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TO DISMISS ON THE PLEADINGS OR NOT TO DISMISS ON THE PLEADINGS: EXTRAORDINARY RENDITION AND THE STATE SECRETS DOCTRINE UNDER THE REYNOLDS FRAMEWORK IN MOHAMED V. JEPPESEN

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I. INTRODUCTION

In the 1807 case of *United States v. Burr*, President Thomas Jefferson accused former Vice President Aaron Burr of committing treason against the United States.[1] Burr was allegedly assembling an army to try to overtake the South, and was collaborating with foreign nations to overthrow the U.S. government.[2] In preparation for trial, Burr's attorneys requested private correspondence from President Jefferson, which they claimed was material to their defense. The Supreme Court, in a decision by Chief Justice Marshall, expressed its opinion on whether the President could withhold the evidence, stating, "The president, although subject to the general rules which apply to others, may have sufficient motives for declining to produce a particular paper, and those motives may be such as to restrain the court from enforcing its production."[3] The case signaled the beginning of a common law doctrine known as the state secrets privilege, a tool that allows the federal government the ability to prevent disclosure of sensitive information.

Since its inception in 1807, the state secrets doctrine has been invoked on numerous occasions, particularly in times of war and on issues pertaining to national security.[4] Over the years, two different standards for applying the state secrets doctrine have emerged—one, as a total bar to any litigation based solely on the subject matter, and the other, an evidentiary privilege to prohibit select secret materials from disclosure.

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1. United States v. Burr, 25 F. Cas. 30 (C.C.D. Va. 1807) (No. 14,692D).
2. *Id.* at 31.
3. *Id.*
4. *See* Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1077 (9th Cir. 2010) ("Courts must act in the interest of the country's national security to prevent disclosure of state secrets.").

Following the terrorist attacks on September 11, the use of the state secrets doctrine has greatly expanded, especially in cases involving extraordinary rendition—where terror suspects are abducted and forcibly transported beyond the protection of western laws. Several of these suspects subsequently brought suit in the U.S. alleging abuse during their detention. In all of these cases, the federal government has attempted to use the state secrets doctrine to dismiss the cases at the outset of the pleading phase.

This Casenote starts with an examination of the background and scope of the state secrets doctrine, particularly with regard to extraordinary rendition. Part III examines the Ninth Circuit's recent decision in *Mohamed v. Jeppesen* and how that court applied the doctrine. Part IV discusses how the standard was misused in *Mohamed* and why the suit should have been allowed to continue. Part IV further discusses whether extraordinary rendition is a program that can even qualify as a true state secret. Finally, Part V concludes that, based on the current understanding of the state secrets doctrine under the *Reynolds* framework, the Ninth Circuit erred by allowing dismissal on the pleadings.

II. BACKGROUND ON THE STATE SECRETS DOCTRINE AND EXTRAORDINARY RENDITION

A. The State Secrets Doctrine

Courts have acknowledged that rarely, and only when absolutely necessary, they must act in the interest of national security to prevent the disclosure of state secrets.[5] That means that valid evidence may be excluded and litigants may even be denied their day in court.[6] There are two ways that courts may apply this principle—(1) under the *Totten* bar or (2) under the *Reynolds* framework. The *Totten* bar completely bans adjudication of any kind and does not consider the ramifications of a dismissal. Cases are simply thrown out at the outset based on subject matter. Conversely, the *Reynolds* framework is an evidentiary device

5. *Id.* at 1077.
6. *Id.*

that excludes certain privileged information. The exclusion of this evidence may eventually prove fatal to the entire suit, but it does not immediately preclude the case from being adjudicated. Each of the standards is described below.

1. The *Totten* Bar

The Supreme Court has stated as a general principle that "public policy forbids the maintenance of any suit . . . which would inevitably lead to the disclosure of matters which the law itself regards as confidential."[7] In the 1876 case of *Totten v. U.S.*, a former spy during the Civil War brought suit against the federal government for failing to compensate him for his services.[8] Concluding that the very existence of such a relationship was "the kind of fact itself not to be disclosed," the Court dismissed the suit at the outset and allowed no further proceedings.[9]

The *Totten* bar was recently affirmed in *Tenet v. U.S.*, a Supreme Court case involving Cold War spies who accused the CIA of reneging on a contract to pay for their espionage services.[10] Reiterating that the *Totten* bar is "designed not merely to defeat asserted claims, but to preclude judicial inquiry entirely," the Court dismissed the case at the outset.[11]

Whether or not the Supreme Court has ever used the *Totten* bar in any other case is a matter of some debate. In its decision in *Mohamed v. Jeppesen*, the Ninth Circuit claimed that the Supreme Court invoked the *Totten* bar in *Weinberger v. Catholic Action of Hawaii/Peace Education Project*.[12] There, a group of environmentalists sued the United States Navy for failing to comply with a requirement to produce environmental impact reports.[13] While the Ninth Circuit in *Mohamed* cited that the Supreme Court used language from *Totten* in its dismissal, the Court

7. Totten v. United States, 92 U.S. 105, 107 (1876).
8. *Id.* at 105.
9. *Id.* at 107.
10. Tenet v. United States, 544 U.S. 1 (2005).
11. *Id.* at 6.
12. Weinberger v. Catholic Action of Haw./Peace Educ. Project, 454 U.S. 139 (1981).
13. *Id.* at 141.

only referenced *Totten* in dicta, and dismissed the case on other grounds.[14]

While the Supreme Court has never articulated an actual rule for when the *Totten* bar is appropriate, it has only definitively invoked it in espionage cases.[15] As a district court recently noted in *Hepting v. AT&T Corporation*, a consequence of spies entering into contracts with the United States is an implicit waiver of their rights to litigate because they knew that the government could never publicly avow the relationship.[16]

Further, while the scope of the *Totten* bar is unclear, what is clear is that it is rarely invoked. And because of the harsh consequences associated with it, courts are dissuaded from using *Totten* and are instead encouraged to evaluate state secret claims under the more nuanced *Reynolds* framework.[17] Particularly because the state secrets doctrine is entirely judge-made common law, courts are generally reluctant to end suits at the outset without trying to parse out privileged information from non-privileged information. The *Reynolds* framework is the favored test with which to conduct a state secrets analysis.

2. The *Reynolds* Evidentiary Framework

Unlike the *Totten* bar, which completely ends the litigation, the *Reynolds* framework is the more common and less severe application of the state secrets doctrine.[18] In *U.S. v. Reynolds*, spouses of civilians killed in an Air Force plane crash sued under the Federal Torts Claims Act. The Court held that while some evidence may be excluded under the state secrets doctrine, the case as a whole would proceeded without the offending evidence.[19] In *Reynolds*, the United States attempted to

14. *Id.* at 142 (finding that the Navy was not required to prepare these reports because Congress excluded them under the Freedom of Information Act, and the reports in this case were hypothetical and not based on actual environmental impact; therefore, the Court's holding did not involve the state secrets privilege).

15. *See* Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1084 (9th Cir. 2010) (noting that the *Totten* bar has never been clearly defined).

16. Hepting v. AT&T Corp., 439 F. Supp. 2d 974, 984 (N.D. Cal. 2006).

17. *See, e.g.*, *Mohamed*, 614 F.3d at 1084 (noting the harsh consequences of *Totten* and the rarity with which it should be applied).

18. *Id.*

19. United States v. Reynolds, 345 U.S. 1, 11 (1953).

utilize the state secrets doctrine to end the litigation at the outset. The government claimed that the sensitive documents requested by plaintiffs were privileged, and therefore, the government was protected from disclosure.[20] The suit was permitted to proceed because although the documents were secret and could be withheld, they had little bearing on the merits of the claim. The Court created a new framework for evaluating state secrets that considered the specific evidence rather than the nature of the case itself.[21]

In subsequent decisions since *Reynolds*, courts have developed a three-part test for the proper invocation of state secrets under this framework.[22] First, the defendant must satisfy certain procedural requirements.[23] Second, courts must determine if the information is indeed privileged.[24] Finally, and only if the claim of privilege is successful, courts must decide how to proceed in light of that claim.[25]

For the procedural requirements to be satisfied, a director of a governmental agency—and not a subordinate—must invoke the doctrine and personally explain why the information must be kept secret.[26] The privilege is limited to government officials and is not available to private parties.[27] If the procedural requirements are satisfied, the court will examine the information to determine if the information is truly a secret.[28] If the court determines that it is, then it has to determine how to proceed while making every attempt to separate out the privileged information from the non-privileged information so that the suit can proceed.

If the plaintiff cannot make a prima facie case without the privileged

20. *Id.* at 4.

21. *Id.* (holding that the Air Force's plans and blueprints had no bearing on whether faulty engineering and mechanics contributed to the crash).

22. *See* Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1080–83 (9th Cir. 2010) (citations omitted) (outlining the three-part test).

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 1080.

27. *Id.* In cases where the government intervenes and then moves for dismissal, the government official can assert the privilege on behalf of itself and other defendants.

28. In camera investigations allow for the courts to review sensitive information that the public cannot access before determining its admissibility in open court.

evidence, then the suit is dismissed.[29] Similarly, if the defendant is denied an opportunity to present a valid defense because doing so would invoke the privileged information, the suit is also dismissed.[30]

Some courts have added a third consideration, holding that if the privileged information is so closely related to the non-privileged, a suit can be dismissed because of the unacceptable risk of disclosure of state secrets.[31] The court can dismiss the suit if the potential for disclosure is too significant, even when the plaintiff and defendant are able to establish their initial arguments using non-privileged information.[32]

Unlike the *Totten* bar, which dismisses the suit without considering the other parties' interests, the *Reynolds* framework is a balancing test. Under *Reynolds*, courts examine the government's claim of privilege critically, without mere acceptance, while still offering great deference to the government's claim of national security.[33] Because *Reynolds*'s flexibility often allows the case to proceed after certain evidence or particular claims are removed, it is the standard that courts most often invoke as it does not deny litigants their day in court. From a public policy standpoint, courts have noted the state secrets doctrine is a judge-made common law doctrine, and less harsh consequences to litigants is a more favored approach.

B. The State Secrets Doctrine in Post 9/11 Cases

The federal government has asserted the state secrets doctrine in a series of recent cases following the attacks on September 11. Since the attacks, the government has become more aggressive in the war on terror. In response to this aggressive approach, plaintiffs have brought suits alleging various violations, which the government has attempted to quash by citing the state secrets privilege. In two recent cases, plaintiffs alleged that the government secretly recorded private conversations in violation of wiretapping statutes.

29. Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1080–83 (9th Cir. 2010)

30. *Id.*

31. *Id.*

32. *Id.* at 1083 (holding that proceeding with a case would be "an unacceptable risk of disclosing state secrets").

33. United States v. Reynolds, 345 U.S. 1, 9–10 (1953).

In *In re Sealed Case*, a former Drug Enforcement Agency official accused his bosses of secretly wiretapping his conversations to build evidence against him in order to fire him.[34] Citing the national security interests surrounding the case and the need to protect the identities of CIA operatives, the government moved for dismissal under the state secrets doctrine.[35] The district court initially granted the dismissal, but the appeals court for the District of Columbia reversed. The appellate court found that although there was some privileged information, the plaintiff could establish a prima facie case using non-privileged information, as stipulated by the *Reynolds* framework.[36] One reason the court refused to dismiss the suit was because the CIA provided no concrete answer as to why the case could not proceed. The court refused to rely on a merely hypothetical defense.[37] The court went on to hold, "Where the United States has sufficient grounds to invoke the state secrets privilege, allowing the mere prospect of a privileged defense to thwart a citizen's efforts to vindicate his constitutional rights would run afoul of the Supreme Court's caution [in these cases]."[38]

More recently, in *Hepting*, the plaintiffs initiated a class action suit and sued the government and AT&T alleging that AT&T was providing structural support for the government's illegal wiretapping program.[39] Employees at AT&T testified that the company had worked with the government to build a supercomputer for the purpose of spying on private conversations on the phone and the Internet.[40] The government, representing itself and AT&T, moved to dismiss the entire suit under either *Totten* or *Reynolds*.[41] In denying that request, the court held that because President Bush and other government officials had publicly acknowledged the wiretapping program and confirmed AT&T's role in the program, the government had opened the door for precisely the type

34. *In re* Sealed Case, 494 F.3d 139, 141 (D.C. Cir. 2007).
35. *Id.*
36. *Id.* at 151.
37. *Id.* at 149–150.
38. *Id.* at 151.
39. *Id.*
40. Hepting v. AT&T Corp., 439 F. Supp. 2d 974 (N.D. Cal. 2006).
41. *Id.*

of suit that plaintiffs brought.[42]

Both *In re Sealed Case* and *Hepting* acknowledged that when the subject matter is not itself a state secret, dismissal on the pleadings is often inappropriate.

1. *El-Masri v. U.S.*: The First Extraordinary Rendition Case

Some of the most recent cases concerning the government's claim of the state secrets doctrine deal with its program of extraordinary rendition—a program designed to interrogate alleged terror suspects in countries that do not abide by U.S. or international law.[43] Extraordinary rendition allows for the transfer of these suspects to locales where there are far fewer restrictions on the types of interrogation methods that can be used to extract information from them, which can then be used in the war on terror.[44]

The first extraordinary rendition case tried in American courts was the Fourth Circuit's 2007 decision in *El-Masri v. United States.*[45] In this case, El-Masri, a German citizen, accused former CIA Director George Tenet, various CIA officers, and several private companies of committing tortuous acts under the Alien Tort Statute after they allegedly arranged for El-Masri's kidnapping and detention in Macedonia.[46] El-Masri claimed that he was secretly flown to that country, interrogated, beaten, blindfolded, and prohibited from communicating with others. Upon El-Masri's release—allegedly granted because U.S. operatives admitted to "having the wrong man"—he brought suit against both private and public officials.[47] El-Masri advanced two arguments that were ultimately rejected: (1) that extraordinary rendition is not a state secret and (2) that even if the state secrets doctrine applied, the court should not dismiss the entire suit at the outset before discovery could even occur. El-Masri argued that it

42. *Id.*

43. *See, e.g.*, El-Masri v. United States, 479 F.3d 296, 300 (4th Cir. 2007) (explaining the extraordinary rendition program).

44. *See id.*

45. *Id.*

46. *Id.*

47. *Id.*

was possible to separate out privileged information from non-privileged information.[48]

The Fourth Circuit rejected El-Masri's arguments, despite acknowledging that the press had revealed some details on the extraordinary rendition program and despite a report issued by the British government detailing the U.S. involvement in the program.[49] The court upheld the dismissal even before responsive pleadings from the defendants were filed and before any discovery was permitted.[50]

In ruling that the district court was correct in granting the government's motion to dismiss at the outset, the Fourth Circuit examined the case. The court concluded that the very subject matter of the suit and the central facts needed to litigate it were so closely connected to the offending state secrets that dismissal was proper.[51] The court continued, stating, "Dismissal at the pleading stage is appropriate if state secrets are so central to a proceeding that it cannot be litigated without threatening their disclosure."[52] Said another way, the Fourth Circuit required more than the plaintiff's ability to make a prima facie case with non-privileged evidence; the court required the plaintiff to establish that litigation could proceed, beyond a prima facie case, without the use of privileged evidence. Because the court determined that such a case could not be made without the offending evidence, dismissal was appropriate even at the pleading stage.[53]

Further, the court stated that though public information had been revealed through the media about the extraordinary rendition program, that alone was insufficient to no longer classify extraordinary rendition as a state secret.[54] When El-Masri argued that he could make his claims with only publicly circulated information, the court again rejected his arguments claiming that even if El-Masri could establish his case, the

48. *Id.* at 302.

49. El-Masri v. United States, 479 F.3d 296, 310 (4th Cir. 2007).

50. *Id.* at 313.

51. *Id.* at 308.

52. *Id.*

53. *Id.*

54. *Id.* at 308–309 (asserting that though the press was aware of El-Masri's ordeal, "[A]dvancing a case in the court of public opinion, against the United States at large, is an undertaking quite different from prevailing against specific defendants in a court of law.").

defendants would require the privileged information as part of any valid defense they would raise.[55]

For two years, *El-Masri* was the only extraordinary rendition case on file until plaintiffs alleging they were tortured recently brought suit in the Ninth Circuit.

III. *MOHAMED V. JEPPESEN*

In *Mohamed v Jeppesen*, the Ninth Circuit reviewed the most recent case of extraordinary rendition. In a 6–5 decision, the court chose to grant the U.S. government's motion to dismiss at the pleading stage based on the state secrets doctrine.[56]

In *Mohamed*, five foreign-born men sued in federal court claiming that they were victims of the extraordinary rendition program.[57] While the plaintiffs were from different countries and were transferred to different locations, each recounted a similar story of being arrested, transferred to American custody, forcibly transferred to another country, and tortured in various ways.[58] The plaintiffs alleged that they were beaten, subjected to shock therapy, held without the ability to contact their families or legal counsel, and forced to endure inhumane living conditions. The detainees also alleged that they were bound and gagged, and were kept in almost total darkness.[59] In all cases, they were eventually released and returned to their home countries.[60]

Instead of suing the government, as the plaintiffs had in *El-Masri*, the plaintiffs in *Mohamed* sued Jeppesen Dataplan Incorporated (Jeppesen) under the Alien Tort Act, alleging forced disappearance, torture, and various First Amendment violations.[61] A subsidiary of Boeing Corporation, Jeppesen is a transportation and airline company that, according to the plaintiffs, arranged the flights that sent the alleged

55. El-Masri v. United States, 479 F.3d 296, 308–309 (4th Cir. 2007).

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

57. *Id.*

58. *Id.* at 1074–1075.

59. *Id.*

60. *Id.*

61. *Id.* at 1075.

victims to the countries where they were allegedly tortured.[62] The plaintiffs argued that Jeppesen knew or should have known its actions were facilitating torture, and that it intentionally falsified flight plans to avoid public scrutiny.[63] After the suit had been brought in district court, the U.S. government intervened, and argued that the case should be dismissed, relying on the state secrets privilege.[64] The government reasoned that any case on extraordinary rendition would involve national security details that could not be exposed. After allowing the government's intervention, the district court granted the motion to dismiss under the state secrets doctrine, but it did so under the *Totten* bar. The government argued that the very subject matter was forbidden from suit, rather than arguing the *Reynolds* evidentiary framework, which would have allowed the case to proceed.[65]

On appeal to the Ninth Circuit, a three-judge panel reversed the district court's decision, holding that the government had failed to establish a basis for dismissal under the state secrets doctrine.[66] However, the Ninth Circuit decided to review the case en banc and eventually ruled to reinstate the district court's motion to dismiss.[67]

The Ninth Circuit began its analysis with a discussion of whether to apply the *Totten* or the *Reynolds* bar to review the government's use of the state secrets doctrine.[68] The court concluded that while the *Totten* bar may not be as narrow as the plaintiffs would argue, the *Reynolds* framework was the more appropriate in this case.[69] After establishing that the first two criteria of the *Reynolds* test were satisfied—(1) the government properly invoked the privilege and (2) the information presented was a state secret—the court was left with the third prong of the *Reynolds* framework—to evaluate how the case should proceed in

62. Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1076 (9th Cir. 2010).

63. *Id.*

64. *Id.* Significantly, the government advanced its state secret argument under both the *Totten* and *Reynolds* frameworks. *Id.*

65. *Id.* at 1077; *see also* Mohamed v. Jeppesen Dataplan, Inc., 539 F. Supp. 2d 1128 (N.D. Cal. 2008).

66. Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1077 (9th Cir. 2010).

67. *Id.*

68. *Id.*

69. *Id.* at 1084.

light of the offending state secrets.[70]

The first rule of law the court acknowledged was that, wherever possible, secret information should be walled off from non-secret information, and the suit should proceed without that evidence.[71] However, where the information between secret and non-secret evidence is so closely connected that the suit cannot continue for fear of revelation, then courts can dismiss the entire case at the outset.[72] Acknowledging that dismissing the entire suit is within the purview of *Totten* and that the Ninth Circuit rejected other decisions conflating the two standards, the majority nonetheless concluded that they operate on a continuum. The court held, therefore, that it is possible for the *Reynolds* framework to reach the same practical conclusion as *Totten*: dismissal on the pleadings.[73]

The Ninth Circuit pre-empted the dissent's argument and stressed in its decision that this dismissal may occur as early as the pleadings, even before an answer is offered or before discovery begins.[74] The court concluded that because there was an unjustifiable risk that state secrets may be exposed, there was no reason to be reckless and push things to the limit to allow cases to proceed when it is clear that they are sufficiently reliant on state secrets.[75] Importantly, the Ninth Circuit conceded that the government's extraordinary rendition program is not a pure state secret and that the plaintiffs may well be able to establish a prima facie case based on the public records evidence it procured.[76] However, the court found the dismissal at the pleading stage a proper decision because the defense may have had to use state secrets in order to defend itself, creating a potential for harm from future litigation,.[77]

Finally, the court pointed out several other remedies that may offer

70. *Id.* at 1086.

71. *Id.* (reiterating that "[W]henever possible, sensitive information must be disentangled from nonsensitive information to allow for the release of the latter.'").

72. Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1082–83 (9th Cir. 2010); *see also* El-Masri v. United States, 479 F.3d 296, 308 (4th Cir. 2007).

73. *Mohamed*, 614 F.3d at 1089 (agreeing that *Reynolds*, unlike *Totten*, does not support dismissal based on the subject matter yet ultimately dismissal may still be appropriate).

74. *Id.*

75. *Id.* at 1083.

76. *Id.* at 1090.

77. *Id.*

redress, including Congressional action preventing future use of extraordinary rendition or the President admitting wrongdoing and offering reparations to victims.[78]

In a vigorous dissent, five justices argued that, like the Fourth Circuit in *El-Masri*, the majority was conflating the *Totten* bar and the *Reynolds* framework.[79] Reiterating that *Reynolds* is solely an evidentiary privilege and should be used only to suppress offending evidence and not to excise entire claims, the dissent argued that the majority misapplied *Reynolds*.[80] First, the dissent reasoned that since the court was considering a Rule 12 motion for dismissal, the court's job was merely to assess whether the plaintiff had maintained a cause of action for which relief can be granted. The court's job was not, according to the dissent, to consider the merits of the litigation or to decide potential issues associated with future litigation.[81] Next, the dissent explained that the defense's filing of a Rule 8(b)(6) motion to refuse an answer was meant to apply only to specific requests for information and not, as the majority argued, meant to prevent the government from filing an answer altogether.[82] Where a defendant cannot answer part of a complaint because of evidentiary rules, the defendant must still address the parts of the complaint that are answerable so that the suit can proceed.[83] If the majority was correct—that the defendants could excise entire allegations at the outset—the *Reynolds* privilege would become an immunity doctrine.[84] For that reason, the dissent was not convinced that there is ever a case where, under *Reynolds*, the entire suit could be dismissed at the pleadings.[85]

Finally, the dissent argued that because of the significant constitutional claims at stake in this case, the priority that courts place on due process, and the importance of checks and balances, the court

78. *Id.* at 1091.

79. Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1093 (9th Cir. 2010) (Hawkins, J., dissenting).

80. *Id.* at 1093–1094.

81. *Id.* at 1100.

82. *Id.* at 1098.

83. *Id.*

84. *Id.*

85. Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1099 n.12 (9th Cir. 2010) (Hawkins, J., dissenting).

should grant litigants their day in court and not dismiss entire suits.[86] The dissent, like the majority, readily agreed that certain aspects of *Mohamed* may concern state secrets and may be prohibited because of the state secrets doctrine. The dissent, however, argued that the case should be remanded to the district court for the defendants to file an answer to determine if the case could proceed.[87]

IV. DISCUSSION

A. The Ninth Circuit Conflated the Totten *and* Reynolds *Standards and Failed to Recognize That Extraordinary Rendition's "Very Subject Matter" Is Not a State Secret.*

The Ninth Circuit's first error in dismissing *Mohamed* at the pleading phase was, ironically, something that the court had previously criticized about the Fourth Circuit's decision in *El-Masri*. Specifically, the Ninth Circuit erred by conflating the *Totten* total bar on litigation standard with the more nuanced *Reynolds* evidentiary framework.[88]

The U.S. Supreme Court was clear in *Totten* that dismissal of an entire suit at the outset should occur only when the very subject matter of the case is itself a state secret.[89] If the subject matter is not a state secret, then courts are to use the *Reynolds* framework, which merely prohibits the introduction of privileged evidence.[90] If the plaintiff cannot establish a prima facie case or the defense is denied critical evidence without the offending information, then dismissal of the suit may be appropriate.[91] But *Reynolds*, by its own assertion, is an evidentiary test and is not an immunity doctrine.[92]

As the Ninth Circuit conceded in *Mohamed*, the extraordinary

86. *Id.* at 1101.

87. *Id.*

88. *Id.* at 1087 n.12 (explaining how the court conceded it had objected to *El-Masri* in a previous decision because of its overbroad interpretation of the "very subject matter" analysis).

89. Totten v. United States, 92 U.S. 105, 107 (1875).

90. Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1079 (9th Cir. 2010).

91. *See id*. at 1083.

92. United States v. Reynolds, 345 U.S. 1, 6 (1953).

rendition program is not a state secret.[93] However, the court reasoned that even under *Reynolds*, the government could prevail on its state secret argument to dismiss at the pleadings.[94] By explaining that even though some aspects of the program were known, there was too great a risk of disclosure of those secret elements if the suit proceeded to litigation, the Ninth Circuit applied the *Totten* bar to a *Reynolds* question.

This application is inappropriate for several reasons, and was disavowed by the Ninth Circuit itself just two years before it decided *Mohamed*.[95]

1. Extraordinary Rendition Is Not a State Secret and Sufficient Information About the Program Already Existed in the Public Realm to Allow the Suit to Commence.

First, while it may be true in other contexts that the potential disclosure of state secrets is too great to allow a suit to commence because of the state secrets doctrine, the breadth and depth of coverage on the extraordinary rendition program is so significant that it is difficult to see why dismissal on the pleadings was necessary here.[96] The extraordinary rendition program has been publicly acknowledged by the President of the United States, high-ranking members of the U.S. government, the governments of other nations, and countless media and news organizations.[97]

The New Yorker magazine first exposed the extraordinary rendition program in a scathing 2006 article, in which a British journalist exposed

93. *Mohamed*, 614 F.3d at 1090 "[The court] do[es] not hold that the existence of the extraordinary rendition program is itself a state secret.").

94. *Id.*

95. *See* Al-Haramain Islamic Found., Inc. v. Bush, 507 F.3d 1190 (9th Cir. 2007) (considering a state secrets case just two years prior to *Mohamed* and disagreeing with too expansive a reading of the state secrets privilege that allowed for outright dismissal at the pleadings).

96. As this Casenote observes, the dissent in *Mohamed* prepared a 1,800 page appendix of public records and documents that highlights the information already available concerning extraordinary rendition.

97. Both Presidents George W. Bush and Barack Obama have acknowledged U.S. participation in the program, as have other top officials in U.S. government, including current Attorney General Eric Holder who supplied the memo invoking the state secret privilege in *Mohamed*.

alleged torture practices detailed in top-secret documents obtained from the Spanish government, which described the rendition flights.[98] That journalist, Stephen Gray, wrote a book called "Ghost Plane," which detailed El-Masri's allegations. Gray's book also included information alleging that then-Secretary of State Condoleezza Rice ordered El-Masri's release when the government discovered that they had imprisoned the wrong man.[99]

Following the Fourth Circuit's ruling in *El-Masri* and concerns from civil rights organizations that the U.S. was sanctioning torture, Congress initiated two years of hearings on the extraordinary rendition program.[100] In April 2007, two House foreign affairs committees held a joint hearing on the legality of extraordinary rendition. The hearing featured heated exchanges among Congressmen opposed to the practice, members of the CIA, and other intelligence experts who vehemently—and in great detail—defended the program's merits.[101] After learning more about extraordinary rendition, Congressman Bill Delhaunt remarked, "These renditions not only appear to violate our obligations under the UN Convention Against Torture and other international treaties, but they have undermined our very commitment to fundamental American values."[102] That same year, Senator Joe Biden of Delaware introduced legislation to prohibit rendition.[103]

During the 2009 opening arguments in front of the Ninth Circuit, Mohamed's attorneys argued that there were no state secrets left to protect. In support, Mohamed's attorneys cited to the fact that the government had declassified thousands of pages of information about interrogation techniques. Mohamed's attorneys also explained that all other nations involved in extraordinary rendition had acknowledged

98. Jane Mayer, *The CIA's Travel Agent*, NEW YORKER (Oct. 30, 2006), http://www.newyorker.com/archive/2006/10/30/061030ta_talk_mayer (citing El-Masri's case and including an interview with Jeppesen about its involvement in the extraordinary rendition program).

99. *Id.*

100. *Extraordinary Rendition in U.S. Couterterrorism Policy: The Impact on Transatlantic Relations: Hearing Before the H. Comm. on Foreign Affairs*, 110th Cong. (2007).

101. *Id.*

102. *Id.* at 2 (statement of Rep. Bill Delahunt).

103. In 2007, following these hearings, Senator Biden introduced the National Security with Justice Act of 2007. This act would have significantly curbed the use of extraordinary rendition and would have required strict constraints on who is deemed an enemy combatant.

their role in it.[104] Additionally, in 2010 the *New York Times* conducted an open and on-the-record interview with officials from the Obama Administration, who defended extraordinary rendition and explained its benefits.[105]

In sum, the amount of information—including Congressional hearings presented on the public record—that has emerged in just two years since the decision in *El-Masri* changes the dynamics of the extraordinary rendition debate. The amount of information makes it clear that extraordinary rendition is not a state secret. Further, there is nothing so inherently secretive about extraordinary rendetion that should allow for dismissal of litigation on the pleadings.

This is the same logic that the D.C. Court of Appeals applied recently in its decision in *Hepting v. AT&T*.[106] The court in *Hepting* conducted a long and detailed factual analysis of the government's wiretapping program, and concluded that the public knowledge of the program was so pervasive that its very subject matter could no longer be considered a state secret.[107]

As evidence that the subject matter in *Hepting* was not a state secret, the court drew on similar information that the dissent in *Mohamed* highlighted: the fact that the President of the United States had acknowledged the program, that major media outlets had reported on the program, that high-level government officials had commented on the program, and that Congress had investigated the merits of the program.[108]

With all of that information, the court determined that the subject matter of the case did not require dismissal on the pleadings and elected to return the issue to the district court to determine if the plaintiff could

104. Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1074 (9th Cir. 2010).

105. John B. Bellinger III, Op-Ed., *More Continuity Than Change*, N.Y. TIMES (Feb. 14, 2010), http://www.nytimes.com/2010/02/15/opinion/15iht-edbellinger.html.

106. Hepting v. AT&T Corp., 439 F. Supp. 2d 974 (N.D. Cal. 2006).

107. *Id.* at 986. Specifically, the court cites two reports—a New York Times article and a radio address by former President George W. Bush—that exposed sufficient details about the wiretapping program so that it was no longer a state secret. *Id.* The court determined that because the government had already admitted to the basic "contours" of the wiretapping program, exclusion of states secrets was unnecessary. *Id*. This argument is clearly applicable to the extraordinary rendition program as described in *Mohamed*.

108. *Id.*

establish a prima facie case against the government.[109]

Perhaps most significantly, the *Hepting* court distinguished the subject matter of illegal wiretapping with the extraordinary rendition program that had recently been found to be a state secret by the Fourth Circuit in *El-Masri*.[110] The *Hepting* court looked to *El-Masri* and concluded that the court was correct in dismissing *El-Masri* at the outset, based on the pleadings, because there was only "limited sketches of the alleged program [that] had been disclosed." Additionally, the issue in *El-Masri* concerned the existence of extraordinary rendition and whether the government was involved in it.[111] However, as outlined above, because of the years that elapsed between the Fourth Circuit's decision in *El-Masri* and the Ninth Circuit's decision in *Mohamed*, sufficient information about the extraordinary rendition program has come to light to negate many of the concerns over the secretive nature of the program. Indeed, there is no question anymore as to whether the government is involved in the program, only whether the government was *illegally* torturing people.

Therefore, the Ninth Circuit would have been correct to apply the same test that the D.C. Court of Appeals did in *Hepting*—determining that because the subject matter was not a state secret, dismissal at the outset was inappropriate, and remanding to the district court as the trier of fact to discern whether the case could proceed.

2. As the Ninth Circuit Noted, If the Subject Matter Is Not a State Secret, Then Allowing Dismissal on the Pleadings Misapplies the *Reynolds* Test

Two years prior to *Mohamed*, the Ninth Circuit in *Al-Haramain v. U.S.* clearly held that the state secrets doctrine under the *Reynolds* analysis should not allow dismissal on the pleadings.[112]

After learning that its phones had been illegally wiretapped, Al-Haramain, a charitable organization, sued the government for violating its Fourth Amendment rights. The Ninth Circuit distinguished the case

109. *Id.* at 994.

110. *Id.* at 984–985.

111. *Id.* at 994.

112. Al-Haramain Islamic Found., Inc. v. Bush, 507 F.3d 1190 (9th Cir. 2007).

from the Fourth Circuit's decision in *El-Masri* by allowing the claims to proceed even though certain evidence had to be excluded from the case. Whereas the Fourth Circuit concluded that "for purposes of the state secrets analysis, the 'central facts' and 'very subject matter' of an action are those facts that are essential to prosecuting the action or defending against it,'" the Ninth Circuit did not necessarily view those two concepts as one and the same. Said differently, the Ninth Circuit rejected the Fourth Circuit's holding that the "very subject matter" test was dispositive as to whether the plaintiff could establish a prima facie case.[113] The Ninth Circuit distinguished its decision from cases that must be dismissed at the very outset because of their subject matter and cases in which the plaintiff can establish a prima facie case absent the challenged material.[114] Dismissal at the outset, the court reasoned, was an overbroad reading of the state secrets doctrine when (1) the plaintiff is able to present a case using admissible facts and (2) the subject matter is not banned under *Totten*. Based on this reasoning, the Ninth Circuit misapplied the *Reynolds* test to *Mohamed* and allowed the case to be dismissed prematurely.

B. The Reynolds *Framework Is an Evidentiary Privilege and Should Prevent Dismissal of an Entire Suit When the Plaintiff Can Establish a Prima Facie Case and the Defendant Has not Even Submitted an Answer.*

Having established that extraordinary rendition in general is not, by its very subject matter, a state secret, it is clear that the *Totten* bar to litigation was the incorrect standard to utilize in *Mohamed*. The Ninth Circuit's error was not in applying *Reynolds*, but in conflating the two standards and allowing an evidentiary privilege to dismiss an entire suit at the pleadings before the defendant even filed an answer.

As the U.S. Supreme Court articulated in *Reynolds*, the test over whether to allow the admittance of evidence is if "there is a reasonable danger that compulsion of the evidence will expose military matters

113. *Id.* at 1201–1202 (distinguishing *El-Masri* from *Al-Haramain*).

114. *Id.*

which, in the interest of national security, should not be divulged."[115] If, after the evidentiary privilege is properly asserted and the offending information is excised, the plaintiff cannot establish a prima facie case, then dismissal at the pleadings may be appropriate. However, if that is not the situation, then the *Reynolds* test, like all other rules of evidence, is merely a tool for courts to discern how a case should proceed. The general rule under the *Reynolds* framework is that, where possible, privileged information should be separated out from non-privileged information and the case should proceed.[116] Because this is the goal of the *Reynolds* framework, and because granting due process to litigants is such a fundamental right, courts should afford plaintiffs every opportunity to overcome evidentiary hurdles.

The dissent in *Mohamed* correctly observed that even if the state secrets privilege can be asserted as early as the pleadings stage, the privilege allows defendants to utilize only Rule 8(b)(6) motions to restrict their answers. Importantly, the dissent noted that nothing in the *Reynolds* test, or the rules of evidence generally, allows an evidentiary privilege to expand into an immunity doctrine. As the Supreme Court observed in *Reynolds*, the state secrets privilege "has long been established in the law of evidence" and is meant to be applied as other evidentiary precautions are, and no broader than that.

The plaintiff in *Mohamed* acknowledged and stipulated that there may be certain pieces of evidence that would be prohibited from admittance based on the state secrets privilege. But that evidence should be considered on a piece-by-piece basis, and at the very least, the defendant should have to file an answer and disclose which evidence the defendant would be unable to produce.[117]

However, the majority in *Mohamed* rejected both the dissent's argument that an evidentiary privilege is not intended to excise entire claims and the plaintiffs' plea to wait until further in the litigation to determine if the suit could proceed. In reaching this conclusion, the majority relied on two cases that, under the *Reynolds* framework, dismissed entire suits without allowing them to proceed. However, the

115. United States v. Reynolds, 345 U.S. 1, 10 (1953).

116. Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1086 (9th Cir. 2010).

117. *Id.* at 1072.

similarities between *Mohamed* and those two cases are tenuous at best, making the two cases not readily applicable.

The first case that the majority cited was its own precedent, *Kasza v. Browner*. In that decision, plaintiffs were former workers at an Air Force base who sued the Air Force and the United States government for violating certain health and safety standards.[118] Because the defendants asserted the state secrets privilege at the pleadings and, when fully examined, "the mosaic of privileged and non-privileged information together" was sufficient for the dismissal of the litigation, the Ninth Circuit ruled that *Mohamed* followed *Kasza*, and should allow for outright dismissal.[119]

However, there are two important distinctions between *Mohamed* and *Kasza*, which the majority failed to consider. First, *Kasza* permitted the case to proceed and required the government to file a response before rendering its decision.[120] It was not until later, after discovery commenced and the court considered each piece of evidence separately, that the Ninth Circuit concluded that much of the information the plaintiffs requested would be barred by the evidentiary privilege of the state secrets doctrine. In *Mohamed*, the plaintiff argued that the timing of the dismissal in his case was inappropriate and that he could establish his case without asking for offending evidence in discovery. That Mohamed never received that opportunity while the plaintiffs in *Kasza* did is a major difference between the two cases.

Second, the Ninth Circuit's reasoning for dismissing *Kasza* differed greatly from its reasoning for dismissing *Mohamed*. After the excluded evidence was prohibited in *Kasza*, there was no information left for the plaintiffs to establish a prima facie case. Additionally, the court later determined that the very subject matter in *Kasza* was a state secret, which precluded further judicial inquiry entirely. These two factors—(1) that plaintiff could not establish a prima facie case without the offending evidence and (2) that the very subject matter was a state secret—are absent in *Mohamed*. In *Mohamed*, the court assumed, *arguendo*, that plaintiff could establish a prima facie case. The court

118. Kasza v. Browner, 133 F.3d 1159 (9th Cir. 1998).

119. *Id.* at 1170.

120. *Id.* at 1164.

also acknowledged the thousands of public records that the plaintiff had procured to mount a complaint. Additionally, the court clearly stated that extraordinary rendition as a subject matter is simply not a state secret.

The Ninth Circuit next considered *Black v. U.S.* as proof that dismissal on the pleadings is appropriate under the *Reynolds* evidentiary privilege.[121] In *Black*, the plaintiff, an electrical engineer who worked for the government and the CIA, brought federal tort and *Bivens* actions against the government for psychological and physical damage he allegedly received after they learned of an encounter he had with a Soviet.[122] Similar to *Kasza*, the Eighth Circuit allowed the suit to proceed until discovery. During discovery, the court determined that the suit must be dismissed due to the plaintiff's failure to prove a prima facie case without the offending evidence. As stated above, *Mohamed* is distinguishable from *Black* in that the plaintiff in *Mohamed* met his prima facie burden and the defendants were at least required to submit an answer. Therefore, because both *Kasza* and *Black* present such stark and significant differences from the conclusions reached in *Mohamed*, the cases were inapplicable in *Mohamed*.

In considering how the *Reynolds* evidentiary framework should be utilized in cases concerning state secret privileges, the Ninth Circuit should have considered the following two cases from the D.C. Circuit Court of Appeals.

The first case, *Ellsberg v. Mitchell*, involved plaintiffs alleging that they were victims of warrantless wiretapping authorized by the government and the CIA.[123] The plaintiffs in *Ellsberg*, who were defendants in a related criminal case, filed interrogatories and requested discovery from various governmental organizations about the extent and scope of the wiretapping.[124] When the government asserted the state

121. Black v. United States, 62 F.3d 1115 (8th Cir.1995).

122. *Bivens* actions allow for damage remedies for constitutional violations committed by federal agents.

123. Ellsberg v. Mitchell, 709 F.2d 51 (D.C. Cir. 1983). The plaintiffs in were defendants in the famous "Pentagon papers" case, where Daniel Ellsberg and other defendants were accused of illegally releasing confidential information about the Vietnam War to the media and other public organizations. *Id*. at 52.

124. *Id.*

secrets privilege exempted it from disclosing the information, the district court agreed and granted the motion to dismiss.[125] However, in an important and oft-cited opinion on the state secrets doctrine, the D.C. Court of Appeals reversed the decision. According to the appellate court, if the *Totten* test was inapplicable, the *Reynolds* evidentiary privilege was insufficient to permit excising entire claims. Therefore, the court ruled that dismissing the entire suit was not appropriate.[126] The court of appeals further explained that, under *Reynolds*, privileged information is merely to be treated "as though a witness had died, and the case will proceed with no consequences save those resulting from the loss of the evidence."[127] The state secrets privilege, the court concluded, does not allow for the outright dismissal of the suit without consideration of the evidence—a rule that the D.C. court affirmed only recently.[128]

In a 2005 case, *Crater Corp. v. Lucent*, Crater sued Lucent Technologies for breaching patent permissions when Lucent unveiled a "coupling device" that Crater alleged it had already developed.[129] The U.S. government reportedly utilized this technology for its illegal wiretapping program. When Crater brought suit, the government intervened, asserting the state secrets privilege at the pleadings to prevent disclosures about this device from surfacing.[130] The D.C. Circuit Court of Appeals overturned the district court's grant of the government's motion to dismiss, holding that the motion was not ripe for consideration until discovery could be conducted.[131] The court of appeals described the district court's action as "putting the cart before the horse," and despite acknowledging that some evidence would clearly be protected by the state secrets doctrine, the appellate court remanded the case for a much more thorough examination of the evidence.[132]

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125. *Id.* at 64.

126. *Id.* at 62.

127. *Id.* at 64.

128. *See* Crater Corp. v. Lucent, 423 F.3d 1260 (Fed. Cir. 2005).

129. *Id.* at 1263.

130. *Id.* (noting that the U.S. objected to any discovery that would reveal the development or usage of the coupling device).

131. *Id.* at 1268.

132. *Id.* (concluding that further proceedings were required to determine if sufficient non-privileged evidence existed to allow the suit to continue.)

Ellsberg and *Crater*, therefore, stand for the proposition that even when the state secrets doctrine is properly invoked, the evidence must be examined piece by piece to determine how the case should proceed. Treating offending evidence like a witness who has died, and preventing courts from prematurely dismissing suits involving state secrets, is, according to these decisions, precisely what *Reynolds* hoped to achieve.

For the foregoing reasons, it is clear that (1) the *Reynolds* test is an evidentiary privilege, and evidentiary privileges are not immunity doctrines; (2) whenever possible, courts should attempt to separate out privileged information from non-privileged information so that the case can proceed; (3) the Ninth Circuit incorrectly applied *Kasza* and *Black* to its analysis; and (4) two significant state secrets cases not considered by the Ninth Circuit more aptly compare to *Mohamed*. While the plaintiff in *Mohamed* conceded that some information in his case may be privileged, the Ninth Circuit erred in its understanding of the *Reynolds* evidentiary test. This misunderstanding led to dismissal of the entire suit at the pleadings before a detailed analysis of the evidence could occur.

C. The Ninth Circuit Incorrectly Allowed the Assertion of a Hypothetical Defense Instead of Requiring Jeppesen to Assert a Valid Defense.

Courts agree that when analyzing a state secrets doctrine issue, it is not enough to consider the plaintiff and whether the plaintiff can establish a prima facie case; courts must also consider whether defendants can assert a valid defense.[133] If defendants cannot assert a valid defense without the secret evidence, courts may properly dismiss entire suits at the pleadings.[134] A "valid defense" must be legally sufficient and meritorious.[135] For this reason, the Ninth Circuit erred by granting the defendant's motion to dismiss not based on any valid defense but on the proposition of a valid defense, which was never actually asserted.

Before the Ninth Circuit decided *Mohamed* en banc, a three-judge

133. *See, e.g.*, *In re* Sealed Case, 494 F.3d 139, 153 (D.C. Cir. 2007).

134. *Id.*

135. *Id.* (defining "meritorious" as meriting a legal victory).

panel on the court of appeals ruled to overturn the district court and allow the case to proceed.[136] That three-judge panel acknowledged that the issue of state secrets may surface in the case and may prevent the defendants from asserting a valid defense.[137] The panel concluded, however, that the government's arguments were premature, and the lower court should not evaluate "hypothetical claims" that had not yet been introduced.[138]

The government's attempt to rely on hypothetical defenses was explicitly rejected by the three-judge panel. Even though this position was later overturned en banc, it has support. It is the law in the D.C. Circuit as articulated in *In re Sealed Case*. There, a Drug Enforcement Agency officer who worked in Burma sued the State Department in a *Bivens* action. The officer alleged that he was harassed and spied on because his superior, an unnamed CIA agent, had a vendetta against him.[139] The officer further alleged that his phones were illegally wiretapped, that conversations he had with his subordinates were taken out of context, and that he was repeatedly threatened and intimidated.[140] The State Department and CIA argued that they could not answer plaintiff's complaint because of the state secrets privilege—an argument that the D.C. Court of Appeals emphatically rejected.

The court of appeals reasoned that while there were *possible* defenses that the government could raise that would involve state secrets, none had actually been raised. As the court went on to conclude:

> Were the valid defense exception expanded to mandate dismissal of a complaint for any plausible or colorable defense, then virtually every case in which the United States successfully invokes the state secrets privilege would need to be dismissed. This would mean abandoning the practice of deciding cases on the basis of evidence-the unprivileged evidence and

136. Mohamed v. Jeppesen Dataplan, Inc., 579 F.3d 943 (9th Cir. 2009), *reh'g en banc granted*, 586 F.3d 1108 (9th Cir. 2009).

137. *Id.*

138. *Id.* at 960 (dismissing the government's argument when it tried to assert hypothetical claims that had not yet been considered by the court).

139. *In re* Sealed Case, 494 F.3d 139, 151 (D.C. Cir. 2007). For a description of a *Bevins* action, see *supra* note 122.

140. *Id.*

privileged-but-dispositive evidence-in favor of a system of conjecture.[141]

Also, when issuing its remand orders to the district court, the D.C. Court of Appeals instructed that under the *Reynolds* framework dismissal on the pleadings was appropriate only if (1) the plaintiff could not establish a prima facie case without the offending evidence or (2) the defendant's valid defense is obscured to the point that the trier of fact is likely to reach an erroneous conclusion.[142] The D.C. court, therefore, correctly understood that as an evidentiary privilege, the appropriate role of the appeals court in state secret cases is to allow district courts to consider the facts and evidence. This approach, which was advocated by the dissent in *Mohamed*, was not accepted by the Ninth Circuit's majority, which misapplied the evidentiary privilege by refusing to remand for a consideration of whether Jeppesen's valid defense was barred by state secrets.

El-Masri is one of the few cases where the court acknowledged it was dismissing a case on the pleadings based on hypothetical defenses.[143] However, in that case the Fourth Circuit contended that any defense would have to involve state secrets because state secrets were so central to the litigation and concerned its very subject matter. This argument was expressly rejected by the Ninth Circuit in *Mohamed*.[144]

Therefore, the Ninth Circuit incorrectly permitted the dismissal of plaintiff's complaint in *Mohamed* because the possibility of merely hypothetical defenses is not appropriate under the *Reynolds* framework and no valid defense was ever advanced by the defendants.

D. Dismissal at the Outset Is Against Policy Reasons and Is Contrary to Other Countries' Interpretations of State Secrets Privileges.

Since the emergence of the state secrets doctrine, first following the Aaron Burr case in 1807, and then formally in *Totten v. U.S.*, a critical question has remained about how best to balance protecting the

141. *Id.* at 150–151.

142. *Id*. at 154.

143. *Id.* at 149 (citing El-Masri v. United States, 479 F.3d 296, 309 (4th Cir. 2007)) (noting that *any* valid defense that the defendants' might raise would involve privileged information and would, therefore, dismiss the need to consider particular defenses).

144. *Id*.

government's interest while providing litigants fair and open access to justice. Courts began interpreting *Reynolds* to mean that secret information should be walled off from non-secret information and cases should ordinarily not be dismissed at the outset because, as a public policy matter, litigants deserve their day in court.[145] Indeed, since *Totten* was decided 150 years ago there has only been one other concrete example of the U.S. Supreme Court dismissing a case at the outset based on its very subject matter—*Tenet*.[146]

The reasons why outright dismissal of a suit without a discussion of its merits is disfavored by courts are clear. These reasons were articulated by the majority in *Mohamed*: (1) that outright dismissal is rarely applied, and the parameters for it are not clearly defined; (2) that the state secrets doctrine is judge-made and has extremely harsh consequences; and (3) that conducting a more detailed analysis will tend to improve the accuracy, transparency and legitimacy of the proceedings.[147]

Dismissing a suit at the pleadings is a drastic measure for the reasons stated above. Dismissal was particularly drastic in *Mohamed* because of the ongoing constitutional issues raised by the extraordinary rendition program.

When the D.C. district court was considering whether to dismiss a wiretapping case at the pleadings, one of the reasons the court rejected the government's argument was because of the pervasive constitutional claims present in that case.[148] As that court stated, no case dismissed at the pleadings because of its subject matter has ever involved "widespread violations of individual constitutional rights."[149] The types of cases that had been dismissed at the outset included highly technical subject matter and claims involving contract disputes over covert espionage. However, as that court noted, the issues in that suit involved

145. Ellsberg v. Mitchell, 709 F.2d 51, 57 (D.C. Cir. 1983).

146. *See* Weinberger v. Catholic Action of Haw./Peace Educ. Project, 454 U.S. 139 (1981). To reiterate an earlier discussion, some courts, like the Ninth Circuit, have held that *Weinberger* was a third example of a case decided under *Totten*. That, however, is not necessarily true, and the Court's discussion of state secrets in that case was limited to dicta.

147. Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1084 (9th Cir. 2010).

148. *See* Hepting v. AT&T Corp., 439 F. Supp. 2d 974, 993 (N.D. Cal. 2006).

149. *Id.*

such significant constitutional questions that, as a matter of public policy, attempts should be made for the case to proceed.[150]

This way of thinking—to grant evidentiary privileges but not absolute immunity to the government—is precisely in line with how many other democratic nations view the state secrets privilege.[151] Most countries now tend to conduct a balancing test to determine whether the state's interest is so pivotal that immunity should be granted, or whether the court can, in pursuit of justice and the public interest, allow the suit to proceed without the offending information.[152]

In Spain, for example, plaintiffs who brought a claim after their family members were killed for suspected terrorism were allowed to proceed to trial despite the government's protest. Using a balancing test, the Spanish court determined that the plaintiffs' interests were more important than government's right to its confidential papers.[153] The court concluded, "Constitutional guarantees of the right to obtain effective protection from judges, and certainty that the rule of law shall prevail, should take precedence over the state's security interests."[154]

Israeli courts considering a similar case to *Mohamed*—one that concerned how the Israeli government was interrogating potential terror suspects—also reached the conclusion that the state secrets privilege was insufficient to deny the plaintiffs their day in court over their constitutional claims.[155] The Israeli court reasoned that while protecting state secrets was critical, Israel should not be permitted to "consign its fight against terrorism to the twilight shadows of the law."[156]

These nations' practices have demonstrated that it is possible to

150. *Id.* at 993–994.

151. Nicole Hallett, *Protecting National Security or Covering Up Malfeasance: The Modern State Secrets Privilege and Its Alternatives*, 117 YALE L.J. POCKET PART 82 (2007), http://thepocketpart.org/2007/10/01/hallett.html (summarizing how other countries view the state secrets privilege, and concluding that while the U.S. views the privilege as an absolute immunity to protect privileged information, most countries tend to balance the need to guard sensitive information with the importance of safeguarding constitutional rights).

152. *Id.*

153. *Id.* (citing Constitucion C.E. art. 24, cl. 1 (Spain), *translated in* The Kingdom of Spain: Constitution, in *XVII* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 1 (Rudiger Wolfrum & Rainer Grote eds., 2007)).

154. *Id.*

155. *Id.*

156. *Id.*

protect the government's secrets, carefully seal off protected documents, and still allow litigants to seek their day in court. Ensuring that the government is responsible for its actions is precisely the way other courts in other nations have dealt with the state secrets privilege, and many Americans advocate this approach as well. As previously noted, Congressional hearings, including legislation to end extraordinary rendition, have emerged in recent years.[157] Earlier this year, a *New York Times* editorial on *Mohamed* stated, "The state secrets privilege is so blinding and powerful that it should be invoked only when the most grave national security matters are at stake. It should not be used to defend against allegations that if true, would be 'gross violations of the norms of international law.'"[158] This sound public policy is yet another reason why *Mohamed* was incorrectly decided and why the invocation of state secrets should not have led to dismissal at the pleadings in this case.

V. CONCLUSION

Throughout America's history, there has been tension between the conflicting goals of security and liberty. The terrorist attacks on September 11 brought this tension to the forefront. As practices that once had been rare grew more common, the perceived need to shield those practices from scrutiny grew. Extraordinary rendition is one such practice. While it doubtlessly has contributed to the security of the United States, it is impossible to weigh whether those benefits outweigh the moral and human costs it has imposed on those who fall subject to it. Despite the government's official acknowledgment of extraordinary rendition, it is considered a state secret and prevents litigants from redressing wrongs in court. The state secrets doctrine has existed for over 200 years, and it has an important role in securing our safety and ensuring that state secrets are not revealed. The doctrine was created in recognition of the legitimate need to protect certain secret information; it was never intended to protect unconstitutional practices from judicial

157. Members of Congress, such as Rep. Ed Markey of Massachusetts and Sen. Patrick Leahy of Vermont, have in recent years introduced legislation that would prohibit the government's use of extraordinary rendition.

158. Editorial, *Torture Is a Crime, Not a Secret*, N.Y. TIMES, Sept. 9, 2010, at A30.

scrutiny.

While courts need to be conscientious about protecting state secrets, in only extreme circumstances should constitutional claims be barred in the name of national security. The United States has held true to this ideal by preferring the *Reynolds*' flexible balancing test to *Totten*'s total bar to litigation.

It was under that general framework that the Ninth Circuit's three-judge panel decided *Mohamed v. Jeppesen* and correctly concluded that the *Reynolds* test did not allow for complete dismissal of the suit at the pleadings stage. The en banc reversal was an overbroad reading of *Reynolds*. The decision was issued despite the fact that the defendants never filed an answer explaining their inability to respond and despite the fact that plaintiffs could establish a prima facie case without offending evidence. By conflating *Totten* and *Reynolds*, and by granting dismissal so early in the litigation process, the Ninth Circuit turned an evidentiary privilege into an immunity doctrine.

There is no doubt that some of the evidence either plaintiff or defendant would require in *Mohamed* was restricted due to the state secrets privilege. However, the dissent's view—that the case should have been remanded to consider if the plaintiff's case could proceed—was the better approach.

While there are, to be sure, state secrets involved in extraordinary rendition cases, the existence and practice of extraordinary rendition is not a secret. The Ninth's Circuit's *Mohamed* decision incorrectly applied the *Reynolds* test by allowing dismissal at the pleading stage without any showing that the case involved actual state secrets. The Ninth Circuit did not fulfill its responsibility to engage in judicial scrutiny of allegedly unconstitutional acts by allowing the government to plea their way to immunity.