explaining the nature of the support it gave to the program).

187. *See id.* at 1089 ("[T]here 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.").

188. *See id.* at 1087 ("[W]e 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." (emphasis omitted)).

189. *Id.* at 1092 (recognizing that because of decision's "impact on human rights" the majority did not "reach our decision lightly").

190. *Id.* at 1091 ("The government, having access to the secret information, can determine 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.").

191. *Id.* ("Second, Congress has the authority to investigate alleged wrongdoing and restrain excesses by the executive branch.").

provide plaintiffs a remedy.[192] Fourth, Congress could enact legislation specifying a cause of action and proper procedures to litigate claims such as those of the plaintiffs.[193]

D. *The Dissent*

The five dissenters objected to what they believed was the majority's expansion of the *Reynolds* state secrets privilege.[194] They argued for a more cautious application of the state secrets privilege due to its ability to perhaps conceal government misconduct or violate due process.[195] Under their application of the law, a case could only be dismissed on the grounds of the *Reynolds* state secrets privilege if the pieces of evidence that had been deemed privileged were necessary for the plaintiff to establish a claim or for a defendant to mount an appropriate defense.[196] As such, the dissent believed the case should have been remanded to the district court, with the government required to assert the state secrets privilege with regard to specific pieces of evidence and for that court to determine whether such evidence was privileged and to subsequently make a dismissal determination.[197]

The dissent explained that the proper procedures for this case would have required the defendant to first file an answer to

---

192. *Id.* at 1092 ("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.").

193. *Id.* ("Fourth, Congress has the authority to enact remedial legislation authorizing appropriate causes of action and procedures to address claims like those presented here.").

194. *See id.* at 1097 (Hawkins, J., dissenting) ("*Reynolds* cannot, as the majority contends, be asserted during the pleading stage to excise entire allegations.").

195. *See id.* at 1094 ("[T]he doctrine is so dangerous as a means of hiding government misbehavior under the guise of national security, and so violative of common rights to due process, that courts should confine its application to the narrowest of circumstances that still protect the government's essential secrets.").

196. *Id.* at 1093 ("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.").

197. *See id.* at 1101 ("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.").

the complaint.[198] Upon completion of that filing, the government could then assert its claims of privilege with regard to specific evidence during the discovery stage.[199] After these claims for evidence were evaluated, the court could then determine whether it was appropriate to dismiss the case.[200] The majority's decision to dismiss the suit on the pleadings due to a risk of divulging state secrets is inappropriate because at such an early stage in the litigation it is unclear as to even what evidence, privileged or nonprivileged, the plaintiff will use.[201] A dismissal at this stage wrongfully prevents the plaintiffs from even attempting to prove their case with nonprivileged information.[202]

Finally, the dissent is disturbed by the majority's reliance on *El-Masri* to support their decision.[203] The dissenters explain that in *El-Masri*, the Fourth Circuit conflated the *Totten* bar with the *Reynolds* state secrets privilege in deciding to dismiss that suit.[204] Moreover, in another case, *Al-Haramain Islamic Foundation, Inc., v. Bush*, the Ninth Circuit "expressly rejected" the "logic" of *El-Masri*.[205] Thus, *El-Masri* was an odd choice of support for the majority's holding.

198. *Id.* at 1098 ("[T]he 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.").

199. *See id.* at 1094 (explaining that the proper approach would be 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").

200. *See id.* at 1095 ("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.").

201. *See id.* at 1100 (arguing that court cannot determine whether privileged evidence would be essential to proving a claim without knowing what nonprivileged evidence a party intends to introduce).

202. *See id.* at 1094 (expressing dismay that plaintiffs "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").

203. *See id.* at 1099 n.14 (noting that the Ninth Circuit rejected the reasoning of *El-Masri*).

204. *See id.* (stating that the Fourth Circuit "merged" the dismissal criteria of *Totten* with the dismissal criteria of *Reynolds*).

205. *Id.* ("[T]his court in *Al-Haramain* expressly rejected *El-Masri*'s logic." (citing Al-Haramain Islamic Found., Inc. v. Bush, 507 F.3d 1190, 1201 (9th Cir. 2007))).

III. *ONE STEP TOO FAR:* MOHAMED'S *EXPANSION OF* REYNOLDS *PRIVILEGE*

Having summarized the circumstances surrounding the *Mohamed* litigation, as well as described the majority and dissenting opinions in Part II, this Part analyzes the holding of the *Mohamed* decision. Specifically, this Comment concludes that the *Mohamed* decision represents an unwarranted expansion of the *Reynolds* state secrets privilege that renders the privilege essentially indistinguishable from the *Totten* bar. Section A addresses this expansion of the *Reynolds* state secrets privilege. Section B contends that the majority's alternative remedies suggestions are inadequate.

A. *State Secrets Privilege after* Mohamed

As the dissent correctly noted, the majority reached the wrong conclusion in *Mohamed.* Although the majority chose not to decide the case under *Totten,* the court expanded the *Reynolds* state secrets privilege to become the functional equivalent of *Totten.* A case can now be dismissed if there is a risk that state secrets may be divulged.[206] In the situation where *Totten* would not clearly bar a lawsuit, the Ninth Circuit inappropriately created a second opportunity for a court to dismiss a case.

The ruling in *Mohamed* is inappropriate because it is contrary to the intention of the US Supreme Court in *Reynolds.* In that case, the Court intended for lawsuits in which the state secrets privilege was invoked to continue the litigation process, just without the sensitive evidence.[207] Barring a lawsuit altogether is a harsh decision that should not be taken lightly. As such, the Court only allowed the dismissal of a lawsuit to occur in specific situations, such as when the lawsuit centered on a confidential agreement.[208] Absent such an agreement, the Court wanted the

206. *See supra* note 178 and accompanying text (explaining that *Mohammed* was dismissed because there was "no feasible way to litigate Jeppesen's alleged liability without creating an unjustifiable risk of divulging state secrets").

207. *See supra* notes 34–35 and accompanying text (explaining that the Court in *Reynolds* allowed plaintiffs to attempt to prove their case using only nonpriviliged evidence).

208. *See supra* notes 43–45 and accompanying text (discussing the holding of *Totten,* which called for dismissal of a lawsuit that involved the enforcement of a secret espionage contract).

plaintiffs to at least have the opportunity to attempt to prove their claim with nonprivileged information.[209] If they could not make out a prima facie case, the lawsuit would have to be dismissed.[210] But at least the plaintiffs would have the opportunity to try to prove their claim.

The Ninth Circuit has, contrary to the Court's intentions, lowered the threshold to bar a suit. The *Mohamed* decision effectively renders the state secrets privilege useless, as it prevents a plaintiff from even attempting to prove his claim with nonprivileged evidence. Consequently, the *Reynolds* state secrets privilege will no longer function as an evidentiary privilege. Rather, if a lawsuit might possibly implicate state secrets, the case can now be dismissed before a single piece of evidence is even requested. The *Mohamed* court should have required Jeppesen to file an answer and then determine whether the materials containing state secrets should be removed.[211] As the dissent pointed out, it is very difficult for courts to conclude at such an early stage of a litigation whether a case such as *Mohamed* will or will not implicate state secrets.[212] After all, anything is possible at such an early stage.

Furthermore, it was inappropriate for the court to cite to *El-Masri* to support its holding.[213] *El-Masri* is a prime example of a court conflating the *Totten* bar with the *Reynolds* state secrets privilege.[214] The *Mohamed* case, however, is not such a case. The majority in *Mohamed* put *Totten* to the side and decided the case solely on the grounds of the *Reynolds* state secrets privilege.[215] The majority expanded the states secrets privilege without

209. *See supra* notes 34–35 and accompanying text (noting that plaintiffs in *Reynolds* had an opportunity to prove their case with nonprivileged evidence).

210. *See supra* note 143 and accompanying text (describing situations when a lawsuit may be dismissed under *Reynolds*).

211. *See supra* note 199 and accompanying text (asserting that proper procedures would have included requiring the defendant to first file an answer).

212. *See supra* note 202 and accompanying text (explaining that it was too early to determine whether there is a risk that state secrets will be divulged because it is unclear what evidence will even be used).

213. *See supra* notes 204–06 and accompanying text (expressing consternation that majority cited to *El-Masri* because Ninth Circuit previously rejected the logic of that decision).

214. *See supra* notes 103–07 and 204–06 (outlining the Fourth Circuit's justification for the *El-Masri* decision).

215. *See supra* note 179 (noting that the majority will not resolve the suit under the *Totten* bar).

invoking *Totten* at all. As such, the *Mohamed* decision is different from *El-Masri.* In fact, this decision stands alone, lacking any valid counterparts.

Additionally, as some commentators have noted, the *Mohamed* holding is incredibly troubling because it forecloses victims of the extraordinary rendition program from turning to the judicial system to remedy their injuries.[216] It is almost impossible for a plaintiff asserting a claim of torture against either the US government or its contractors to overcome the standard established in *Mohamed.* At the pleading stage of such a case, it would almost always appear that state secrets would be implicated. Taking this opportunity away from plaintiffs who have suffered such horrific crimes is not only unfair, but also contrary to the very purpose and intention of the state secrets privilege.

B. *Alternative Remedies*

Finally, it is worth addressing the alternative remedies suggested by the *Mohamed* majority at the end of its opinion.[217] Although the majority's compassion for the unfortunate situation into which its decision placed the plaintiffs is appreciated, it is also useless.[218] Not one of the alternative remedies suggested by the court would provide the plaintiffs with proper redress. The suggested alternative remedies requires the US government, either the executive or the legislative branch, to try to right the wrong done.[219] In this case, however, the plaintiffs were not seeking redress from the US government. Rather, they sued Jeppesen, a private corporation.[220] As such, an appropriate alternative remedy must require that Jeppesen, not the US government, pay damages to the plaintiffs. Turning to the

---

216. *See supra* note 5 (explaining that the decision is all the more troubling due to the seriousness of torture).

217. *See supra* notes 191–94 and accompanying text (listing the alternative remedies suggested by majority).

218. *See supra* note 190 and accompanying text (noting that the majority understood the effect of its holding on torture victims).

219. *See supra* notes 191–94 and accompanying text (discussing the four remedies plaintiffs could seek from the government).

220. *See supra* notes 112–13 and accompanying text (explaining that plaintiffs sued Jeppesen for its role in plaintiffs' renditions).

government would absolve these complicit corporate actors from ever having to compensate those they harmed.

CONCLUSION

The unfortunate effects of the *Mohamed* decision will continue to be felt by other plaintiffs in the years to come. The holding almost ensures that neither the US government, nor its private sector partners, will ever have to answer to claims of human rights violations. The expansive decision assures that the *Reynolds* state secrets privilege will no longer function as purely an evidentiary privilege. Instead, the *Reynolds* state secrets privilege will serve alongside the *Totten* bar as a rule of nonjusticiability, rendering victims of torture remediless in the US judicial system.