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Torture and Public Policy: *Mohamed v. Jeppesen Dataplan, Inc.*, Allows "Extraordinary Rendition" Victims to Litigate Around State Secrets Doctrine

I. INTRODUCTION

In *Mohamed v. Jeppesen Dataplan, Inc.*,[1] the Ninth Circuit examined the state secrets doctrine as it relates to the War on Terror. The plaintiffs, alleged victims of the Central Intelligence Agency's ("CIA") "extraordinary rendition" program, sued the private corporation providing logistical support for plaintiffs' so-called "torture flights"—shuttling prisoners from their home countries to CIA "black site" prisons and other locations. The government intervened before an answer had been filed and claimed that the case must be dismissed on the pleadings as its very subject matter is a state secret barred by *Totten v. United States*.[2] Although the district court agreed, the ruling was appealed and reversed by a unanimous three-judge panel.[3]

On appeal, the court declined the government's invitation to extend the harsh *Totten* bar on all judicial remedies whenever a state secret is implicated. Instead, it adopted the flexible evidentiary framework presented in *United States v. Reynolds*[4] allowing the case to continue on remand as long as evidence that is truly a state secret is not indispensable to a prima facie case or to a valid defense.[5] The *Mohamed* ruling will allow litigation to continue, for now, on evidence amassed by the plaintiffs from publicly available sources.[6]

1. 563 F.3d 992 (9th Cir. 2009). After this Note was written, the opinion was amended and reissued by the same judge that wrote the original opinion. The new citation is Mohamed v. Jeppesen Dataplan, Inc., 579 F.3d 943 (9th Cir. 2009). The amendments were made to limit the language of some sweeping dicta in the first version of the opinion, but they do not change the holding of the court nor any part of the case relevant to this Note.

2. 92 U.S. 105 (1875).

3. *Mohamed*, 563 F.3d at 997.

4. 345 U.S. 1 (1953).

5. *Mohamed*, 563 F.3d at 1009.

6. Sources include public disclosures from repentant foreign governments who were involved with the CIA and statements from a former Jeppesen employee. *See* Mohamed v. Jeppesen Dataplan, Inc., 539 F. Supp. 2d 1128, 1130 n.1 (N.D. Cal. 2008).

The problem with this outcome is that although it is favorable to these litigants who admittedly have public sources, the next set of alleged victims to torture may not be as lucky. This standard, in tandem with an earlier Ninth Circuit case, thus creates a perverse incentive for the government to curb all disclosures to the public in order to insure their own immunity.[7]

II. FACTS AND PROCEDURAL HISTORY

A. Factual Background

1. Allegations of torture

All five plaintiffs allege torture, forced disappearances, and secret incommunicado detention performed by U.S. agents or foreign governments in concert with the CIA.[8]

a. Plaintiff Mohamed, an Ethiopian citizen and legal resident of the United Kingdom, alleged that he was flown to Morocco, severely beaten, and had his bones routinely broken.[9] Interrogators allegedly cut him with a scalpel from head to toe, "including his penis," and then poured "hot stinging liquid" into the wounds.[10] He was then transferred to a CIA "dark prison," further tortured, deprived of food, and for twenty-four hours a day kept in near-darkness and subjected to loud noises like the screams of women and children.[11] Mohamed spent the next five years at Guantanamo. During the pendency of this appeal he was released to the United Kingdom without being charged.[12]

b. Plaintiff Britel, an "Italian citizen of Moroccan origin," was transferred to American custody after his arrest for immigration law

7. If somehow the court could have found a standard that allowed revealing government information notwithstanding the privilege, the perverse government incentive would abate dramatically. Exactly how to do this is admittedly unclear and is not discussed in this Note. It is merely meant to draw attention to this particular repercussion of the current standard.

8. Plaintiffs allege that they were held in secret without counsel, consular agents, or family knowing of their whereabouts, much less given access to them. *See* Complaint ¶¶ 3, 8, 104, Mohamed v. Jeppesen Dataplan, Inc., 539 F. Supp. 2d 1128 (N.D. Cal. 2008) (No. 07-2798), *available at* http://www.aclu.org/pdfs/safefree/mohamed_complaint20070530.pdf.

9. *Mohamed*, 563 F.3d at 998.

10. *Id*.

11. *Id*.

12. *Id*.

violations in Pakistan.[13] Britel alleged that he was beaten, deprived of food and sleep, and threatened with "sexual torture, including sodomy with a bottle and castration."[14] He was released, then detained again, coerced into signing a false confession, convicted, and sentenced to serve fifteen years in a Moroccan prison.[15]

c. Plaintiff Agiza, an Egyptian citizen seeking asylum in Sweden, alleged that he was captured by Swedish authorities and handed over to U.S. agents who flew him to Egypt.[16] He was there "severely and repeatedly beaten" for five weeks while in a "squalid, windowless, and frigid cell."[17] He was also placed on a wet mattress, with electrodes on his "ear lobes, nipples and genitals," and partially electrocuted.[18] Agiza spent two and a half years in detention before being provided with a trial before a military court, convicted, and sentenced to fifteen years in an Egyptian prison.[19]

d. Plaintiff Bashmilah, a Yemeni citizen, was in Jordan visiting his infirm mother when he was detained by the Jordanian government.[20] They allegedly physically and psychologically abused him, transferred him to U.S. agents who flew him to Afghanistan, and placed him in solitary confinement in twenty-four-hour darkness.[21] Then he was placed in "twenty-four-hour light and loud noise," and shackled in painful positions.[22] He "attempted suicide three times."[23] Next, he was flown to a "CIA 'black site' prison," which had alternating white noise and "deafeningly loud" music.[24] In the end, he was tried for a petty crime, "sentenced to time served abroad, and released."[25]

e. The final plaintiff, al-Rawi, is an Iraqi citizen and has been a legal resident of the United Kingdom since 1994. Al-Rawi was

13. *Id*. at 997.

14. *Id*. at 997–98.

15. *Id*. at 998.

16. *Id*. at 997; *see also* AMNESTY INTERNATIONAL, STATE OF DENIAL: EUROPE'S ROLE IN RENDITION AND SECRET DETENTION 67 (2008), *available at* http://www.amnestyusa.org/stoptorture/pdf/Europe%20renditions%20whole%20doc%20low%20res.pdf.

17. *Mohamed*, 563 F.3d at 997.

18. *Id*.; *see also* Complaint, *supra* note 8, at ¶ 145.

19. *Mohamed*, 563 F.3d at 997.

20. *Id*. at 998.

21. *Id*.

22. *Id*.

23. *Id*.

24. *Id*.

25. *Id*.

traveling to Gambia on business when detained by the Gambian Intelligence Agency and interrogated by U.S. CIA agents.[26] He was flown to Afghanistan, detained in the CIA "dark prison" where loud noises played twenty-four hours a day, then flown "to Bagram Air Base, where he was 'subjected to humiliation, degradation, and physical and psychological torture by U.S. officials.'"[27] He was beaten, threatened with death, and then shackled in "excruciating pain" for his trip to Guantanamo.[28] Finally, he was released and returned to the United Kingdom, apparently without being charged.[29]

2. Role of Jeppesen Dataplan, Inc.

Each of the prisoner plaintiffs were allegedly transported inhumanely to various prisons aboard a Jeppesen Dataplan, Inc., ("Jeppesen") flight. Preparation for each flight began with the passengers being stripped naked, cavity searched, placed in a diaper, covered by a hood and overalls, shackled in pain-positions, and chained to a chair or stretcher.[30] For every leg of these transfers, Jeppesen, a wholly-owned subsidiary of Boeing,[31] allegedly provided the flight services and logistics.[32]

A former employee of Jeppesen, Sean Belcher, gave a sworn declaration that Jeppesen apparently provided these services because "'the rendition flights paid very well.'"[33] A supervisor told him, "We

26. *Id.*

27. *Id.*

28. *Id.*

29. *See id.*; *see also* FRONTLINE/World Extraordinary Rendition: Interviews: Bisher al-Rawi, *available at* http://www.pbs.org/frontlineworld/stories/rendition701/interviews/bisher.html [hereinafter PBS] (transcript of interview with Plaintiff al-Rawi).

30. *See Mohamed*, 563 F.3d at 997–98; PBS, *supra* note 29, at 4–5; Complaint, *supra* note 8, *passim*.

31. *Mohamed*, 563 F.3d at 997.

32. Complaint, *supra* note 8, ¶ 11. The flight logistics allegedly entailed "pre-departure flight planning services, including itinerary, route weather, and fuel plans for both aircraft involved in their renditions." *Id.* They "procured necessary landing and overflight permits for all legs of the rendition flights; and through local agents, arranged fuel and ground handling for the aircraft; filed flight plans with national and inter-governmental air traffic control authorities; paid passenger fees for the crew; and made arrangements to secure the safety of the aircraft and crew on the ground." *Id.* It should be remembered though that Jeppesen is not accused of actually torturing anyone. It is only accused that they "knew" or "should have known" that people were going to be tortured and yet Jeppesen continued to aid and abet the torturers with their logistics.

33. *Mohamed*, 563 F.3d at 999 n.1.

do all the extraordinary rendition flights."[34] Belcher also testified that "there were some employees who were not comfortable with that aspect of Jeppesen's business because they knew some of these flights end up with the passengers being tortured."[35] However, Belcher testified that his supervisor explained "that's just the way it is, we're doing them."[36]

B. Procedural History

1. Original complaint

Plaintiffs filed suit against Jeppesen under the Alien Tort Statute ("ATS"),[37] which allows foreign nationals to sue in U.S. courts for torts in violation of U.S. treaties or gross violations of customary international law.[38] Plaintiffs alleged in their complaint that Jeppesen was either "actively participating" or "aiding and abetting" in the "torture and other cruel, inhuman, or degrading treatment" of the plaintiffs by agents of the United States and allies in foreign governments.[39]

Before Jeppesen filed an answer to the complaint, the United States Government moved the court to intervene in the case, and at the same time moved to dismiss the complaint.[40] The government asserted the state secrets privilege and gave two declarations from then-CIA Director General Michael Hayden, satisfying the procedural requirements of invoking the privilege.[41] One statement was redacted and public, while the other was classified and heard in

34. *Id.* (internal quotations omitted).

35. *Id.* (internal quotations omitted).

36. *Id.* (internal quotations omitted); *see also* Jane Mayer, *Outsourcing: The C.I.A.'s Travel Agent*, NEW YORKER, Oct. 30, 2006, *available at* http://www.newyorker.com/archive/2006/10/30/061030ta_talk_mayer.

37. 28 U.S.C. § 1350 (2006).

38. *See Mohamed*, 563 F.3d at 999; Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

39. *Mohamed*, 563 F.3d at 999. Torture has long been recognized as a violation of customary international law, as would be aiding and abetting torture. Torture is also a violation of several U.S. treaties. Therefore, the ATS appears to have been appropriately invoked. *See generally* Robert Johnson, *Extraordinary Rendition: A Wrong Without a Right*, 43 U. RICH. L. REV. 1135, 1157–60 (2009).

40. *See* Mohamed v. Jeppesen Dataplan, Inc., 539 F. Supp. 2d 1128, 1132–33 (N.D. Cal. 2008). The motion to intervene was made pursuant to Federal Rule of Civil Procedure 24(a). *Id.*

41. *Id.* at 1134.

camera. Plaintiffs objected to the dismissal of the case,[42] but did not oppose U.S. intervention.[43]

2. Ruling of the district court

The district court[44] allowed the United States to intervene and agreed with the government's reasoning for dismissal.[45] In granting the motion to dismiss, the court found that the state secret doctrine articulated in *Reynolds* barred this case from continuing.[46] It reasoned that "at the core of Plaintiffs' case . . . are 'allegations' of covert U.S. military or CIA operations in foreign countries against foreign nationals [which are] clearly . . . state secret[s]," and thus categorically barred from litigation.[47]

III. SIGNIFICANT LEGAL BACKGROUND

The concept of a state secret is not new, but it does tend to be developed only when we are at war. It first appeared in American jurisprudence in Aaron Burr's treason trial,[48] and it was further defined in the aftermath of the Civil War, the Cold War, and now the War on Terror. The doctrine today is marked by "[t]wo parallel strands"[49] from two landmark Supreme Court cases, *Totten v. United States*,[50] and *United States v. Reynolds*.[51] Various circuits have applied the standards from these cases, including the Ninth Circuit.

A. Totten v. United States

In *Totten*, the estate of an alleged spy claimed the United States had not adequately compensated him for espionage services rendered during the Civil War.[52] Allegedly, President Lincoln had commissioned the spy to proceed south, ascertain the strength of the

42. *Id.* at 1135–36.
43. *Id.* at 1133.
44. Northern District of California, Judge James Ware.
45. *Mohamed*, 539 F. Supp. 2d at 1134–36.
46. *See id.* at 1136.
47. *Id.*
48. United States v. Burr, 25 F. Cas. 30, 37 (C.C.D. Va. 1807) (No. 14,692d).
49. Mohamed v. Jeppesen Dataplan, Inc., 569 F.3d 992, 1000 (9th Cir. 2009).
50. Totten v. United States, 92 U.S. 105 (1875).
51. United States v. Reynolds, 345 U.S. 1 (1953).
52. *Totten*, 92 U.S. at 105.

Confederate Army, and "procure plans of forts and fortifications, and gain such other information as might be beneficial to the government of the United States," for which he would be paid $200 a month.[53] The Court of Claims found that he had in fact faithfully performed his charge behind rebel lines during the entire period of the war, but he had only been reimbursed for his expenses.[54]

On appeal, the Supreme Court found that such a contract for espionage services should not even be litigated in a court of justice.[55] The Court reasoned that public policy forbids the revelation of such contracts, given the inevitable need for a detailed presentation of the contract in order to sustain an action.[56] Furthermore, any espionage contract necessarily contains an implied covenant to never reveal its existence, and such a covenant would be broken by merely bringing suit.[57]

B. United States v. Reynolds

In *Reynolds*, three civilians were killed in a B-29 crash while on "a highly secret mission of the Air Force," testing secret electronic equipment.[58] The estates of the civilians asked the government to produce a report to show the negligence of the military. The government resisted, asserting that "it has been determined that it would not be in the public interest to furnish this report."[59] The district court ordered production of the documents to assess the validity of the government's claims, but the Air Force refused.[60] Judgment was entered for plaintiffs and then affirmed at the court of appeals.[61]

The Supreme Court reversed, holding that the government was allowed to assert the privilege and prevent the discovery of the evidence.[62] They reasoned that "[t]oo much judicial inquiry into the

53. *Id*. at 105–06.

54. *Id*. at 106.

55. *Id*. at 106–07.

56. *Id*.

57. *Id*. at 106 ("Both employer and agent must have understood that the lips of the other were to be for ever sealed respecting the relation of either to the matter. This condition of the engagement was implied from the nature of the employment.").

58. United States v. Reynolds, 345 U.S. 1, 2–4 (1953).

59. *Id*. at 4 (internal quotation marks omitted).

60. *Id*. at 5.

61. *Id*.

62. *Id*. at 10–12.

claim of privilege would force disclosure of the thing the privilege was meant to protect . . . ."[63] The Court took "judicial notice that this is a time of vigorous preparation for national defense . . . . [T]hese electronic devices must be kept secret if their full military advantage is to be exploited in the national interests."[64] But the Court stated that after "a formal claim of privilege" has been lodged, it is still for the judge to determine, in a manner that protects the allegedly privileged information, whether the privilege is justified given the circumstances of the case.[65] The test proposed by the Court is whether "there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged."[66] The necessity of the information to the case should also be accounted for, though "even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets *are* at stake."[67] In *Reynolds*, the Court found the government's assertion reasonable, particularly in light of "a dubious showing of necessity."[68] The Court thus held that the district court erred when it did not continue the case without the privileged reports.[69]

C. Kasza v. Browner

The Ninth Circuit most recently applied the state secrets privilege in *Kasza v. Browner*.[70] At first glance, the case looks like it supports a *Totten* categorical bar to recovery, but in reality it follows the *Reynolds* evidentiary framework. In *Kasza*, former workers of a classified government factory sued the United States Air Force and the Environmental Protection Agency for violating certain health standards.[71] However, "*[o]nce discovery got underway*, the Air Force refused to furnish almost all of the information requested on the ground that it was privileged."[72] The court did not bar discovery at

63. *Id*. at 8.
64. *Id*. at 10.
65. *Id*. at 8 (footnote omitted).
66. *Id*. at 10.
67. *Id*. at 11 (emphasis added).
68. *Id*.
69. *See id*. at 11–12.
70. Kasza v. Browner, 133 F.3d 1159 (9th Cir. 1998).
71. *Id*. at 1162.
72. *Id*. at 1163 (emphasis added).

the outset, but once evidence that would be excludable under the *Reynolds* state secrets test was unavailable, the plaintiffs essentially lost all ability to litigate the case. The case was dismissed accordingly, and the Ninth Circuit affirmed the dismissal.[73] Thus *Kasza* advocates dismissing the complaint if, without inclusion of the privileged state secrets evidence, a plaintiff cannot make out a prima facie case, or, alternatively, if the defendants would be deprived of an otherwise valid defense.

IV. THE COURT'S DECISION

The Ninth Circuit in *Mohamed* found that the categorical *Totten* bar applied by the district court, which wipes out all judicial remedies when state secrets are central to a plaintiff's claims, was too harsh a standard.[74] Instead, the court utilized the *Reynolds* case, which provides a more flexible evidentiary approach that allows the case to continue as long as individual pieces of evidence protected by the state secrets privilege are not found to be indispensable to a prima facie case or a valid defense.[75] Finding that the case could proceed under the *Reynolds* standard, the court remanded the cases for further proceedings.

A. Totten *Is Too Harsh*

The government argued that *Totten* was a categorical bar to this lawsuit because plaintiff's claims were all premised on a secret contract between Jeppesen and the government, much like the secret contract between the spy and President Lincoln in *Totten*.[76] The court rejected this argument on several points. First, some of plaintiff's claims did not require proving the existence of a contract between the government and Jeppesen.[77] Plaintiffs might show only knowledge that the passengers were going to be tortured in order to prove liability. Second, *Totten* and its progeny are about plaintiffs revealing *their own* secret relationships with the government. Mohamed and his fellow plaintiffs are not seeking to reveal any sort of agreement they themselves have entered. Thus they are not

73. *Id.* at 1176.

74. Mohamed v. Jeppesen Dataplan, Inc., 563 F.3d 992, 1001–03 (9th Cir. 2009).

75. *Id.* at 1003–04.

76. *Id.* at 1001.

77. *Id.*

breaking the *Totten* implied covenant that their own "lips [are] to be forever sealed," such that suing by itself defeats recovery.[78] Third, the language from *Reynolds* about *Totten* being a situation where the "very subject matter" of the case involved a state secret was only in a footnote and was not meant to be the foundation of a new expanding doctrine.[79] Declining to apply the *Totten* bar, the court held that the case was wrongly dismissed under a supposed categorical bar to recovery based on a "very subject matter" *Totten* test.[80]

B. Reynolds *Is a Balance of the Legitimate Interests*

The court noted that there is a constitutional prerogative to provide judicial review and to check the Executive.[81] The *Totten* bar completely abdicates this responsibility and gives an unhealthy deference to the Executive's determination of what is a state secret. Throwing out the entire case thus creates a "winner-takes-all" bar to recovery that is too crude an instrument for balancing the delicate due process concerns with legitimate executive secrecy concerns.[82] The *Reynolds* framework, on the other hand, has been approved by analogous cases and reduces the "violence of the collision" between the executive and judicial branches.[83]

The government argued that if the *Reynolds* framework were adopted, the information in the secret evidence would still be excludable because the information itself could be expected to harm national security.[84] The court pounced on this argument and explained that *information* is never protected by an evidentiary privilege.[85] For example, the Fifth Amendment right against self-incrimination will not prevent the prosecution from using

78. *Id.* at 1002 (alteration in original) (internal quotation marks omitted).

79. *Id.* (internal quotation marks omitted); *see* United States v. Reynolds, 345 U.S. 1, 11 (1953).

80. *Mohamed*, 563 F.3d at 1003–04.

81. *Id.* at 1003.

82. *Id.*

83. *Id.* "Unlike *Totten*, the *Reynolds* framework accommodates these division-of-powers concerns . . . without categorically immunizing the CIA or its partners from judicial scrutiny." *Id.* at 1004.

84. *Id.*

85. *Id.* at 1004–06.

incriminating information obtained from other evidence sources.[86] Likewise, if the state secrets doctrine is properly invoked, it makes that particular piece of evidence privileged.[87] However, the case goes on, and the information in that evidence is still discoverable from other sources, "regardless whether privileged evidence might also be probative of the truth or falsity of the [same information]."[88]

C. The Freedom of Information Act Standard Does Not Work for "State Secrets"

The government tried to present arguments based on the Freedom of Information Act[89] ("FOIA") case law, but the court found them "unpersuasive."[90] The standard in FOIA cases for determining exempt matters is simply to take the executive's word for it—if it has been deemed "classified" then it is "categorically exempt from disclosures that would otherwise be required under the Act."[91] Such a loose standard is not appropriate in the state secrets context. It would give complete control over determination of what qualifies under the privilege to the Executive Branch, "in plain contravention" of the *Reynolds* admonition to not leave control of evidence solely to the "'caprice of executive officers.'"[92]

86. *Id*. at 1005. Similarly, just because some information was shared under an attorney-client privilege does not mean parties cannot obtain that same information from another source.

87. With the only effect that "'the evidence is unavailable, as though a witness had died [or a document had been destroyed], and the case will proceed accordingly, with no consequences save those resulting from the loss of evidence.'" *Id.* at 1006 (quoting Al-Haramain Islamic Found., Inc. v. Bush, 507 F.3d 1190, 1204 (9th Cir. 2007) (alteration in original)).

88. *Id*. at 1005.

89. 5 U.S.C. § 552 (2009).

90. *Mohamed*, 563 F.3d at 1006.

91. *Id*.; *see* 5 U.S.C. § 552(b)(1)(A)–(B) (2009).

92. *Mohamed*, 563 F.3d at 1007 (quoting United States v. Reynolds, 345 U.S. 1, 8–10 (1953)). The court was well informed of the "abuses" that could come from giving a classified blank-check power to the executive, and in footnote 7 it catalogued a short history of embarrassing situations deemed classified whenever they have nothing to do with national security. The most embarrassing revelation was the accident report in *Reynolds* that the Supreme Court granted the privilege for in 1953, which was recently declassified: it revealed a shameful cover-up of missteps that led to those men's deaths. It was in fact not a legitimate state secret—yet it is the leading case on the doctrine.

D. Conclusion—the Case Must Continue

Finally, the government argued a *Kasza*-style dismissal applies because plaintiffs will not be able to bolster enough evidence for even a prima facie case, assuming all the evidence would be deemed privileged.[93] The court dismissed this assertion as premature, explaining, "we simply cannot prospectively evaluate hypothetical claims of privilege that the government has not yet raised and the district court has not yet considered."[94] The court remanded the case, finding that the plaintiffs had successfully defeated a motion to dismiss with their "well-pleaded complaint,"[95] and ordered that discovery proceed.

V. ANALYSIS

While *Mohammed v. Jeppesen Dataplan, Inc.*, is a well-reasoned opinion in the right direction, the case is problematic because it creates a subtle incentive for government operations to become more secretive. This Note argues that public policy should temper the state secrets evidence privilege, and because "more secretive" government operations are against public policy, a different standard from the one articulated by the court should be considered in future cases.

A. There Is an Incentive To Be More Secretive

Even though the *Mohamed* opinion brings alleged victims of inhumane treatment one step closer to actually litigating their claims, only a certain type of plaintiff—"plaintiffs [that] can prove the 'essential facts' of their claims 'without resort to [privileged evidence]'"[96]—can pass the *Reynolds* hurdle that remains after the pleadings.

This standard has yet to be applied to the plaintiffs in *Mohamed* because they have not yet requested "specific evidence" against which the government can formally invoke the privilege.[97] Considering that the district court will be presiding when the privilege is later brought forward in this case, and it has already

93. *Id.* at 1004.

94. *Id.* at 1008.

95. *Id.*; *see also* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

96. *Mohamed*, 563 F.3d. at 1001 (quoting *Reynolds*, 345 U.S. at 11).

97. *Id.* at 1009.

determined that the classified information in the Hayden declaration justifies the state secrets doctrine,[98] it is fair to assume that if these plaintiffs do not have outside evidence they will be later barred by the *Reynolds* privilege.[99] Nevertheless, the court seemed to take comfort in the plaintiffs' alleged ability to produce outside information as an indication that this case would ultimately survive, even if the *Reynolds* standard precluded classified evidence.[100]

However, what will happen to future victims that cannot find outside information? They are still completely vulnerable to dismissal, despite the good direction that *Mohamed* offers. The prospect of dismissal naturally places an incentive on the government not to disclose anything purposefully and to keep a tighter control on the information that leaks out about its operations. In short, if the government were able to create a true "black box," it would ensure its own immunity.[101]

This incentive to create greater secrecy reinforces the Ninth Circuit's earlier case on the state secrets doctrine, *Al-Haramain Islamic Foundation, Inc. v. Bush*.[102] That case involved a suit brought because of searches done by the Terrorist Surveillance Program ("TSP") without warrants. The opinion began by rehearsing the government's varied "spoon-fed" disclosures of the "contours" of the program—disclosures voluntarily made by the government to allay public concerns.[103] The court seemed to chide the government's assumption that it could claim the state secrets privilege whenever it had "moved affirmatively to engage in public discourse about the TSP."[104] The court suggested that "[u]nlike a truly secret or 'black

98. *See* Mohamed v. Jeppesen Dataplan, Inc., 539 F. Supp. 2d 1128, 1134 (N.D. Cal. 2008).

99. *See, e.g.*, El-Masri v. United States, 479 F.3d 296 (4th Cir. 2007). In *El-Masri*, the facts are very similar to *Mohamed*. The plaintiff was a victim of the alleged "extraordinary rendition" program, and both the district court and the Fourth Circuit held that the *Reynolds* privilege applied after reading a classified statement from the CIA director. In contrast to *Mohamed*, the court in *El-Masri* rejected the idea that public evidence could still be used to prove information excluded by the *Reynolds* privilege.

100. *See Mohamed*, 563 F.3d at 997 ("Citing publicly available evidence, plaintiffs . . . ."); *id.* at 998–99 ("According to plaintiffs, publicly available evidence establishes that Jeppesen provided . . . .").

101. *See* Al-Haramain Islamic Found., Inc. v. Bush, 507 F.3d 1190, 1192 (9th Cir. 2007).

102. *Id.*

103. *Id.* at 1192–93.

104. *Id.* at 1193.

box' program that remains in the shadows of public knowledge," the government was preventing its own defense by trying to give some kind of public awareness, even "[t]hough its operating parameters remain murky."[105]

The Ninth Circuit seems to be saying that the government should not let even the "contours" of its programs be known if it wants civil immunity. But the government commonly discloses the contours of its secret programs[106]—perhaps so that Congress, and by extension the people, can hold their government accountable.[107]

B. Evidentiary Rules Like the State Secrets Privilege Are Public Policy Driven

The incentive for the government to be more and more secretive is against public policy.[108] Because public policy should be carefully weighed when applying a rule of evidence like the state secrets doctrine, the court should have taken it into consideration.[109]

First, "[t]he Supreme Court could not be clearer that [the state secrets privilege] is a privilege within the law of evidence."[110]

105. *Id*. at 1192–93.

106. Usually the public knows just the basic contours of secret programs because the government is most interested in keeping the "operating parameters . . . murky." *Id*. at 1192–93; *see, e.g.*, Fitzgerald v. Penthouse Int'l, Ltd., 776 F.2d 1236, 1242 (4th Cir. 1985) ("The fact that this program exists is unclassified and is well known . . . [but w]hether other such uses have developed from information obtained in the marine mammal program is a classified fact about which no official release of information has ever been made."); Zuckerbraun v. Gen. Dynamics Corp., 935 F.2d 544, 551 (2d Cir. 1991). The existence of the Phalanx Anti-Missile System, and other systems on board the ship, were public knowledge. However, "[d]esign, performance, and functional characteristics . . . are classified." *Id*. Consider also the present case, *Mohamed*, and the public knowledge of the basics of the detention program; and consider the *Al-Haramain* case and public knowledge of the Terror Surveillance Program.

107. *See* Redacted, Unclassified Brief for Intervenor-Appellee the United States, Al-Haramain Islamic Found., Inc. v. Bush, 507 F.3d 1190 (9th Cir. 2007) (No. 08-15693), 2008 WL 4973859. "As General Hayden's public declaration recognizes, the President has made limited declassifications concerning the CIA terrorist detention and interrogation program. Specifically, the President has publicly acknowledged that the program existed . . . . The President made these limited disclosures in connection with his request to Congress to enact legislation . . . ." *Id*. § C.

108. This may be especially true with programs involving torture. *See infra* Part V.C.

109. Perhaps the idea was dismissed for other reasons, namely, the perverse incentive is unavoidable when choosing the better of two risk-fraught alternatives. But no mention is made of considering it in the opinion.

110. Mohamed v. Jeppesen Dataplan, Inc., 563 F.3d 992, 1005 (9th Cir. 2009) (quoting United States v. Reynolds, 345 U.S. 1, 7–8 (1953)) (internal quotations omitted).

Evidence law thus provides a good guide to how public policy should govern this rule. In the Federal Rules of Evidence, certain policy choices exclude probative evidence in order to avoid perverse incentives.[111] For instance, Rule 407 removes the perverse incentive to not take remedial measures after an accident occurs (such as steps to prevent its recurrence) because a jury might see those measures as evidence of negligence. Rule 407 excludes evidence of remedial efforts in litigation, thus removing the perverse incentive to do nothing.

Also, the federal rules specifically allow courts to weigh public policy concerns when dealing with privileges. Rule 501 says, "the privilege of a witness, person, government, State, or political subdivision . . . may be interpreted by the courts . . . in the light of reason and experience."[112] Allowing a court to use "reason and experience" is a decision to allow courts to consider policy when applying privileges like the attorney-client privilege or the state secrets privilege.

Finally, it must not be forgotten that the state secrets doctrine derives from the common law.[113] It is not statutory, nor is it based in the Constitution.[114] Therefore, based on prevalent judicial principles, the court of appeals is encouraged to seek out the full gamut of policy concerns when applying the standard and is not bound to apply precedent that is based on different circumstances and policies.[115]

111. *See, e.g.*, FED. R. EVID. 407–11. Each of these rules recognizes a perverse incentive in litigation or a criminal matter that a Rule of Evidence has tried to fix.

112. FED. R. EVID. 501.

113. "The state secrets privilege is a common law evidentiary privilege that allows the government to deny discovery of military secrets." Kasza v. Browner, 133 F.3d 1159, 1165 (9th Cir. 2008).

114. *See* Brief of Professors of Constitutional Law, Federal Jurisdiction, and Foreign Relations Law as Amici Curiae in Support of Mohamed and Urging Reversal at 3–5, Mohamed v. Jeppesen Dataplan, Inc., 563 F.3d 992 (No. 08-15693), 2008 WL 6042363.

115. The court in *Mohamed* recognized the role of public policy calculus in deciding legal standards when discussing the FOIA. There the court saw one standard for FOIA claims and another for state secret doctrine claims. *Mohamed*, 563 F.3d at 1006–08. The justification was that a different mix of variables and policies went into the latter cases, thus requiring a different legal standard. *Id.*

C. Public Policy May be Different in Torture Cases

The idea of a state secret stemmed from the concept that some secrets should not be revealed because the collective good of society is safeguarded in their secrecy. To wit, society is safer if there are legitimate clandestine activities.[116] However, several considerations show that torture is something different from a legitimate clandestine activity.

For example, in case law developing the state secrets doctrine, the greater good of society encouraged clandestine operations in the *Totten*, *Reynolds*, and *Kasza* cases. *Totten* involved run-of-the-mill war-time espionage, and the plaintiff wanted the government to pay for espionage services rendered.[117] *Reynolds* involved Air Force technology, and if successful, the suit at most might have encouraged the government to exercise a greater duty of care on its planes.[118] *Kasza* concerned naval technology, and if not dismissed by application of the privilege, it would have encouraged the government to follow environmental protocols more stringently.[119] Torture, however, is of a much more serious nature than payroll fraud, negligence, or regulatory compliance.

Torture is a subject of intense international discussion and much scholarly writing and convincing the reader that it is unjustified would be impossible in this simple Note.[120] However, it seems logical that the public policy calculus involved in allowing torture is

116. The archetypical example would be having spies at wartime. *See* Totten v. United States, 92 U.S. 105 (1875).

117. *Id.*

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

119. Kasza v. Browner, 133 F.3d 1159 (9th Cir. 2008).

120. From a broad standpoint, letting the government get away with torture, official disappearances, and secret detention is in general a serious consideration for at least six reasons: 1) it encourages mistreatment in kind to our own soldiers and American citizens abroad; 2) it is a scorched earth policy that discourages enemy surrender and defection; 3) it makes martyrs of terrorists, galvanizes terrorism supporters in their 'holy' cause, and overall inflames pre-existing hatred; 4) it erodes public confidence within the United States that our nation is one governed by moral norms; 5) it erodes international confidence in the United States as a country founded on moral constitutional principles worth emulating; and 6) because it is reprehensible to our allies, it alienates even our closest friends from helping us in legitimate anti-terrorist efforts. *See generally* Brief Amicus Curiae of Former United States Diplomat's Supporting Plaintiffs-Appellants and Reversal, Mohamed v. Jeppesen Dataplan, Inc. 563 F.3d 992 (9th Cir. 2009) (No. 08-15693), 2008 WL 3845065. This brief makes a complete and cogent argument on why the extraordinary rendition program should be stopped in order to restore our damaged international image and regain the support of allies who find this practice anathema to a free society.

unique to torture. The formulation of a different standard is prudent—especially when applying the Ninth Circuit's interpretation of the state secrets doctrine would allow the government to get away with its more heinous operations just because it has limited all public disclosure. And any future case, like *Mohamed*, that creates that incentive by following old state secrets standards not calibrated for torture should address this legitimate concern.

VI. CONCLUSION

The *Mohamed* opinion allows alleged victims of the CIA's extraordinary rendition program to clear one more hurdle in their quest for justice in American courts. The Ninth Circuit made plain that the state secrets doctrine does not protect government defendants from information attainable outside of privileged evidence, and state secrets "at the core" of a plaintiff's case will not necessarily bar recovery under the harsh *Totten* standard.[121] Only time will tell, however, if this is a true victory for those committed to human rights because the opinion unmistakably creates a perverse incentive for government operations to become even more secretive.

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121. Mohamed v. Jeppesen Dataplan, Inc., 563 F.3d 992, 1000 (9th Cir. 2009).

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