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Breaking The Silence: A Challenge To Executive Use Of The State Secrets Privilege To Dismiss Claims Of CIA Torture In *Mohamed V. Jeppesen Dataplan, Inc.*

Erin E. Bohannon

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NOTES

Breaking the Silence: A Challenge to Executive Use of the State Secrets Privilege to Dismiss Claims of CIA Torture in *Mohamed v. Jeppesen Dataplan, Inc.*

ERIN E. BOHANNON*

I. INTRODUCTION	621
II. THE ORIGINS AND DEVELOPMENT OF THE STATE SECRETS DOCTRINE	624
A. Totten and Reynolds: <i>Defining the State Secrets Doctrine</i>	624
B. <i>The State Secrets Doctrine and the War on Terror: Civil Claims by Victims of Extraordinary Rendition</i>	625
III. <i>MOHAMED V. JEPPESEN DATAPLAN, INC.</i> : A CHECK ON THE EXECUTIVE'S INVOCATION OF THE STATE SECRETS PRIVILEGE	627
IV. ANALYSIS: CONTROLLING PUBLIC PERCEPTION AND DISCOURSE IN THE WAR ON TERROR THROUGH EXPANSIVE CLAIMS OF STATE SECRETS	632
A. <i>An Uncertain Balance of Powers Calls for Change</i>	632
B. <i>Keeping the Secret</i>	633
C. <i>Divergence in the Application of the State Secrets Doctrine as it Relates to Claims by Victims of Extraordinary Rendition Suggests the Need for Clarification and Reform</i>	637
D. <i>Towards Righting Our Wrongs: In Camera Judicial Review as an Alternative to Dismissal of Cases by Victims of Extraordinary Rendition at the Pleading Stage</i>	638
V. CONCLUSION	642

I. INTRODUCTION

From the dark controversy surrounding American efforts to combat terrorism emerged the claims of several suspected terrorists, who contended that the United States Central Intelligence Agency, the CIA, transported them to “black sites” where they were tortured and interrogated in contravention of international law.¹ The CIA refers to this prac-

* Senior Notes & Comments Editor, *University of Miami Law Review*; J.D. Candidate, 2011, University of Miami School of Law. I thank Professor Elizabeth M. Iglesias and the editors of the *University of Miami Law Review* for their guidance and insight. I also thank my family for their encouragement and support.

1. See, e.g., *Mohamed v. Jeppesen Dataplan, Inc.*, 539 F. Supp. 2d 1128 (N.D. Cal. 2008), *rev'd*, 579 F.3d 943 (9th Cir. 2009), and *aff'd on reh'g en banc*, 614 F.3d 1070 (9th Cir. 2010) (a claim for damages by five plaintiffs who were separately renditioned and tortured); *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007) (a claim for damages by an individual who was renditioned to a CIA prison after being captured in Macedonia); see also Jamie A. Baron Rodriguez, Article & Essay, *Torture on Trial: How the Alien Tort Statute May Expose the*

tice as the extraordinary rendition program.² In *Mohamed v. Jeppesen Dataplan, Inc.*, five plaintiffs alleged that they were victims of the CIA's extraordinary rendition program.³ The plaintiffs sought damages from Jeppesen Dataplan, a Boeing subsidiary, asserting that publicly available evidence showed that Jeppesen provided flight planning and logistical support for the flights that carried the plaintiffs to their detention and torture.⁴ The victims told a similar story. They were kidnapped or detained while traveling in a foreign country.⁵ Drugged and blindfolded, they were dressed in jumpsuits and diapers, and flown to a secret location.⁶ Upon their arrival, they were held in a tiny cell and tortured.⁷ The abuse aimed to retrieve information about suspected terrorist activities.⁸ The interrogation techniques included brutal beatings and bone breaking.⁹ The rendition victims also experienced electrocution, starvation, and sleep deprivation by constant light or darkness and exposure to ear-piercing recordings twenty-four hours a day.¹⁰

The United States intervened before Jeppesen answered the complaint and moved for dismissal, asserting the state secrets privilege.¹¹ The District Court for the Northern District of California granted the motion to intervene and dismissed, holding that the very subject matter of the suit was a state secret because it involved allegations of CIA conduct and covert operations in foreign countries.¹² On appeal, the United States Court of Appeals for the Ninth Circuit reversed the district court, holding that dismissal at the pleading stage was premature unless the subject matter of the suit was a contract for espionage between the plaintiff and the government.¹³

The Ninth Circuit's holding in *Mohamed* represented a significant change in the recent case law applying the state secrets doctrine in suits

Government's Illegal "Extraordinary Rendition" Program Through Its Use of a Private Contractor, 14 ILSA J. INT'L & COMP. L. 189, 197 (2007) (explaining that the CIA's secret detention facilities abroad are referred to as "black sites").

2. David Weissbrodt & Amy Berquist, *Extraordinary Rendition: A Human Rights Analysis*, 19 HARV. HUM. RTS. J. 123, 127-28 (2006) (explaining the process of rendition as the forced transfer of a person to another country for interrogation and detention and that extraordinary rendition is used by the government to avoid scrutiny for the use of torture and illegal interrogation techniques).

3. *Mohamed*, 579 F.3d at 949.

4. *Id.* at 951.

5. *Id.* at 949-50.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 951-52.

13. *Id.* at 961.

involving allegations of torture because it held that dismissal at the pleading stage was improper.¹⁴ Specifically, the Ninth Circuit's interpretation of the state secrets privilege created a circuit split with the Fourth Circuit's decision in *El-Masri v. United States*, which held that the lower court properly dismissed a civil claim by a victim of the CIA's extraordinary rendition program at the pleading stage because the matter could not be litigated without disclosing state secrets.¹⁵ However, this circuit split ceased to exist when the Ninth Circuit changed its position en banc and affirmed the district court's decision to dismiss the case at the outset.¹⁶

Despite the Ninth Circuit's en banc decision, the circuit split that arose between the Ninth and Fourth Circuits reveals an important tension in our current law concerning when executive claims of secrecy can bar access to the courts and how these claims should be evaluated by the judiciary. Despite the Obama Administration's promises for greater transparency and stricter standards for policing extreme interrogation,¹⁷ the government continues to invoke the state secrets privilege and assert that certain matters cannot be heard because the very subject matter of the suit is a state secret.¹⁸

This note argues that the state secrets doctrine currently functions to keep questionable government actions out of the public view, effectively controlling the public perception and discourse surrounding the United States government's actions in the War on Terror. Further, this note argues that the state secrets doctrine must be clarified and reformed to give victims of torture an opportunity to be heard and to encourage the United States government to take accountability for its actions. Part II sets forth the relevant law leading up to *Mohamed*. It provides an analysis of the leading standard and the recent cases and theories that depart from the leading standard. Part III provides a detailed discussion of the *Mohamed* decision from the district court ruling through the Ninth Circuit appeal. Part IV provides an analysis of *Mohamed*. Part IV first

14. *See id.*

15. *El-Masri v. United States*, 479 F.3d 296, 311 (4th Cir. 2007).

16. *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1093 (9th Cir. 2010).

17. *See* Exec. Order No. 13,491, Sec. 3 (b), 74 Fed. Reg. 4893 (Jan. 22, 2009) (setting forth that no individual will be subjected to unlawful interrogation techniques); *see also* EDWARD C. LIU, CONG. RESEARCH SERV., THE STATE SECRETS PRIVILEGE AND OTHER LIMITS ON LITIGATION INVOLVING CLASSIFIED INFORMATION 12 (2009) (describing the proposed changes of H.R. 984 as well as the current state of the law in this area).

18. Mark Wilson, *Obama's Use of State Secrets Is More of the Same*, DEMOCRACY, Mar. 3, 2009, <http://democracy.com/obamas-use-of-state-secrets-is-more-of-the-same/> (criticizing President Obama for following the Bush trend of expansive invocation of the state secrets privilege and for the Obama Administration's assertions that the executive has the final say on this matter and that it is non-reviewable by the courts).

explains how the state secrets doctrine controls public exposure to the United States government's participation in torture by keeping damages claims by victims of extraordinary rendition out of the courts. Part IV then explains the need for reform through in camera judicial review and clarification of the doctrine. Part V reaffirms these arguments and briefly concludes.

II. THE ORIGINS AND DEVELOPMENT OF THE STATE SECRETS DOCTRINE

A. *Totten and Reynolds: Defining the State Secrets Doctrine*

In *Totten v. United States*, the foundational case on the state secrets doctrine, the Supreme Court of the United States held that "public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential."¹⁹ *Totten* involved a suit by the administrator of an estate to collect payment for services rendered by the decedent, William A. Lloyd.²⁰ Lloyd had a contract with President Lincoln to gain information about the strategies and whereabouts of the Southern army and report this information back to the President.²¹

The Supreme Court illustrated its continued reliance on the *Totten* holding recently in *Tenet v. Doe*, holding that a suit involving a government contract for espionage should be barred outright in order to keep the espionage relationship between the plaintiff and the government a secret.²² *Tenet* involved a husband and wife's claim for financial support against the CIA after years of espionage services.²³ In reaching its holding, the Supreme Court discussed the conflict that is at the center of the current debate concerning the scope of the state secrets doctrine; specifically, whether *Totten* permits a categorical bar to suits where the subject matter involves military secrets, or whether *Totten* only permits a categorical bar on suits involving government contracts for espionage.²⁴

The conflict as to the scope of the state secrets doctrine is perhaps a

19. *Totten v. United States*, 92 U.S. 105, 107 (1876).

20. *Id.* at 105.

21. *Id.* at 105–06.

22. *Tenet v. Doe*, 544 U.S. 1, 11 (2005).

23. *Id.* at 5.

24. *See id.* at 8–9. In the en banc decision of *Mohamed*, the Ninth Circuit declined to address the scope of the *Totten* doctrine, instead ruling that dismissal was warranted under *Reynolds*. The fact that there is so much confusion regarding the scope of the seminal case on the state secrets doctrine shows that this area of the law is highly uncertain and in desperate need of clarification. *See Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1085 (9th Cir. 2010) (en banc) ("We do not resolve the difficult question of precisely which claims may be barred under *Totten* because application of the *Reynolds* privilege leads us to conclude that this litigation cannot proceed further.").

result of the tension between the *Totten* holding and the two-step test set forth in *United States v. Reynolds*,²⁵ which is the modern seminal case on invocation of the state secrets privilege. In *Reynolds*, the Supreme Court held that courts should follow a two-step test in evaluating a claim of privilege under the state secrets doctrine.²⁶ First, there must be a formal claim of privilege by the head of the department who has control over the matter.²⁷ Second, the court must determine whether the circumstances warrant a claim of privilege without disclosing the information the privilege is meant to protect.²⁸ In *Reynolds*, the Supreme Court outlined the flexibility of the second inquiry, stating that if

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 . . . the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.²⁹

Under *Reynolds*, the court analyzes whether the government properly invoked the claim of privilege and will exclude the evidence accordingly.³⁰ This does not call for a complete dismissal of a case, merely for exclusion of privileged evidence.³¹ For example, *Reynolds* involved a tort claim by several surviving spouses of men who died in a plane crash where the government was testing secret defense equipment.³² The government claimed the state secrets privilege as to the official crash reports.³³ However, the government offered alternative evidence in the form of eyewitnesses that could testify to the non-privileged events.³⁴ The Supreme Court stated that the case could proceed using the witnesses instead of the privileged crash reports.³⁵

B. *The State Secrets Doctrine and the War on Terror: Civil Claims by Victims of Extraordinary Rendition*

Recent cases involving claims by victims of the government's extraordinary rendition program illustrate the gaps in state secrets doctrine jurisprudence. Mainly, these cases address whether a suit involving

25. 345 U.S. 1 (1953).

26. *Id.* at 8.

27. *Id.*

28. *Id.*

29. *Id.* at 10.

30. *Id.* at 8.

31. *Id.*

32. *Id.* at 3.

33. *Id.*

34. *Id.* at 5.

35. *Id.* at 11.

privileged information about the government's rendition program should be barred outright in accordance with a broad reading of *Totten*, or whether the evidence should be evaluated piece by piece, allowing plaintiffs the opportunity to bring their claims using non-privileged evidence in line with *Reynolds*. That is, a broad reading of *Totten* would permit the dismissal of a case outright if the very subject matter of the suit was a state secret. The following cases address whether a private contractor's involvement in rendition is so confidential that it warrants dismissal at the pleading stage.

In *El-Masri v. United States*, the United States Court of Appeals for the Fourth Circuit held that the lower court properly dismissed a civil claim by a victim of the CIA's extraordinary rendition program at the pleading stage because the matter could not be litigated without disclosing state secrets.³⁶ The case involved Khaled El-Masri's civil action against the former director of the CIA, three corporate defendants, and several employees of the CIA.³⁷ El-Masri alleged that officers detained him while traveling in Macedonia, turned him over to CIA operatives, and then transported him to a facility in Afghanistan where the CIA held him for roughly five months.³⁸ El-Masri contended that his captors drugged and beat him, confined him in an unsanitary cell, and interrogated him about his involvement in terrorist activities.³⁹ In the lower court, the United States District Court for the Eastern District of Virginia, the United States had intervened and claimed that the state secrets privilege precluded litigation of El-Masri's claim because it would reveal privileged information about the CIA's extraordinary rendition program.⁴⁰ The lower court agreed with the United States and dismissed El-Masri's claim.⁴¹

On appeal to the Fourth Circuit, El-Masri acknowledged that some information that would help his claim may be privileged, but challenged the lower court's determination that his claim was so entwined with state secrets that it precluded litigation of the matter.⁴² However, the Fourth Circuit agreed with the lower court's dismissal of the case, citing several of that court's state secrets decisions where privileged information was so central to the dispute that it could not be litigated once the executive properly made a claim of privilege.⁴³

36. *El-Masri v. United States*, 479 F.3d 296, 311 (4th Cir. 2007).

37. *Id.* at 299.

38. *Id.* at 300.

39. *Id.*

40. *Id.* at 301.

41. *Id.* at 302.

42. *Id.*

43. *Id.* at 306–07 (citing *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268, 281 (4th Cir.

The Fourth Circuit summarized the case law on the matter, explaining that information is unavailable once the privilege is properly invoked and “a proceeding in which the state secrets privilege is successfully interposed must be dismissed if the circumstances make clear that the privileged information will be so central to the litigation that any attempt to proceed will threaten that information’s disclosure.”⁴⁴ Thus, the court could dismiss El-Masri’s claim if privileged information was central to his claim. El-Masri took the position that United States government officials, reports in the media, and foreign governmental entities had already made many of the facts essential to his suit public.⁴⁵ However, in line with the other decisions dismissing cases at the pleading stage where privileged information was central to the litigation, the Fourth Circuit held that El-Masri could not litigate his claim without revealing privileged information; specifically, CIA operations relating to the extraordinary rendition program.⁴⁶

Recently, *Mohamed v. Jeppesen Dataplan, Inc.* created a circuit split with the Fourth Circuit’s holding in *El-Masri*.⁴⁷ Both cases involved suits by torture victims of the CIA’s extraordinary rendition program that were dismissed at the pleading stages. However, on appeal, the Fourth Circuit in *El-Masri* agreed with the district court and affirmed dismissal at the pleading stage,⁴⁸ whereas the Ninth Circuit in *Mohamed* held that dismissal at the pleading stage was premature unless the subject matter of the suit was a contract for espionage.⁴⁹

III. *MOHAMED V. JEPPESEN DATAPLAN, INC.*: A CHECK ON THE EXECUTIVE’S INVOCATION OF THE STATE SECRETS PRIVILEGE

Five plaintiffs, Binyam Mohamed, Abou Elkassim Britel, Ahmed Agiza, Mohamed Farag Ahmad Bashmilah, and Bisher Al-Rawi, alleged that the United States CIA worked with foreign governments to conduct the extraordinary rendition program in order to gain information from suspected terrorists by using interrogation methods in violation of inter-

1980) (dismissing a claim for tortious interference with a Navy contract because state secrets were integral to making a prima facie case at trial)).

44. *Id.* at 307–08 (citing *Sterling v. Tenet*, 416 F.3d 338, 348 (4th Cir. 2005) (dismissing an African-American CIA officer’s title VII action because state secrets in the form of CIA performance reports and witnesses whose identities were confidential were central to successful litigation of the claim)).

45. *Id.* at 308.

46. *Id.* at 311.

47. See *Mohamed v. Jeppesen Dataplan, Inc.*, 579 F.3d 943 (9th Cir. 2009).

48. *El-Masri*, 479 F.3d at 311.

49. *Mohamed*, 579 F.3d at 962.

national law.⁵⁰ The plaintiffs brought suit against Jeppesen Dataplan, alleging that publicly available evidence showed that Jeppesen provided flight planning and logistical support for the flights that carried the plaintiffs to their detention and torture.⁵¹ The plaintiffs sought damages under the Alien Tort Statute⁵² for Jeppesen's participation in their forced abduction and involvement in their torture and cruel and inhuman treatment in contravention of international law.⁵³ The United States intervened before Jeppesen answered the complaint and moved for dismissal, asserting the state secrets privilege.⁵⁴ The District Court for the Northern District of California granted the motion to intervene and dismiss, holding that the very subject matter of the suit was a state secret because it involved allegations of CIA conduct and covert operations in foreign countries.⁵⁵ However, the district court declined to address whether the invocation of the state secrets privilege as to specific privileged evidence would prevent the plaintiffs from making a *prima facie* case and the plaintiffs appealed.⁵⁶

Although the plaintiffs were detained in different locations and at different times, their experiences were eerily similar.⁵⁷ Agiza was captured in Sweden where he was seeking asylum. He was transferred to American custody, where he was held in a small, windowless cell in Egypt for five weeks.⁵⁸ During this time, he was repeatedly beaten and shocked through electrodes that were attached to his body.⁵⁹ Agiza's detention spanned over two years and culminated in a six-hour military trial that resulted in a fifteen-year sentence in an Egyptian prison.⁶⁰ These facts were publicly acknowledged by the Swedish government.⁶¹

Britel was arrested in Pakistan on immigration charges and transferred to American custody.⁶² Britel was blindfolded, shackled, dressed

50. *Id.* at 943.

51. *Id.* at 951. The plaintiffs asserted that they could prove their claims through publicly available evidence and thus did not need to reveal any secret government information to prove their claims. For example, the details of plaintiff Agiza's detention and torture were publicly acknowledged by the Swedish government. *Id.* at 949. To prove Jeppesen's involvement, the plaintiffs also cited a report by a former Jeppesen employee, who stated that the director of planning services told him, "'We do all the extraordinary rendition flights,' which he also referred to as 'the torture flights' or 'spook flights.'" *Id.* at 951.

52. 28 U.S.C. § 1350 (2006).

53. *Mohamed*, 579 F.3d at 951.

54. *Id.*

55. *Id.* at 951–52.

56. *Id.* at 952.

57. *Id.* at 949.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

in a diaper and overalls, and flown to Morocco.⁶³ In Morocco, he was beaten severely, threatened with sexual torture, and deprived of food and sleep.⁶⁴ Britel eventually signed a false confession and was sentenced to fifteen years in a Moroccan prison.⁶⁵

Officials arrested Mohamed in Pakistan on immigration charges. He was flown to Morocco where he was beaten and tortured.⁶⁶ The Moroccan authorities cut him with a scalpel on his body, pouring hot stinging substances into the wounds.⁶⁷ He was blindfolded and handcuffed and forced to listen to loud music day and night.⁶⁸ Eighteen months later he was returned to American custody in Afghanistan where he was subjected to recordings of screaming women and children in complete darkness day and night.⁶⁹ Mohamed was then transferred to Guantanamo Bay, Cuba, for five years before being released.⁷⁰

Al-Rawi was arrested in Gambia, then shackled, blindfolded, and dressed in a diaper and overalls, and transported to Afghanistan.⁷¹ He was subjected to complete darkness and made to listen to loud recordings day and night, depriving him of sleep.⁷² Al-Rawi was also beaten and subjected to other torture.⁷³ He too was transferred to Guantanamo Bay before his release.⁷⁴

Bashmilah was apprehended in Jordan and transferred to American custody. He was then flown to Afghanistan like the other plaintiffs.⁷⁵ He was subjected to twenty-four-hour darkness and noise, then constant light and noise.⁷⁶ He was also shackled in painful positions. Bashmilah attempted suicide three times in an attempt to escape these conditions.⁷⁷ He was transferred to other CIA prisons before being convicted of a trivial crime.⁷⁸

On appeal, the Ninth Circuit began its analysis by outlining the two diverging views of the state secrets doctrine in *Totten* and *Reynolds*.⁷⁹

63. *Id.*

64. *Id.* at 950.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 952.

That is, *Totten* requires that a suit involving a secret agreement between the plaintiff and the government be dismissed on the pleadings because the very subject matter of the suit is a state secret.⁸⁰ In contrast, *Reynolds* prevents only discovery of evidence that threatens national security; and the litigation may proceed as if the evidence is unavailable so long as the plaintiffs can prove their case in the absence of the privileged evidence, and the defendants are not deprived of evidence that prevents them from making a complete defense.⁸¹

Jeppesen and the government maintained that *Totten* barred the suit because it was "predicated on the existence of an alleged secret agreement with the government."⁸² The Ninth Circuit declined to extend *Totten*'s holding to the plaintiffs' suit against Jeppesen because *Totten* applied to secret contracts between a plaintiff and the government, not as between a plaintiff and a third party that had a secret contract with the government.⁸³ Thus, under the Ninth Circuit's reasoning, *Totten* would bar a suit by Jeppesen against the government because Jeppesen was a party to a secret contract with the government.⁸⁴ Conversely, *Totten* would not apply to the third-party plaintiffs because the plaintiffs did not willfully enter an agreement that "supports a conclusion that their 'lips [were] to be forever sealed respecting' the claim on which they sue[d], such that filing [the] lawsuit would in itself defeat recovery."⁸⁵

The Ninth Circuit also declined to read *Totten* broadly as a complete bar on suits where the government labels the subject matter as classified because this would raise significant separation-of-powers issues between the executive and the judiciary.⁸⁶ Specifically, if the judiciary could not hear cases involving matters the executive deemed classified, then this would violate the judiciary's role to "say what the law is."⁸⁷

The Ninth Circuit explained that outside the narrow *Totten* bar on secret contracts between a plaintiff and the government, the *Reynolds* framework for rendering privileged evidence unavailable piece by piece instead of dismissing a suit altogether better prevents overreaching by the executive branch with respect to secret conduct.⁸⁸ The court

80. *Id.*

81. *Id.* at 953.

82. *Id.*

83. *Id.* at 954.

84. *Id.*

85. *Id.* (quoting *Totten v. United States*, 92 U.S. 105, 106 (1876)).

86. *Id.* at 955-56.

87. *Id.* at 955 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)).

88. *Id.* "Accordingly, we conclude that if a lawsuit is not predicated on the existence of a secret agreement between the plaintiff and the government, *Totten* does not apply, and the subject matter of the suit is not a state secret." *Id.* at 956.

explained that “[u]nlike *Totten*, the *Reynolds* framework accomodates these division-of-powers concerns by upholding the President’s secrecy interests without categorically immunizing the CIA or its partners from judicial scrutiny.”⁸⁹ Following this logic, the court concluded that the case was improperly dismissed at the outset because the lawsuit did not seek to enforce a secret contract between the plaintiffs and the government.⁹⁰

The Ninth Circuit also rejected the government’s assertion that the case should be dismissed under *Reynolds* because privileged information would be necessary to make out the plaintiffs’ prima facie case.⁹¹ The court explained that *Reynolds* applies only to evidence and not to the underlying facts of the suit.⁹² Thus, a case may proceed if certain evidence is privileged so long as the plaintiff is not prevented from making a prima facie case and the defendant is not prevented from making a valid defense.⁹³ The court explained that at the motion-to-dismiss stage, the government was asking the court to “prospectively acknowledge hypothetical claims of privilege that the government has not yet raised and the district court has not yet considered.”⁹⁴ Jeppesen had not answered the complaint and discovery had not begun.⁹⁵ The only relevant determination then was whether the plaintiffs had stated a claim upon which relief could be granted, which they had.⁹⁶ Thus, the court could not determine whether the *Reynolds* privilege applied because there had been no discovery request for specific evidence and the government had not made a formal claim of privilege as to specific evidence.⁹⁷ The court explained that:

On remand, the government must assert the privilege with respect to secret evidence (not classified information), and the district court must determine what evidence is privileged and whether any such evidence is indispensable either to the plaintiffs’ prima facie case or to a valid defense otherwise available to Jeppesen. Only if privileged evidence is indispensable to either party should it dismiss the

89. *Id.* at 956.

90. *Id.*

91. *Id.* at 956–57. However, the Ninth Circuit took the opposite position en banc, affirming dismissal of the case under the *Reynolds* privilege. See *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1085 (9th Cir. 2010) (en banc).

92. *Mohamed*, 579 F.3d at 957.

93. *Id.* at 958; see also *Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998) (explaining that the case must be dismissed if invocation of the privilege prevents the defendant from making a defense).

94. *Mohamed*, 579 F.3d at 960.

95. *Id.*

96. *Id.*

97. *Id.* at 961 (citing *United States v. Reynolds*, 345 U.S. 1, 8–9 (1953)).

complaint.⁹⁸

In *Mohamed*, the Ninth Circuit attempted to limit executive overuse of the state secrets privilege, holding that civil suits by victims of the extraordinary rendition program should not automatically be dismissed at the pleading stage.⁹⁹ Instead, what is secret for purposes of the privilege must be evaluated by the court on a case-by-case basis.¹⁰⁰ The Ninth Circuit reasoned that information may be classified, but this cannot automatically render it secret under the privilege without giving the executive branch unlimited power over what can be litigated.¹⁰¹

The Ninth's Circuit's holding in *Mohamed* strives to prevent executive invocation of the state secrets privilege merely to hide embarrassment or control what is litigated. In *Reynolds*, the Supreme Court expressly stated that "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers."¹⁰² Following this logic, the Ninth Circuit further warned of the potential for executive abuse of the privilege in *Mohamed* when it explained that courts should be wary of invocation of the privilege as to "classified" information that is aimed at preventing government embarrassment as opposed to true military secrets.¹⁰³

IV. ANALYSIS: CONTROLLING PUBLIC PERCEPTION AND DISCOURSE IN THE WAR ON TERROR THROUGH EXPANSIVE CLAIMS OF STATE SECRETS

A. *An Uncertain Balance of Powers Calls for Change*

An analysis of the tensions and arguments posed by the *Mohamed* case raise several significant issues. First, government invocation of the state secrets doctrine blocks victims of the extraordinary rendition program from having their claims heard in American courts. Thus, in the context of the War on Terror, the state secrets doctrine works to control public exposure to the United States government's participation in torture. Next, the uncertainty in the state secrets doctrine and its recent expansion in favor of executive power suggests that it is time for a change.¹⁰⁴

98. *Id.* at 962.

99. *Id.*

100. *Id.*

101. *Id.* at 955–56.

102. *Reynolds*, 345 U.S. at 8–10.

103. *See Mohamed*, 579 F.3d at 959 n.7.

104. *See, e.g.*, Daniel J. Huyck, Comment, *Fade to Black: El-Masri v. United States Validates the Use of the State Secrets Privilege to Dismiss "Extraordinary Rendition" Claims*, 17 MINN. J. INT'L L. 435, 456–61 (2008) (explaining that the *El-Masri* court conflated *Totten* and *Reynolds*

B. *Keeping the Secret*

The contemporary use of the state secrets doctrine to dismiss damages claims by victims of extraordinary rendition¹⁰⁵ keeps American human rights abuses out of the courts and the public view, hiding a disturbing yet ironic component of the War on Terror.¹⁰⁶ That is, by kidnapping and torturing suspected terrorists, the United States is fighting terror with terror, engaging in the type of extreme practices that it seeks to combat. The government's refusal to give victims of the extraordinary rendition program a day in court is also the government's refusal to admit its wrongful participation in their detention and torture. In fact, the government's actions reinforce a hierarchy of power that suggests that subjugating foreign enemies through torture is acceptable and should go unchecked.¹⁰⁷

The executive branch has an incentive to control the public perception of foreign policy measures¹⁰⁸ because a president's power to maintain favor during a time of war is shaped by public perception and approval of the war. The executive thus has a strong interest in how the media frames its foreign policy actions, as well as the actions of the legislature and the courts, which collectively form the perceptions of the American public.¹⁰⁹ For example, the Bush Administration strategically framed the public perception of the War on Terror, shifting the focus from war on a country to war on an ideology, a war on fear.¹¹⁰ This point is illustrated in the now famous "torture memos" from the Attorney General's Office regarding the legality of the Bush Administration's

and that the state secrets doctrine has been increasingly used by the government to dismiss entire claims rather than exclude certain privileged pieces of evidence).

105. See, e.g., *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007).

106. See Dahlia Lithwick, *Torture Roulette: The Obama Administration Has Picked the Worst Possible Case for Its First Torture Trial*, SLATE, Dec. 14, 2009, <http://www.slate.com/id/2238568/pagnum/all/> (explaining that no torture victim has had his day in court and no court has ruled on the legality of the Bush Administration's torture policies).

107. See Dorothy Roberts, *Torture and the Biopolitics of Race*, 62 U. MIAMI L. REV. 229, 244 (2008) (explaining that the United States' history of maintaining a racial hierarchy through physical domination and torture combined with mass media representations of torture normalize torture as a way to maintain the dominant power structure and that this hierarchy is reinforced through our torture of suspected terrorists abroad).

108. See Rebecca A. Glazier & Amber E. Boydston, *Media (Non)Conformity to Executive Framing of the War on Terror 2-3* (Aug. 23, 2009) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1451384 (an insightful work on how President Bush had an interest in shaping media portrayals of foreign policy during the War on Terror and how the media deviated from executive interests).

109. *Id.* at 3.

110. See Elizabeth M. Iglesias, Foreword, *Article II: The Uses and Abuses of Executive Power*, 62 U. MIAMI L. REV. 181, 211 (2008) (discussing the claims of inherent executive power that arose in the context of the War on Terror, which destabilized traditional notions of republican government and sought to justify the government's actions through military necessity).

interrogation tactics of suspected terrorists held abroad, which repeatedly referred to the War on Terror as an “unprecedented” type of conflict that required the actions taken against suspected terrorists.¹¹¹ Indeed, it was through this lens of the War on Terror as a new, unprecedented war that expansive invocations of executive power were justified in the public perception.¹¹² It is in this context that one must evaluate the executive’s current justifications for expansive use of the state secrets privilege and how the executive invokes the privilege to block allegations of torture from exposure through American courts.

A comparison of the government’s disparate treatment of the *Mohamed* case with the government’s case against Khalid Sheikh Mohammed, the mastermind behind the September 11th attacks, illustrates the government’s use of the state secrets doctrine to block public exposure to the United States government’s participation in torture, and to control the public perception of the War on Terror in general. Like in *Mohamed*, the litigation against Khalid Sheikh Mohammed will likely involve allegations of CIA torture and will potentially reveal government policies condoning the torture of suspected terrorists. Just as the plaintiffs’ claims in *Mohamed* would involve Jeppesen’s part in CIA detainment and torture, many speculate that Khalid Sheikh Mohammed’s defense will focus on his alleged water-boarding and forced confession while detained at Guantanamo Bay.¹¹³ Yet, the government has made no claim of state secrets in the Khalid Sheikh Mohammed case, nor is one expected.¹¹⁴

The Ninth Circuit Court of Appeals discussed the Khalid Sheikh Mohammed case during the en banc rehearing of *Mohamed* on December 15, 2009.¹¹⁵ Specifically, Ben Wizner, counsel for the plaintiffs, explained that the government will not seek dismissal of the proceedings against Khalid Sheikh Mohammed as it did in *Mohamed* simply because some privileged material may be involved.¹¹⁶ Instead, any evidence will be assessed piece by piece to determine whether it is privileged and

111. See Memorandum from John C. Yoo, Deputy Assistant Att’y Gen., Dep’t of Justice, to William J. Haynes II, Gen. Counsel, Dep’t. of Def. (Mar. 14, 2003), available at <http://www.justice.gov/olc/docs/memo-combatantsoutsideunitedstates.pdf>.

112. See Iglesias, *supra* note 110, at 211.

113. See Hannity: ‘Terror on Trial’ Special: Who Is KSM? (FOX television broadcast Dec. 11, 2009), transcript available at <http://www.foxnews.com/story/0,2933,580177,00.html> (featuring Rudy Guiliani, who explains that the defense in the Khalid Sheikh Mohammed case will likely focus on his water-boarding and attempt to exaggerate Bush-era policies and will focus on what America did wrong as opposed to horrible acts of terrorism).

114. Oral Argument from Rehearing En Banc at 8:02, *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010) (No. 08-15693EB), available at http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000004702.

115. *Id.*

116. *Id.*

exclusion is required.¹¹⁷ Wizner explained that this is how the *Mohamed* case should proceed.¹¹⁸ Indeed, in *Reynolds*, the Supreme Court required evidence to be assessed in this manner, excluding evidence if the privilege applies, but continuing with the litigation using non-privileged evidence.¹¹⁹

When the panel questioned Department of Justice attorney Douglas Letter about this issue and why the government demands dismissal of the *Mohamed* case at the pleading stage, Letter attempted to differentiate the Khalid Sheikh Mohammed case because it is a criminal matter.¹²⁰ He explained that the Attorney General must believe he can proceed on non-privileged material and that this is different from the case in *Mohamed* where Attorney General Eric Holder found that the case could not proceed without revealing state secrets and accordingly made a formal claim of privilege.¹²¹ However, the distinction between a civil case brought by victims of extreme interrogation and a criminal case against a victim of extreme interrogation does not clearly present a reason why the government would invoke the privilege in one instance, but not another where the government's questionable and allegedly secret interrogation operations would be revealed in either instance.

A more obvious explanation for the disparate treatment of these cases is the government's interests in keeping the matters private, or in making them public. The government's reasons for invoking the state secrets doctrine to dismiss *Mohamed* at the pleading stage are clear. Litigating *Mohamed* in a public forum would reveal the government's participation in the extraordinary rendition program and its involvement in the torture of suspected terrorists, many of whom the government later released without bringing criminal charges.¹²² This is an embarrassment to the government that reveals the dark side of its foreign policy.

Conversely, in the case against Khalid Sheikh Mohammed, the government has not invoked the state secrets privilege to dismiss this claim because it wants the case litigated in a public forum.¹²³ In fact, the government actively sought to hold Khalid Sheikh Mohammed's trial in

117. *Id.*

118. *Id.*

119. *See* United States v. Reynolds, 345 U.S. 1, 8 (U.S. 1953).

120. Oral Argument from Rehearing En Banc, *supra* note 114, at 57:15.

121. *Id.*

122. *See* Mohamed v. Jeppesen Dataplan, Inc., 579 F.3d 943, 949–51 (9th Cir. 2009). Plaintiff Al-Rawi was released after his confinement and torture; the other plaintiffs were convicted of trivial crimes. *Id.*

123. *See* Lithwick, *supra* note 106 (explaining that some suspect that the Obama Administration wants the Khalid Sheikh Mohammed trial to be the sole forum for litigating the legality of torture).

a civil court in Manhattan,¹²⁴ a move that clearly sought to make these matters public.¹²⁵ The government has a strong interest in holding Khalid Sheikh Mohammed responsible for a horrible crime, bringing some closure to the victims, and maintaining its role as a combatant of terrorism.

A comparison of *Mohamed* with the case against Khalid Sheikh Mohammed reveals how the executive's interest in the public perception of the War on Terror affects which cases the government seeks to keep out of the courts through invocation of the state secrets privilege. In fact, Khalid Sheikh Mohammed's case may be the first adjudication involving allegations of CIA torture litigated in an American court.¹²⁶ Some speculate that the Obama Administration would like the New York trial of Khalid Sheikh Mohammed to be the sole forum for determining the legality of government-sanctioned torture.¹²⁷ Specifically, the Obama Administration maintains the extraordinary rendition program and has actively sought dismissal of cases involving claims of government-sanctioned torture.¹²⁸ Thus, only addressing the issue in a case involving an individual charged with an unthinkable crime lessens the impact of the government's abuse of the perpetrator. As one critic put it:

KSM [Khalid Sheikh Mohammed] is a monster. Nobody disputes that he was central to the planning and execution of the attacks on the Twin Towers and the Pentagon. If the trial of a man who was instrumental in killing thousands of innocent Americans becomes the sole forum in which the legality of prisoner abuse is to be litigated, public sentiment in favor of torture will only grow stronger The Obama administration will have been instrumental in selling the public on future torture in a way that is even more distressing than its recent

124. See Margot Williams, *Khalid Shaikh Mohammed*, N.Y. TIMES, Jan. 29, 2010, http://topics.nytimes.com/top/reference/timestopics/people/m/khalid_shaikh_mohammed/index.html?scp=1-spot&sq=khalid%20shaikh%20mohammed&st=cse (explaining that the Obama Administration sought to hold Khalid Shaikh Mohammed's trial in lower Manhattan's financial district, but the outcry of New Yorkers who disagreed with holding the trial in Manhattan for security, financial, and emotional reasons caused the Administration to seek a different forum).

125. As of November 20, 2010, the forum for Khalid Sheikh Mohammed's trial remains undetermined. In fact, many suspect that a civilian trial is no longer likely because it may embarrass the government and convey weakness in a time of war. See David Jackson, *Obama's Plan to Try Khalid Sheikh Mohammed in Civilian Court May Be Done*, THE OVAL (Nov. 18, 2010, 8:47 AM), <http://content.usatoday.com/communities/theoval/post/2010/11/obamas-plan-to-try-ksm-in-civilian-court-may-be-done/1>.

126. See Lithwick, *supra* note 106.

127. *Id.*

128. See Glenn Greenwald, *Salon Radio: Critical State Secrets Hearing Today*, SALON (Dec. 15, 2009), <http://www.salon.com/opinion/greenwald/radio/2009/12/15/wizner/index.html?source=newsletter> (discussing the Obama Administration's continuance of Bush policies with respect to the state secrets doctrine).

efforts to immunize the torturers themselves.¹²⁹

Certainly, our government has an understandable interest in holding terrorists responsible for the deaths of innocent victims and showing the world that this behavior is wrong. However, it is also time that our nation leads by example and provides victims of abusive government practices with redress in American courts. The government's expansive use of the state secrets doctrine to dismiss cases involving human rights abuses committed by Americans during the War on Terror illustrates that in its current state, the executive invokes the privilege to control government embarrassment by policing what claims are heard in American courts and in the court of public opinion.¹³⁰

C. *Divergence in the Application of the State Secrets Doctrine as it Relates to Claims by Victims of Extraordinary Rendition Suggests the Need for Clarification and Reform*

The former split between the Fourth Circuit's analysis in *El-Masri* and the Ninth Circuit's analysis in *Mohamed* illustrates a significant point of tension in the application of the state secrets privilege. Specifically, the Fourth Circuit interprets the state secrets privilege to permit dismissal of an entire claim when the subject matter of the suit may involve privileged information.¹³¹ While a broad reading of *Totten* may permit such a result, to allow the government to invoke the privilege to dismiss a claim any time it involves potentially secret information gives the executive the power to determine what claims may be heard and what government abuses may go unchecked, violating the judiciary's constitutional duty "to say what the law is."¹³²

The uncertainty in the state secrets case law, and what many deem to be an unwarranted expansion of the doctrine in favor of unbridled executive power, suggests that it is time for Congress or the Supreme Court to clarify the doctrine.¹³³ Specifically, the government now invokes the *Totten* doctrine allowing complete dismissal of a claim, which began during the Civil War era to prevent spies from enforcing contract claims against the government, to hide grave human rights abuses, and to deny access to the courts to individuals who have legiti-

129. See Lithwick, *supra* note 106.

130. See *Mohamed v. Jeppesen Dataplan, Inc.*, 579 F.3d 943, 959 n.7 (9th Cir. 2009).

131. See, e.g., *El-Masri v. United States*, 479 F.3d 296, 311 (4th Cir. 2007) (dismissing a civil claim by a victim of the CIA's extraordinary rendition program at the pleading stage because the matter could not be litigated without disclosing state secrets, despite other available non-privileged evidence that could have been used to support his claim).

132. *Mohamed*, 579 F.3d at 955 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

133. See Huyck, *supra* note 104, at 456–61.

mate claims against our government.¹³⁴ Further, courts understand *Reynolds*, which requires a specific claim of privilege, to permit dismissal of a claim before discovery if the case will involve confidential subject matter.¹³⁵ As the *Mohamed* Court recognized, *Reynolds* never suggested such a result.¹³⁶ In fact, *Reynolds* required courts to assess whether the government properly invoked the claim of privilege and to exclude the evidence accordingly.¹³⁷ This does not call for a complete dismissal of a case—merely for exclusion of privileged evidence.¹³⁸

The expansive use of the state secrets privilege to dismiss entire cases instead of excluding specific evidence shows that courts are accepting executive claims of privilege “without conducting any meaningful review of the invocation of the privilege.”¹³⁹ Courts must heed the warnings set forth by the Supreme Court in *Reynolds* and the Ninth Circuit in *Mohamed* and take a more active role assessing executive claims of the state secrets privilege to prevent the “intolerable abuses” that result when judicial control over what evidence may be heard is “abdicated to the caprice of executive officers.”¹⁴⁰ The remainder of this note calls for the judiciary to take a more active role in assessing executive claims of privilege through in camera review of the evidence in question.

D. *Towards Righting Our Wrongs: In Camera Judicial Review as an Alternative to Dismissal of Cases by Victims of Extraordinary Rendition at the Pleading Stage*

The government’s expansive use of the state secrets doctrine to dismiss cases involving human rights abuses committed during the war on terror illustrates that in its current state, the executive invokes the doctrine to control government embarrassment by policing which claims reach American courts and the court of public opinion.¹⁴¹ The executive is essentially creating its own revisionist history of the War on Terror, which seeks to minimize American participation in torture and other war

134. See *El-Masri*, 479 F.3d at 311; see also *Mohamed*, 579 F.3d at 943.

135. See *El-Masri*, 479 F.3d at 311. The Ninth Circuit also takes this position in the rehearing en banc decision that affirmed the district court’s dismissal of *Mohamed*. *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1089 (9th Cir. 2010) (en banc) (“Here, our detailed *Reynolds* analysis reveals that the claims and possible defenses are so infused with state secrets that the risk of disclosing them is both apparent and inevitable.”).

136. See *Mohamed*, 579 F.3d at 957.

137. *Id.*

138. *Id.*

139. Carrie Newton Lyons, *The State Secrets Privilege: Expanding its Scope Through Government Misuse*, 11 LEWIS & CLARK L. REV. 99, 117 (2007).

140. *United States v. Reynolds*, 345 U.S. 1, 8 (1953); *Mohamed*, 579 F.3d at 959 n.7.

141. See *Mohamed*, 579 F.3d at 959 n.7.

crimes.¹⁴² The Supreme Court or Congress must clarify and reform the state secrets doctrine to provide victims of torture with a means to have their claims heard and to bring some accountability to the American government. If the United States accepts greater accountability for mistreated victims of the War on Terror, it would likely reduce anti-American sentiment among Al-Qaeda and Middle Eastern countries involved in conflict with the United States. Scholars have commented on how the detention of suspected terrorists in Guantanamo Bay has fueled anti-American rhetoric.¹⁴³ Denying those detained and tortured in violation of international law from redress in American courts only exacerbates this effect.

An ideal solution to expansive use of the state secrets privilege is to foreclose dismissal of cases at the pleading stage, where no discovery has taken place and where the government has not made any formal claim of privilege as to *specific* evidence. The Ninth Circuit in *Mohamed* correctly determined that analyzing evidence piece by piece and assessing the government's specific claims of privilege as to that evidence is likely the best compromise between the government's interest in protecting state secrets and the plaintiffs' rights to have their claims heard.¹⁴⁴ This would also bring application of the state secrets privilege within the original scope of *Reynolds*, which required judges to make an independent assessment of whether the executive properly invoked the state secrets privilege.¹⁴⁵

In order to facilitate judicial assessment of whether the state secrets privilege applies, in camera review of the evidence in question would provide an independent check on executive invocation of the privilege.¹⁴⁶ This would also ensure that the government makes a specific claim of privilege, instead of a general claim that secrets will inevitably be disclosed, warranting dismissal at the outset as in *Mohamed*.

However, disclosure of privileged evidence is a major concern with in camera judicial review of military matters.¹⁴⁷ In fact, the fear of interfering with military secrets has likely contributed to the circuit courts' inclination to accept executive claims of privilege when made. For example, in *Reynolds*, the Supreme Court explained that when the court

142. See Glenn Greenwald, *The Crime of Not "Looking Backward,"* SALON, Jan. 19, 2010, http://www.salon.com/news/opinion/glenn_greenwald/2010/01/19/guantanamo/index.html.

143. Interview by Glenn Greenwald with Gregory Johnston, Ph.D., Candidate in Near Eastern Studies at Princeton University, on *Salon Radio* (Dec. 24, 2009), transcript available at http://www.salon.com/news/opinion/glenn_greenwald/radio/2009/12/24/gjohnsen_transcript/index.html.

144. *Mohamed*, 579 F.3d at 962.

145. See *Reynolds*, 345 U.S. at 8.

146. See Huyck, *supra* note 104, at 469.

147. See *Reynolds*, 345 U.S. at 10.

is satisfied that the state secrets privilege is proper in a given case because “there is a reasonable danger that compulsion of the evidence will expose military matters . . . the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.”¹⁴⁸ Despite this statement, it is clear that increased judicial review is necessary to provide a check on expansive invocation of the privilege. In camera review of the evidence would provide this check, increasing judicial review and limiting expansive invocation of the privilege for improper means, such as preventing government embarrassment.

Politicians have also recognized that increased judicial review of executive claims of privilege is a necessary component of state secrets reform.¹⁴⁹ For example, The State Secrets Protection Act of 2009 was introduced in the 111th Congress and would codify standards and procedures to be used in civil litigation when the government makes a claim of the state secrets privilege.¹⁵⁰ This bill would require courts to examine the actual evidence that the government is asserting the privilege against to determine whether the claim of privilege is valid.¹⁵¹

In camera judicial review of the claimed secret evidence would be a significant change from *Reynolds*, which explicitly stated that the judge must evaluate whether the claim of privilege is proper *without* discovering the privileged information.¹⁵² However, *Reynolds* failed to provide a framework that would necessarily place a check on the executive’s ability to determine what evidence is excluded as privileged and thus which claims may be heard in certain cases. Requiring in camera inspection of the evidence would prevent executive overreaching and expansive use of the state secrets privilege by “allow[ing] an independent judiciary to determine the merits of the privilege and not the party claiming the privilege.”¹⁵³

Further, in contrast to other alternatives, in camera review provides a more viable solution towards giving victims of extraordinary rendition a meaningful opportunity to be heard in American courts. For example, bringing suit against third parties and not the government, as in *Mohamed*, illustrates one solution for torture victims seeking compensation. Under *Totten*, courts dismiss claims as involving state secrets if

148. *Id.*

149. See State Secrets Protection Act of 2009, H.R. 984, 111th Cong. (2009); see also LIU, *supra* note 17.

150. See LIU, *supra* note 17, at 12.

151. *Id.* at 13.

152. See *Reynolds*, 345 U.S. at 10.

153. Huyck, *supra* note 104, at 469.

instituted to enforce a contract against the government,¹⁵⁴ but the same concerns should not bar suits against third parties. Thus, courts could clarify the scope of the state secrets doctrine, as in *Mohamed*, and find that the *Totten* bar does not apply to cases involving third-party military contractors. The evidence revealed would still be limited if harmful to the government, but at least these individuals would have their day in court.¹⁵⁵ Further, holding private companies liable for damages to these victims would discourage them from contracting with the government for services that result in human rights abuses.¹⁵⁶

Allowing suits against private contractors of the government to proceed on a more expansive basis could provide a potential solution for individuals as against private contractors, but would likely be ineffective. Because *Reynolds* states that the judiciary cannot assess the actual evidence the government invokes the state secrets privilege against,¹⁵⁷ even if a claim by a torture victim against a private contractor were permitted to proceed, it would have to be dismissed if the government made a proper claim of privilege and the privileged evidence was central to the claim. The problem that exists in the contemporary law would still be present. Specifically, the judiciary cannot make an independent assessment of whether the executive is properly claiming the privilege or is simply hiding embarrassing and authoritarian actions because the judiciary is unable to discover what the evidence is.¹⁵⁸

What the state secrets doctrine ultimately needs is clarification. The Supreme Court declined to hear El-Masri's case¹⁵⁹ and thus declined to limit the state secrets privilege, which has unclear boundaries¹⁶⁰ and is widely criticized for its expansive invocation. If the state secrets privi-

154. See *Totten v. United States*, 92 U.S. 105, 106 (1876).

155. See, e.g., Press Release, ACLU of N. Cal., Interrogation Memos Provide Further Reason to Give Torture Victims Day in Court, Says ACLU, (Apr. 21, 2009), available at http://www.aclunc.org/news/press_releases/interrogation_memos_provide_further_reason_to_give_torture_victims_day_in_court_says_aclu.shtml (explaining that victims of extraordinary rendition should not be prevented from having their day in court because rendition and its practices are no longer secret because President Obama declassified memoranda from the Office of Legal Counsel outlining these activities).

156. See Jamie A. Baron Rodriguez, Article & Essay, *Torture on Trial: How the Alien Tort Statute May Expose the United States Government's Illegal "Extraordinary Rendition" Program Through Its Use of a Private Contractor*, 14 ILSA J. INT'L & COMP. L. 189, 205 (2009) (explaining that perhaps private contractors that aid the United States government in conducting the extraordinary rendition program, like Jeppesen, should be held liable to the torture victims so private corporations will hesitate to assist the government in these activities).

157. See *Reynolds*, 345 U.S. at 10.

158. See *id.*

159. See *El-Masri v. United States*, 479 F.3d 296, 311 (4th Cir. 2007), cert. denied, 552 U.S. 947 (2007).

160. See Huyck, *supra* note 104, at 453–55 (explaining that there is no clear consensus between the circuits with respect to the correct application of the *Reynolds* test).

lege is clearly limited to bar the use of specific privileged evidence, then the claims may proceed in the absence of the privileged evidence as with other evidentiary claims of privilege, such as the privilege against self-incrimination.¹⁶¹ In *Mohamed*, the Ninth Circuit explained that the state secrets privilege is an evidentiary privilege and should accordingly exclude specific evidence instead of requiring dismissal of the entire case.¹⁶² As one writer noted in the wake of the *El-Masri* decision, if the Supreme Court redirects the state secrets doctrine “to its common law foundation as an evidentiary rule,” then this may return “the proper balance between the need for individual redress for wrongs and the protection of valid national secrets.”¹⁶³

V. CONCLUSION

The War on Terror has complicated American moral and legal frameworks. Among these complications, the state secrets doctrine has shifted from an evidentiary rule to a complete bar on certain suits, preventing victims of extreme interrogation from having their day in an American court. In *Mohamed*, the Ninth Circuit attempted to limit executive overuse of the state secrets privilege, holding that civil suits by victims of the extraordinary rendition program should not be dismissed at the pleading stage.¹⁶⁴ Instead, the Ninth Circuit held that what is secret for purposes of the privilege must be evaluated by the court on a case-by-case basis.¹⁶⁵ Thus, the Ninth’s Circuit’s holding sought to prevent executive invocation of the state secrets privilege merely to hide embarrassment or control what is litigated.¹⁶⁶

The Ninth Circuit’s analysis and contemporary state secrets jurisprudence reveals that the state secrets doctrine currently functions to keep questionable government actions out of the public view, effectively controlling the public perception and discourse surrounding the United States government’s actions in the War on Terror. Further, by refusing to give victims of the extraordinary rendition program a day in court, the government refuses to admit its wrongful participation in their detention and torture.

The expansive use of the state secrets privilege to dismiss entire

161. See *Mohamed v. Jeppesen Dataplan, Inc.*, 579 F.3d 943, 957 (9th Cir. 2009) (“The Supreme Court could not be more clear that ‘the privilege which protects military and state secrets’ is a privilege within ‘the law of evidence,’ just like the ‘analogous privilege, the privilege against self-incrimination.’” (quoting *Reynolds*, 345 U.S. at 7–8)).

162. *Id.*

163. Huyck, *supra* note 104, at 472.

164. See *Mohamed*, 579 F.3d at 960–61.

165. *Id.*

166. *Id.* at 959 n.7.

cases instead of excluding specific evidence shows that courts are accepting executive claims of privilege “without conducting any meaningful review of the invocation of the privilege.”¹⁶⁷ Courts must heed the warnings set forth by the Supreme Court in *Reynolds* and the Ninth Circuit in *Mohamed* and take a more active role assessing executive claims of the state secrets privilege to prevent the “intolerable abuses” that result when judicial control over what evidence may be heard is “abdicated to the caprice of executive officers.”¹⁶⁸

In order to facilitate judicial assessment of whether the state secrets privilege applies, in camera review of the evidence in question would provide an independent check on executive invocation of the privilege.¹⁶⁹ This would also ensure that a specific claim of privilege is made, instead of a general claim that secrets will inevitably be disclosed warranting dismissal at the outset. Without in camera review, the judiciary cannot make an independent assessment of whether the executive is properly claiming the privilege, or is simply hiding embarrassing and authoritarian actions. The state secrets doctrine needs clear limits and clarification in order to provide victims of the extraordinary rendition program an opportunity to be heard and to bring accountability to the American government.

167. Lyons, *supra* note 139, at 117.

168. *United States v. Reynolds*, 345 U.S. 1, 8–10 (1953); *see Mohamed*, 579 F.3d at 959 n.7.

169. *See Huyck*, *supra* note 104, at 469.

