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EXTRAORDINARY RESULTS IN EXTRAORDINARY RENDITION

Alex Turner*

“Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.” —Justice Louis D. Brandeis

IT did not take long for the realization to sink in that the paradigm of U.S. foreign policy had shifted. In fact, it would be more accurate to say that the new paradigm was forced in. Addressing the Joint Session of Congress and the American people just nine days after the September 11, 2001 attacks (9/11), President George W. Bush repeatedly used the phrase “war on terrorism” to chart a new course of U.S. foreign policy that would “include dramatic strikes, visible on TV, and covert operations, secret even in success.”¹ One such covert operation that expanded after 9/11 is the CIA’s Extraordinary Rendition Program, which involves the abduction and subsequent extrajudicial transfer of suspected terrorists to foreign countries for detention and interrogation.² Extraordinary rendition became an important feature of the government’s strategy post-9/11 and included at least 136 individual detainees and participation from more than 50 foreign governments.³

Plaintiffs alleging to be innocent victims of extraordinary rendition and asserting causes of action against the government and private defendants on constitutional, tort, and international law grounds have routinely had their claims dismissed at the outset by federal courts.⁴ The cause for dismissal? The state secrets privilege—a common law evidentiary privilege, the modern articulation of which was set forth by the Supreme Court in

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1. George W. Bush, President of the United States, Address to a Joint Session of Congress and the American People (Sept. 20, 2001), <http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html> [<https://perma.cc/22XS-2X3Y>].

2. Robert Johnson, Note, *Extraordinary Rendition: A Wrong Without a Right*, 43 U. RICH. L. REV. 1135, 1140 (2009).

3. Jonathan Horowitz & Stacy Cammarano, *20 Extraordinary Facts about CIA Extraordinary Rendition and Secret Detention*, OPEN SOCIETY FOUNDATIONS (Feb. 5, 2013), <https://www.opensocietyfoundations.org/voices/20-extraordinary-facts-about-cia-extraordinary-rendition-and-secret-detention> [<https://perma.cc/3WEP-3PH4>].

4. See, e.g., *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010); *El-Masri v. United States*, 479 F.3d 296, 302 (4th Cir. 2007).

United States v. Reynolds.⁵ The government has invoked this privilege with such success that “[t]o date, not a single case brought by an extraordinary rendition victim has reached the merits stage in a U.S. court.”⁶ To understand the harsh reality impacting plaintiffs who have been processed through the Extraordinary Rendition Program, consider the following illustration.

Imagine traveling abroad on business or visiting an ailing relative when, suddenly, agents of the country you are visiting seize you for reasons that you cannot contemplate, while speaking to you in a language that you do not know, all while denying your repeated requests to speak with a translator, an attorney, your spouse, or the local consulate of your home country.⁷ Imagine further that this episode marks the beginning of a brutal saga of detention, interrogation, and torture that will last more than two years, leaving you physically emaciated, emotionally traumatized, and psychologically scarred.⁸ And, finally, imagine that your captors admit to you shortly before your release that although they had determined that your detention was a mistake much earlier, the U.S. government had up until then denied permission for your release for no apparent reason.⁹

Victims of extraordinary rendition have alleged being subjected to a variety of interrogation methods that are prohibited under U.S. and international law at the hands of CIA officials operating “black site[s]” or “dark prison[s].”¹⁰ The treatment is degrading: victims have been stripped naked, blindfolded, shackled, and forced to make recorded false confessions.¹¹ The physical pain and psychological torment are severe: they have been deprived of sleep and food; subjected to loud noise and blinding light twenty-four hours a day; cut from head to toe with a scalpel for the purpose of pouring hot stinging liquids into the open wounds; and shocked with electrodes on ear lobes, nipples, and genitals.¹² The results are unspeakable: victims, having been told by their captors that they were innocent, have emerged forty to sixty pounds lighter and returned home only to find that their family has moved a continent away, believing they had been abandoned.¹³

In a broad sense, courts have recognized the inherent unfairness to individual litigants of the loss of key evidence or the dismissal of their en-

5. See *United States v. Reynolds*, 345 U.S. 1, 10 (1953) (explaining that occasion for the privilege is appropriate where, “from all the circumstances of the case, [] there is a reasonable danger that compulsion of the evidence will expose military [or state] matters which, in the interest of national security, should not be divulged”).

6. OPEN SOCIETY FOUNDATIONS, *GLOBALIZING TORTURE: CIA SECRET DETENTION AND EXTRAORDINARY RENDITION* 20 (2013).

7. See *Jeppesen*, 614 F.3d at 1074–75; *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 532 (E.D. Va. 2006).

8. See *Jeppesen*, 614 F.3d at 1073–75; *El-Masri*, 437 F. Supp. 2d at 532–34.

9. See *El-Masri*, 437 F. Supp. 2d at 533.

10. See *Jeppesen*, 614 F.3d at 1073–75; *El-Masri*, 437 F. Supp. 2d at 532–34.

11. See *Jeppesen*, 614 F.3d at 1073–75; *El-Masri*, 437 F. Supp. 2d at 532–34.

12. See *Jeppesen*, 614 F.3d at 1073–75; *El-Masri*, 437 F. Supp. 2d at 532–34.

13. See *Jeppesen*, 614 F.3d at 1073–75; *El-Masri*, 437 F. Supp. 2d at 532–34.

tire case because of the state secrets privilege.¹⁴ Yet their decisions have rested on the assumption that this is acceptable “in order to protect a greater public value”: the security of the nation.¹⁵ This article does not dispute that the collective interest in national security is supremely important. However, this article argues that there are procedures and options courts can implement to protect valid state secrets yet allow cases brought by extraordinary rendition victims to proceed to the merits.

After examining how federal courts have handled the invocation of the state secrets privilege in extraordinary rendition cases, this paper will argue that federal courts’ dismissals of these cases at the pleadings stage occurs too early. Part I of this article will briefly describe the Ninth Circuit case *Mohamed v. Jeppesen Dataplan, Inc.* to expose flaws in a federal court’s typical *Reynolds* analysis in a case brought by alleged victims of extraordinary rendition that is countered with an assertion of the state secrets privilege. Part II will provide a more in-depth look at the history and development of the state secrets doctrine in U.S. law, highlighting some of its practical nuances through specific examples and demonstrating its relation to the law of evidence and the Federal Rules of Civil Procedure. Drawing on the Freedom of Information Act, Part III will examine principles and procedures that courts faced with allegations of torture and degrading treatment should implement to encourage enforcement of the rule of law and provide justice for plaintiffs while protecting valid state secrets. Part III will conclude by summarizing the key issues addressed and takeaways for courts handling such cases in the future.

I. *MOHAMED V. JEPPESEN DATAPLAN, INC.*: STATE SECRETS PRIVILEGE AND EXTRAORDINARY RENDITION

In the most recent extraordinary rendition case decided by a federal appeals court, *Mohamed v. Jeppesen Dataplan, Inc.*, the Ninth Circuit, sitting en banc, narrowly upheld, six to five, the district court’s grant of the government’s motion to dismiss based on the state secrets privilege.¹⁶ The plaintiffs alleged that the CIA, along with other government agencies and foreign governments, operated a program of extraordinary rendition by apprehending foreign nationals suspected of terrorist activities and transferring them to foreign countries for detention and interrogation by United States and foreign officials.¹⁷ Each of the five foreign-national plaintiffs claimed they were subjects of the Extraordinary Rendition Program and that the program utilized methods of interrogation prohibited by both U.S. federal law and international law.¹⁸ Notably, the plaintiffs

14. *See* *El-Masri v. United States*, 479 F.3d 296, 313 (4th Cir. 2007).

15. *See id.* (quoting *Fitzgerald v. Penthouse Int’l, Ltd.*, 776 F.2d 1236, 1238 n.3 (4th Cir. 1985)).

16. *Jeppesen*, 614 F.3d at 1073.

17. *Id.* at 1073.

18. *Id.* at 1073–74.

filed a lawsuit against a U.S. corporation, Jeppesen Dataplan, Inc., under the Alien Tort Statute, 28 U.S.C. § 1350.¹⁹ They alleged several theories of liability based on their contention that the company provided essential material support to the air transport of plaintiffs while the U.S. government processed them through the Extraordinary Rendition Program.²⁰ The plaintiffs' claims were for (1) forced disappearance and (2) torture and degrading treatment.²¹

Before Jeppesen ever answered the plaintiffs' complaint, the U.S. government moved to intervene and dismiss the case on state secrets privilege grounds.²² It supported its motion with both a classified and an unclassified declaration that stated that the risk of disclosure of certain potentially harmful, sensitive material at issue in the case was too great to allow the litigation to proceed, and thus argued that the case should be dismissed.²³ The district court granted the government's 12(b)(1) motion to dismiss for lack of subject matter jurisdiction based on the state secrets privilege.²⁴ But a three-judge panel at the Ninth Circuit reversed and remanded on grounds that the *Reynolds* evidentiary privilege was not a proper basis for dismissal of the plaintiffs' complaint, though the government could assert it at subsequent stages of the litigation.²⁵ The Ninth Circuit subsequently ordered an en banc rehearing to analyze the application and scope of the state secrets privilege de novo.²⁶

Application of the *Reynolds* analysis by a court generally involves (1) evaluating whether the procedural requirements for asserting the privilege have been met, (2) independently determining the validity of the claim of privilege, and if necessary, (3) resolving how the case should proceed in light of a successful claim of privilege.²⁷ The procedural requirements stipulate that the government is the sole holder of the state secrets privilege and that assertions of the privilege require a "formal claim" by the head of the department controlling the material in question after "personal consideration by that officer."²⁸ In *Jeppesen*, the Director of the CIA, General Michael Hayden, personally lodged the formal claim of privilege and submitted supporting materials for the court to make an independent determination.²⁹ The parties did not dispute that General Hayden met *Reynolds*' procedural requirements.³⁰

A court's next step under *Reynolds* is to make an independent evalua-

19. *Id.* at 1075.

20. *Id.*

21. *Id.* at 1075-76.

22. *Id.* at 1076.

23. *Id.*

24. *Id.*

25. *Id.* at 1077.

26. *Id.* at 1077.

27. *Id.* at 1080-83 (describing in detail each of the three steps).

28. *United States v. Reynolds*, 345 U.S. 1, 7-8 (1953).

29. *Jeppesen*, 614 F.3d at 1080.

30. *Id.* at 1085.

tion of the claim of privilege.³¹ A court should sustain a properly asserted claim of privilege if it concludes, “from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose . . . matters which, in the interest of national security, should not be divulged.”³² Analyzing the claim under the second step of *Reynolds*, the majority concluded that its independent examination of General Hayden’s classified and unclassified declarations had revealed at least some material information that legitimately qualified as state secrets.³³ The court then noted that any detailed explanation of which matters were covered by the privilege would expose the very secrets the privilege is designed to protect.³⁴

Without knowing the contents of the government’s classified declaration, and perhaps what was intentionally left out of it, it is concededly difficult to ascertain exactly what the government was trying to avoid by invoking the state secrets privilege in *Jeppesen*. The majority vaguely concluded that the privilege “indisputably” covers information regarding Jeppesen’s involvement in CIA clandestine intelligence activities and any other information about the operation of the detention and interrogation program.³⁵ But filings from the district court’s docket and myriad public reports reveal an ugly picture of how Jeppesen allegedly assisted the government. For instance, the plaintiffs’ first amended complaint alleged that Jeppesen provided logistical and flight planning services for the CIA’s forcible rendition of terrorism suspects to foreign detention facilities with full knowledge that they were “facilitat[ing] and profit[ing] from” the forced disappearance, torture, and other inhumane treatment of these suspects “in contravention of universally accepted legal standards.”³⁶

Numerous published reports evidence not only Jeppesen’s actual knowledge that its services assisted the CIA in the forced disappearance and torture of the plaintiffs, but also that it knowingly misled governmental and inter-governmental agencies to help the CIA avoid public scrutiny. For example, a former Jeppesen employee claimed that Jeppesen executive Bob Overby told employees at a breakfast meeting that “[w]e do all the extraordinary rendition flights,” adding that these were “the torture flights” and “let’s face it, some of these flights end up this way.”³⁷

31. *Id.* at 1081.

32. *Reynolds*, 345 U.S. at 10.

33. *Jeppesen*, 614 F.3d at 1086.

34. *Id.*

35. *Id.*

36. First Amended Complaint and Demand for Jury Trial at ¶¶ 2, 15, 18, *Mohamed v. Jeppesen Dataplan, Inc.*, 539 F. Supp. 2d 1128 (N.D. Cal. Aug. 1, 2007) (No. 5:07-cv-02798 JW) (“Jeppesen prepared pre-departure flight planning services, including itinerary, route, weather, and fuel plans for the aircraft involved in their renditions; 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.”).

37. Declaration of Sean Belcher in Support of Plaintiffs’ Opposition to the United States’ Motion to Dismiss or, in the Alternative, for Summary Judgment at ¶¶ 2-4,

According to the employee, Overby continued, saying, “[T]hat’s just the way it is, we’re doing them.” He went on to say that the rendition flights were very lucrative and that the government was unconcerned about the cost of getting done what it had to get done.³⁸

Moreover, a Council of Europe report describes how Jeppesen intentionally submitted “dummy flights” to European air traffic control authorities to conceal the true flight paths of the rendition planes.³⁹ Based on public flight records obtained through investigation by the Council of Europe in conjunction with the European Parliament, the report reveals that Jeppesen provided support to fifteen planes involved in a total of seventy extraordinary rendition flights over a four year period beginning in 2001.⁴⁰ Despite numerous public revelations from both inside and outside the United States implicating Jeppesen’s support of extraordinary rendition, the *Jeppesen* majority concluded that state secrets, the disclosure of which “could be expected to cause significant harm to national security,” merited dismissal at the pleadings stage.⁴¹

A court’s final step in the *Reynolds* analysis is to determine how the successful claim of privilege will affect the proceedings.⁴² There are three scenarios, according to the *Jeppesen* court, where successful application of the privilege justifies dismissing the case entirely: (1) if the plaintiff’s prima facie case depends on privileged evidence, (2) if the privilege precludes the defendant from asserting a valid defense, or (3) if privileged and non-privileged evidence are so inseparable that litigating the case on the merits would unjustifiably risk disclosing state secrets.⁴³

Assuming without deciding that invoking the privilege would not prevent the plaintiffs from making out a prima facie case or the defendant from asserting a valid defense, the court nonetheless concluded that “dismissal is . . . required under *Reynolds* because there is no feasible way to litigate Jeppesen’s alleged liability without creating an unjustifiable risk of divulging state secrets.”⁴⁴ While acknowledging the “plaintiffs’ extensive submission of public documents,” the court reasoned that the “inherently complex and unpredictable” nature of adversarial litigation in an

Mohamed v. Jeppesen Dataplan, Inc., 539 F. Supp. 2d 1128 (N.D. Cal. Dec. 14, 2007) (No. 5:07-cv-02798 JW); Jane Mayer, *The CIA’s Travel Agent*, THE NEW YORKER (Oct. 30, 2006), <http://www.newyorker.com/magazine/2006/10/30/the-c-i-a-s-travel-agent> [https://perma.cc/V2UX-NPE4].

38. Declaration of Sean Belcher in Support of Plaintiffs’ Opposition to the United States’ Motion to Dismiss or, in the Alternative, for Summary Judgment at ¶ 4, Mohamed v. Jeppesen Dataplan, Inc., 539 F. Supp. 2d 1128 (N.D. Cal. Dec. 14, 2007) (No. 5:07-cv-02798 JW).

39. Eur. Parl. Ass., *Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report*, at ¶ 185 (June 7, 2007).

40. First Amended Complaint and Demand for Jury Trial at ¶ 52, Mohamed v. Jeppesen Dataplan, Inc., 539 F. Supp. 2d 1128 (N.D. Cal. Aug. 1, 2007) (No. 5:07-cv-02798 JW).

41. Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1086–87 (9th Cir. 2010).

42. *Id.* at 1082.

43. *Id.* at 1083.

44. *Id.* at 1087.

“exceptional case[] like this one, where the relevant secrets are difficult or impossible to isolate . . . would risk disclosure by implication.”⁴⁵ The court did recognize that extraordinary rendition itself is not a state secret and neither are the hundreds of public documents concerning it.⁴⁶

The result reached in *Jeppesen*—an outright dismissal at the pleadings stage—is a striking application of the *Reynolds* privilege.⁴⁷ First, the court essentially held that the risk of divulging something that ought not be revealed during litigation supersedes the risk of injustice that may result from dismissal.⁴⁸ The torture of Binyam Mohamed (Mohamed), the named plaintiff in the case, was a well-established fact⁴⁹ at the time the en banc panel of the Ninth Circuit issued its decision. The government had previously conceded it and a federal judge had found his allegations to be true in a habeas corpus proceeding of a fellow detainee at Guantánamo Bay.⁵⁰ There the court found sufficient indicia of reliability in Mohamed’s allegations that he had in fact endured “lengthy prior torture” that without question occurred “at the behest of the United States.”⁵¹

However, the *Jeppesen* majority concluded that the government’s assertion of the privilege complied with revised standards for its invocation outlined in a 2009 Justice Department memorandum.⁵² Those standards prohibit invoking the privilege for the purposes of, among other things, “conceal[ing] violations of the law . . . prevent[ing] embarrassment to a[n] . . . agency of the United States government . . . or prevent[ing] or delay[ing] the release of information the release of which would not reasonably be expected to cause significant harm to national security.”⁵³ The majority made assurances that the government’s classified and unclassified declarations had persuaded it that the government had not invoked the privilege to avoid scrutiny of particular interrogation techniques or to

45. *Id.* at 1089.

46. *Id.* at 1089–90.

47. One legal scholar observed that “the court stretched the privilege to its outer edges” and that its ruling “represents a breathtaking application of [it].” Steven D. Schwinn, *Ninth Circuit Dismisses Torture Claims Based on State Secrets Privilege*, CONSTITUTIONAL LAW PROF BLOG (Sept. 8, 2010), <http://lawprofessors.typepad.com/conlaw/2010/09/ninth-circuit-dismisses-torture-claims-based-on-state-secret-privilege.html> [https://perma.cc/ZV4D-CSKC].

48. See ALAN W. CLARKE, *RENDITION TO TORTURE* 123 (2012).

49. *Mohammed v. Obama*, 689 F. Supp. 2d 38, 64 (D.D.C. 2009).

50. *Id.* at 66.

51. *Id.* at 64–66 (finding “Binyam Mohamed’s trauma lasted for two long years. During that time, he was physically and psychologically tortured. His genitals were mutilated. He was deprived of sleep and food. He was summarily transported from one foreign prison to another. Captors held him in stress positions for days at a time. He was forced to listen to piercingly loud music and the screams of other prisoners while locked in a pitch-black cell. All the while, he was forced to inculpate himself and others in various plots to imperil Americans. *The Government does not dispute this evidence.*”) (emphasis added).

52. *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1090 (9th Cir. 2010).

53. Memorandum for Heads of Executive Departments and Agencies: Policies and Procedures Governing Invocation of the State Secrets Privilege at 2, OFFICE OF THE ATTORNEY GENERAL (Sept. 23, 2009), <http://www.justice.gov/sites/default/files/opa/legacy/2009/09/23/state-secret-privileges.pdf> [https://perma.cc/DX5Q-HCNL] [hereinafter Holder Memo].

prevent embarrassment.⁵⁴

The validity of the underlying allegations and wealth of incriminating public documentation concerning the events at issue cast doubt on the majority's contention.⁵⁵ In urging that dismissal on the pleadings was inappropriate under *Reynolds*, the five-judge dissent emphasized the danger of the doctrine "as a means of hiding governmental misbehavior under the guise of national security."⁵⁶ Considering the origins of the state secrets doctrine in U.S. common law and the high potential for abuse, courts should reject an unnecessarily deferential response that leads to outright dismissal in the vast majority of cases.

II. THE STATE SECRETS DOCTRINE

The origin of the state secrets privilege in U.S. common law did not arise out of thin air; it is ultimately a consequence of the authority the Constitution vests in the executive branch under the doctrine of separation of powers.⁵⁷ Each branch's authority to curb an assertion of power of another branch through a system of checks and balances is necessary for the proper functioning of our political system, especially where the power being asserted is not expressly contained within the Constitution. Historically, courts have shown great deference to the executive branch's authority over foreign affairs and matters pertaining to national security.⁵⁸ As other commentators have noted, the state secrets privilege is not explicitly granted to the executive branch by the Constitution.⁵⁹ Its use has been primarily justified, on constitutional grounds, as part of the executive's Article II powers over matters of national security.⁶⁰ The Constitution provides little guidance for how much deference judges should give to executive claims of secrecy.⁶¹ In the extraordinary rendition context, some courts have sought to ground the standard for judicial deference in the executive's Article II powers, relying on dicta from *United States v. Nixon* for the proposition that "courts have traditionally shown the utmost deference" to claims of state secrets.⁶² However, the state secrets privilege is judge-made law and the principal cases laying out the contours of the privilege prescribe a more nuanced standard of deference.

54. *Jeppesen*, 614 F.3d at 1090.

55. See CLARKE, *supra* note 48, at 126.

56. *Jeppesen*, 614 F.3d at 1094 (Hawkins, J., dissenting).

57. See generally Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 *FORDHAM L. REV.* 1931, 1935 (2007).

58. *United States v. Nixon*, 418 U.S. 683, 710 (1974); see U.S. CONST. art. II.

59. See Michael H. Page, *Judging Without the Facts: A Schematic for Reviewing State Secrets Privilege Claims*, 93 *CORNELL L. REV.* 1243, 1269 (2008).

60. *Id.* at 1269–1271.

61. *Id.*

62. *Nixon*, 418 U.S. at 710; see, e.g., *El-Masri v. United States*, 479 F.3d 296, 303–04 (4th Cir. 2007) (explaining that "[t]he state secrets privilege . . . has a firm foundation in the Constitution, in addition to its basis in the common law of evidence").

A. ORIGINS OF THE STATE SECRETS PRIVILEGE IN
U.S. COMMON LAW

In 1949, three widows of civilians killed in an Air Force plane crash filed a lawsuit against the U.S. government under the Tort Claims Act.⁶³ During pretrial discovery, the plaintiffs filed a Rule 34 motion under the Federal Rules of Civil Procedure to compel the Air Force's official accident investigation report.⁶⁴ The district court rejected the government's initial claim of privilege over the requested materials on grounds that the plaintiffs had shown good cause for production.⁶⁵ The Secretary of the Air Force then filed a separate, formal claim of privilege, objecting to production "for the reason that the aircraft in question, together with the personnel on board, were engaged in a highly secret mission of the Air Force."⁶⁶ Both the district court and the court of appeals rejected the claims of privilege and stipulated the government's liability for negligence pursuant to Rule 37.⁶⁷ Judgment was entered for the plaintiffs and the issue of whether the government had a valid claim of privilege was appealed to the Supreme Court, which issued the primary opinion relied on by courts in cases where the state secrets privilege is invoked.⁶⁸

The Supreme Court clarified immediately that the state secrets privilege falls within the concept of "privileges" as that term is used in the Federal Rules of Civil Procedure and the law of evidence.⁶⁹ With that as the backdrop, the Court briefly laid out the key features of the privilege developed at common law that were examined in the discussion of the *Jeppesen* case above—the procedural steps that require a "formal claim" by the head of the department controlling the matter after "personal consideration by that officer" and the "reasonable danger" standard by which the court judges the validity of the claim.⁷⁰

The remainder of the *Reynolds* opinion primarily addresses how much deference a court should afford the government in determining whether invocation of the privilege is appropriate.⁷¹ This requires a delicate balance between adequate judicial inquiry to satisfy the court that the circumstances for the privilege are appropriate while preventing "a disclosure of the very thing the privilege is designed to protect."⁷² Drawing upon the privilege against self-incrimination, the Court proposed a compromise of deference to the executive without abdicating "[j]udicial control over the evidence in a case . . . to the caprice of executive of-

63. *United States v. Reynolds*, 345 U.S. 1, 2–3 (1953).

64. *Id.* at 3; *see* FED. R. CIV. P. 34 (allowing for a party to serve on another party a request for non-privileged material).

65. *Reynolds*, 345 U.S. at 3–4.

66. *Id.* at 4.

67. *Id.* at 5; *see* FED. R. CIV. P. 37 (Failure to Comply with a Court Order).

68. *Reynolds*, 345 U.S. at 5–6; *see* *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010); *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007).

69. *Reynolds*, 345 U.S. at 6–7.

70. *Id.* at 7–8.

71. *See id.* at 8–12.

72. *Id.* at 8.

ficers.”⁷³ However, according to the Court, judicial review of the evidence that the government claims as privileged should not be conducted in every case.⁷⁴ A court may decide that the claim of privilege is appropriate if it determines “from all the circumstances of the case” that the “reasonable danger” standard has been met.⁷⁵ If use of privilege is deemed appropriate under this test, the Court finds it inappropriate for even the judge to conduct an *in camera* review.⁷⁶

The plaintiffs’ showing of necessity for the evidence in question will determine the amount of scrutiny a court should give to a claim of privilege.⁷⁷ In *Reynolds*, the plaintiffs’ showing of need for the accident investigation report to prove causation was relatively weak because of an available alternative.⁷⁸ But even the strongest showing of need cannot outweigh a valid claim of privilege “if the court is ultimately satisfied that military [or state] secrets are at stake.”⁷⁹ It is important to note that although the Court found a valid assertion of the privilege over the accident investigation report, it did not consider the possibility of dismissal at the pleadings stage, but rather remanded the case for further proceedings in the district court.⁸⁰ Dismissal of an entire case on state secrets grounds should only be done in exceptional circumstances, as the following material illustrates.

Totten v. United States provides a narrow, categorical bar to adjudication of claims premised on the very existence of a state secret.⁸¹ In *Totten*, decided in 1876, the estate of a Civil War spy sued the United States for breach of a contract to compensate the spy for providing espionage services to the government during wartime.⁸² The Supreme Court stated “as a general principle that public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential.”⁸³ The Court barred the suit entirely because the very existence of an espionage contract with the government was a “fact not to be disclosed.”⁸⁴ In 2005, the Supreme Court reaffirmed *Totten*’s general principle that “lawsuits premised on alleged espionage agreements are altogether forbidden.”⁸⁵

Other courts have broadened the scope of the *Totten* bar beyond the

73. *Id.* at 10.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 11.

78. *Id.* (explaining that the “surviving crew members [were made] available for examination”).

79. *Id.*

80. *Id.* at 12.

81. *See Totten v. United States*, 92 U.S. 105, 105–06 (1875).

82. *Id.*

83. *Id.* at 107.

84. *Id.*

85. *Tenet v. Doe*, 544 U.S. 1, 9 (2005).

context of contracts to perform espionage for the government.⁸⁶ Most courts now hold that where “the very subject matter of the action” is “a matter of state secret,” such as the existence of an espionage contract or a nuclear weapons storage facility, then an action must be “dismissed on the pleadings without ever reaching the question of evidence.”⁸⁷ The Ninth Circuit in *Mohamed v. Jeppesen Dataplan, Inc.* expressly refused to decide that case based on *Totten*, citing difficulties determining the precise scope of its application.⁸⁸ Yet the en banc majority’s finding that dismissal of the case on the pleadings was appropriate under *Reynolds* misguidedly relied on two cases colored by *Totten*, which are readily distinguishable.

B. *MOHAMED V. JEPPESEN DATAPLAN, INC. REVISITED*

In determining that dismissal on the pleadings was appropriate under *Reynolds*, the *Jeppesen* court misguidedly relied on the Fourth Circuit case *El-Masri v. United States* and the Ninth Circuit case *Al-Haramain Islamic Foundation, Inc. v. Bush*. The facts from *El-Masri* are very similar to those in *Jeppesen* and do not merit discussion here. The *El-Masri* court, relying on the dicta from *Nixon* that executive claims of secrecy should be accorded “utmost deference” pursuant to Article II, reasoned that the state secrets privilege “has a firm foundation in the Constitution.”⁸⁹ In an opinion that conflated *Totten* with *Reynolds*, the court took an expansive view of the “very subject matter” principle from *Totten*, holding that dismissal is required under *Totten* if the case cannot be “litigated without threatening the disclosure of [] state secrets.”⁹⁰

Moreover, the *Jeppesen* court erroneously relied on *Al-Haramain* for the proposition that cases not falling within the purview of *Totten* may still be appropriately dismissed under *Reynolds* in certain circumstances.⁹¹ In *Al-Haramain*, the plaintiffs’ entire case was contingent upon their obtaining a sealed document in possession of the government.⁹² There, the Ninth Circuit dismissed the case on the pleadings after determining that the critical document was a matter of state secrets.⁹³ Unlike the case in *Jeppesen*, the *Al-Haramain* court concluded that while the

86. See, e.g., *Weinberger v. Catholic Action of Haw./Peace Educ. Project*, 454 U.S. 139, 146–147 (1981) (Plaintiffs sought to compel an environmental impact statement from the Navy under the National Environmental Policy Act of 1969 regarding a military facility where the Navy allegedly proposed to store nuclear weapons. The Court held that the allegations were “beyond judicial scrutiny” because, “[d]ue to national security reasons, . . . the Navy can neither admit nor deny that it proposes to store nuclear weapons at [the facility].”) (citing *Totten*, 92 U.S. at 107).

87. *United States v. Reynolds*, 345 U.S. 1, 11 n.26 (1953).

88. *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1085 (9th Cir. 2010).

89. *El-Masri v. United States*, 479 F.3d 296, 304 (4th Cir. 2007).

90. *Id.* at 308 (emphasis added).

91. *Jeppesen*, 614 F.3d at 1089.

92. *Al-Haramain Islamic Found., Inc. v. Bush* 507 F.3d 1190, 1205 (9th Cir. 2007) (explaining that “[the plaintiff] has indicated that its ability to establish injury in fact hinges entirely on a privileged document”).

93. *Id.*

very subject matter of the suit was not a state secret, the plaintiff lacked standing, and thus its claim had to be dismissed.⁹⁴ The *Jeppesen* majority's reliance on both *El-Masri* and *Al-Haramain* does not satisfy the requirements to justify dismissal under *Reynolds*.

While dismissal is acceptable under the narrow "very subject matter" test of *Totten*, or in an exceptional case like *Al-Haramain* where the plaintiff lacks standing altogether, the result reached in *Jeppesen* stretched the state secrets doctrine to a new limit. *Jeppesen* answered a question under the guise of a *Reynolds*-only analysis that is not expressly contemplated by *Reynolds*: whether the case must be dismissed entirely as a result of the successful claim of privilege.⁹⁵ Courts have often relied on a mosaic theory as justification for upholding assertions of the state secrets privilege.⁹⁶ "The significance of one item of information," one articulation of the theory goes, "may frequently depend upon knowledge of many other items of information,"⁹⁷ which, when pieced together like a "jigsaw puzzle,"⁹⁸ illustrate the reasonable danger to national security interests that disclosure could pose. The theory is premised on the belief that only the executive—it having authority over national security policy—is competent to judge the significance of individual items of information.⁹⁹ If a court finds that an item of information is a state secret based on a *Reynolds* analysis in light of the mosaic theory, and that item is essential to the plaintiff's case, then dismissal should logically be appropriate under *Reynolds*.

But instead of proceeding to discovery and scrutinizing the government's assertion of the privilege over individual items of evidence, the *Jeppesen* court relied on the mosaic of extraordinary rendition upfront to deny an entire case on the grounds that the facts underlying the plaintiffs' claims are too intertwined with state secrets to risk going forward at all.¹⁰⁰ The court relied exclusively on the government's public and classified declarations to determine that dismissal is appropriate because "there is no feasible way to litigate *Jeppesen*'s alleged liability without creating an unjustifiable risk of divulging state secrets."¹⁰¹ But the plaintiffs had not made a showing of need for particular evidence and the government had not filed an answer to their complaint. The court deferred to the government's view of the mosaic because there was a chance that the government or the court might make a mistake causing disclosure of state

94. *Id.* at 1198, 1205.

95. *See supra* Part II.

96. *See Herring v. United States*, No. Civ.A.03-CV-5500-LDD, 2004 WL 2040272, at *5 (Sept. 10, 2004); *Ellsberg v. Mitchell*, 709 F.2d 51, 58 (D.C. Cir. 1983); *Halkin v. Helms* 598 F.2d 1, 8–9 (D.C. Cir. 1978) [hereinafter *Halkin I*].

97. *Halkin I* at 8–9.

98. *Herring*, WL 2040272 at *5.

99. Page, *supra* note 59, at 1267–69.

100. *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1087 (9th Cir. 2010).

101. *Id.* at 1088.

secrets during discovery.¹⁰²

Claims of secrecy at this stage of the litigation, as the five-judge dissent in *Jeppesen* pointed out, are “necessarily broad and hypothetical” because they are grounded in speculation about how the litigation might proceed.¹⁰³ *Reynolds* makes clear that “[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers.”¹⁰⁴ Rather than remanding the case for further factual findings on Jeppesen’s ability to defend itself using non-privileged evidence, dismissal made abdication of judicial control over the evidence the precise result in this case. Where a court decides or assumes that a plaintiff’s prima facie case and a defendant’s defenses may not inevitably depend on privileged evidence, as is the case in both *Reynolds* and *Jeppesen*,¹⁰⁵ the court should not dismiss the case at the pleadings stage. Fear of “compelled or inadvertent disclosure”¹⁰⁶ due to mistake during discovery is not the test; the test, rather, is if compulsion of evidence is allowed, whether it will expose “military matters, which, in the interest of national security, should not be divulged.”¹⁰⁷ As a former federal judge aptly noted, “In an age when it can be argued that just about every sliver of information has some connection with intelligence and national security, too much judicial deference may be as great a danger to popular government as too little.”¹⁰⁸

C. THE FEDERAL RULES OF CIVIL PROCEDURE SUPPORT ADJUDICATING CLAIMS OF STATE SECRETS DURING DISCOVERY

In light of the Federal Rules of Civil Procedure, *Reynolds* supports the conclusion that deciding what is, or is not, indispensable to a party’s claim or defense in a case should be saved for discovery where the subject matter itself is not a state secret.¹⁰⁹ Rule 8(a) of the Federal Rules of Civil Procedure requires a plaintiff to state a claim for relief that contains “a short and plain statement of the claim showing the pleader is entitled to relief.”¹¹⁰ The primary function of the claim under Rule 8(a) has tradi-

102. *Id.* at 1095 n.4 (Hawkins, J., dissenting) (“Dismissing this suit out of fear of ‘compelled or inadvertent disclosure’ of secret information during the course of litigation assumes that the government might make mistakes in what it produces, or that district courts might compel the disclosure of documents legitimately covered by the state secrets privilege.”).

103. *Id.* at 1096 (Hawkins, J., dissenting).

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

105. *See Reynolds*, 345 U.S. at 12 (holding that “the case will be remanded to the District Court for further proceedings consistent with the views expressed in this opinion”); *Jeppesen*, 614 F.3d at 1087 (“we assume without deciding that plaintiffs’ prima facie case and Jeppesen’s defenses may not inevitably depend on privileged evidence”).

106. *Jeppesen*, 614 F.3d at 1087.

107. *Reynolds*, 345 U.S. at 10.

108. The Honorable Patricia M. Wald, *Two Unsolved Constitutional Problems*, 49 U. PITT. L. REV. 753, 761 (1988).

109. *See Jeppesen*, 614 F.3d at 1090 (“We do not hold that the existence of the extraordinary rendition program itself is a state secret.”).

110. FED. R. CIV. P. 8(a).

tionally been to give notice to the defendants.¹¹¹ However, the practice of notice pleading has been called into question after *Bell Atlantic Corporation v. Twombly*¹¹² and *Ashcroft v. Iqbal*¹¹³ interpreted Rule 8(a) to be a “plausibility” pleading standard, requiring more developed factual allegations to survive a Rule 12(b)(6) motion to dismiss.¹¹⁴ In *Jeppesen*, the Ninth Circuit, on rehearing en banc, assumed that the plaintiffs could plead a legally sufficient prima facie case without use of privileged evidence.¹¹⁵ The CIA had declassified documents describing extraordinary rendition and particular interrogation techniques to which the plaintiffs allege they were subjected.¹¹⁶ Jeppesen’s admitted involvement was well publicized;¹¹⁷ numerous investigative reports by European officials confirm that fact.¹¹⁸ Further, courts in the United States and United Kingdom had acknowledged the fact of Mohamed’s torture, which the government had not disputed.¹¹⁹

The court’s task in its rehearing should have been to review the district court’s grant of the government’s motion to dismiss by weighing the legal sufficiency of the plaintiffs’ complaint.¹²⁰ In granting that motion, the district court cited Rule 12(b)(1) of the Federal Rules, which calls for dismissal for “lack of subject matter jurisdiction” because the court found that the “very subject matter of the case [was] a state secret.”¹²¹ On appeal, the original three-judge panel of the Ninth Circuit reversed the grant of the 12(b)(1) motion, concluding that the “very subject matter” was not a state secret and further that *Reynolds* could not be the basis for a Rule 12(b)(6) motion for “failure to state a claim upon which relief can be granted” either.¹²² As numerous courts have demonstrated, the purpose of a Rule 12(b)(6) motion is to test the sufficiency of the complaint and not to resolve any factual disputes or to assess the plaintiff’s likelihood to win.¹²³ But assertion of an evidentiary privilege is not meant to test the sufficiency of a complaint; instead, its relevance concerns whether evidence is available to later support that complaint.¹²⁴ Thus, a well-pleaded

111. 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1202 (3d ed. 2004).

112. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

113. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

114. 5 WRIGHT & MILLER, *supra* note 111, at § 1202 (3d ed. Supp. 2015).

115. *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1087 (9th Cir. 2010).

116. Reply Brief of Plaintiffs-Appellants on Rehearing En Banc at 18–21, *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010) (No. 08-15693).

117. See Mayer, *supra* note 37.

118. Reply Brief of Plaintiffs-Appellants on Rehearing En Banc at 22–24, *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010) (No. 08-15693).

119. See *supra* text accompanying notes 47–49; R (Binyam Mohamed) v. Sec’y of State for Foreign and Commonwealth Affairs, [2010] EWCA Civ 65.

120. *Jeppesen*, 614 F.3d at 1095 (Hawkins, J., dissenting).

121. *Mohamed v. Jeppesen Dataplan, Inc.*, 539 F. Supp. 2d 1128, 1135–36 (N.D. Cal. 2008).

122. *Mohamed v. Jeppesen Dataplan, Inc.*, 579 F.3d 943, 949, 961 (9th Cir. 2009) (quoting Fed. R. Civ. Pro. 12(b)(6)).

123. 5B WRIGHT & MILLER, *supra* note 111 at § 1356.

124. *Jeppesen*, 614 F.3d at 1099 (Hawkins, J., dissenting); *Jeppesen*, 579 F.3d at 961.

complaint and a responsive pleading should be prerequisites for invocation of the state secrets privilege, barring exceptional circumstances.

Changing the status quo will require courts to enforce principles and procedures that more closely scrutinize assertions of the state secrets privilege. The interests in accountability and justice merit the additional cost that it will take to relieve the clash of values inherent in invocation of the privilege. While there is no clear answer as to how courts can ensure that secrecy is maintained and justice is done, the following section will examine the underlying tension more deeply and offer proposals to improve the current state of affairs.

III. INHERENT PROBLEMS WITH THE STATUS QUO AND GUIDING PRINCIPLES FOR CHANGE

A. THE SECRECY DILEMMA

Robert Chesney, in a recent article, describes the post-Nixon era in 1975 as a time in which Watergate and abusive surveillance practices had caused public confidence in government to fall to its lowest ebb in years.¹²⁵ The public mood at that time highlights “[t]he Secrecy Dilemma”—the “clash of values implicit in the government’s invocation of the state secrets privilege.”¹²⁶ Attorney General Edward Levi, speaking to an audience at the Bar Association of New York City in 1975, recognized that the need for governmental secrecy comes at a price to accountability and the democratic process.¹²⁷ And, this tension between claims of secrecy for security reasons and the public’s right to know is heightened when an individual plaintiff is seeking redress in court for alleged government wrongdoing.¹²⁸ Chesney explains that what is at stake in cases involving individual litigants is not merely generalized democratic accountability, but “enforcement of the rule of law itself.”¹²⁹

It may seem that proceeding to discovery in extraordinary rendition cases merely delays the inevitable because assertions of the state secrets privilege during discovery will ultimately lead to dismissal, only at exceedingly greater cost. Yet denying victims of extraordinary rendition the opportunity to even establish the legal sufficiency of their complaints tilts the balance of competing interests too far in favor of the government.¹³⁰ Academic criticism of the state secrets privilege has emphasized the grave potential for abuse when the judiciary does not provide an adequate check on its invocation. One writer’s observation that an “incentive to keep secrets is that national security secrecy ends public inquiry into allegations of misconduct” appears to be extremely relevant in extraordinary

125. Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249, 1263-64 (2007).

126. *Id.* at 1263.

127. *Id.* at 1263-66.

128. *Id.* at 1266.

129. *Id.*

130. *Id.* at 1266, 1314.

rendition cases where there are underlying allegations of torture and degrading treatment.¹³¹ Over time, courts have rejected the principle that the privilege cannot be invoked in response to allegations of unlawful government conduct.¹³² Nevertheless, federal courts should more closely scrutinize governmental assertions of the privilege than is currently happening under the status quo to uphold the rule of law and prevent governmental abuse.

This article proposes that by following some of the procedures and principles of the Freedom of Information Act, courts in extraordinary rendition cases can tilt the balance of competing interests back toward democratic accountability and enforcement of the rule of law. In 1967, Congress passed the Freedom of Information Act (FOIA) to promote governmental accountability and protect the public's right to know about governmental operations within executive branch agencies.¹³³ FOIA provides broad public access to records from federal agencies to support the public's generalized right to know about their government and is subject to nine exemptions whereby the governmental agency with control over the information at issue can exempt it from disclosure.¹³⁴ Exemption one, which is most relevant to the state secrets privilege, makes FOIA inapplicable to records "to be kept secret in the interest of national defense or foreign policy" when such matters are properly classified by the executive under criteria set by executive order.¹³⁵ Congress strengthened FOIA post-Watergate with the passage of the Privacy Act of 1974 (Privacy Act), which encourages more judicial scrutiny of government exemption claims under FOIA.¹³⁶

While the purpose of FOIA is not to directly benefit plaintiffs in court,¹³⁷ it can greatly impact privileges and discovery in litigation in a number of ways.¹³⁸ First, FOIA exemptions help define an outer boundary to government privileges.¹³⁹ Second, FOIA strengthens the judiciary's position in compelling disclosure of information.¹⁴⁰ Third, FOIA specifically authorizes judicial review in camera of records over which the government has claimed an exemption and, further, calls upon the agency to

131. Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131, 153 (2006).

132. See Chesney, *supra* note 125, at 1295.

133. See Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2012).

134. *What is FOIA?*, FOIA.GOV, <http://www.foia.gov/about.html> [<https://perma.cc/9GJL-SZLJ>].

135. 5 U.S.C. § 552(b)(1)(A)(B) (2012).

136. 2 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 5:53 (3d ed. 2007).

137. CAUSE OF ACTION: ADVOCATES FOR GOVERNMENT ACCOUNTABILITY, GRADING THE GOVERNMENT: A LOOK AT HOW FEDERAL AGENCIES MEASURE UP ON FOIA REQUESTS Vol. I 5 (2013), https://web.archive.org/web/20150428103643/http://gradingthegovernment.com/wp-content/uploads/GTG_Final1.pdf (reporting that a study of 16 federal agencies revealed an average FOIA response time of 75 days).

138. 2 MUELLER & KIRKPATRICK, *supra* note 136, § 5:53.

139. *Id.*

140. *Id.*

prove its claim of exemption.¹⁴¹ FOIA can be used in two ways to alleviate the heightened tension of the secrecy dilemma in extraordinary rendition cases: (1) as a supplementary tool to support allegations of unlawful government conduct and expose governmental changes in policy and (2) as a model of specific procedures and principles that, if adopted by courts, would better ensure enforcement of the rule of law.

B. FOIA AS A PERSUASIVE SUPPLEMENTARY TOOL

One need look no further than *Reynolds* itself to see how a successful FOIA request exposed an abuse of the state secrets privilege and supplemented a plaintiff's claim against the federal government. Nearly fifty years after *Reynolds*, family members of the crash victims filed repeated, persistent requests under FOIA for the accident investigation report that had been withheld pursuant to the state secrets privilege.¹⁴² The efforts of the family members and others with similar interests eventually led the Air Force to declassify the report at issue in *Reynolds*.¹⁴³ The victims' family members found to their dismay that the accident investigation report, which formed the basis for the modern articulation of the state secrets privilege, lacked any detailed information about a secret mission or secret equipment.¹⁴⁴ Instead, the report contained information about the government's negligence in maintaining the plane, including names of those who were at fault.¹⁴⁵

One of the family members subsequently filed suit against the U.S. government under Federal Rule of Civil Procedure 60(b), claiming that the settlement reached fifty years earlier in *Reynolds* was procured through a fraudulent claim of privilege.¹⁴⁶ The court considered the contents of the accident investigation report, now a matter of public record, in determining whether to grant the government's Rule 12(b)(6) motion to dismiss.¹⁴⁷ The plaintiff there was unsuccessful in proving fraud on the court under Rule 60(b).¹⁴⁸ However, the case illustrates both how easily governmental agencies can mislead courts when asserting the privilege and how courts take into consideration matters of public record supporting plaintiffs' allegations when ruling on a 12(b)(6) motion to dismiss.

FOIA can be a persuasive supplementary tool for litigants challenging a governmental assertion of the state secrets privilege in two powerful ways. First, FOIA is a powerful tool for obtaining governmental records that plaintiffs in extraordinary rendition cases can use to challenge a Rule

141. *Id.*

142. LOUIS FISHER, IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE *Reynolds* Case 165-66 (2006).

143. *Id.*

144. *Id.* at 167-68.

145. *Id.* at 166.

146. See *Herring v. United States*, No. Civ.A.03-CV-5500-LDD, 2004 WL 2040272, at *2 (E.D. Pa. Sept. 10, 2004).

147. *Id.* at *7.

148. *Id.* at *4.

12(b) motion to dismiss and to supplement evidence obtained during discovery. In ruling on a 12(b)(6) motion, courts may consider “matters of public record . . . items appearing in the record of the case, and exhibits attached to the complaint whose authenticity is unquestioned.”¹⁴⁹ To this point, however, public documentation about extraordinary rendition has added very little persuasive punch to plaintiffs’ arguments for survival against a 12(b) motion to dismiss. Second, FOIA disclosures serve as an indicator of governmental policy regarding the sensitivity of certain items. Courts should be wary when the government makes blanket assertions of the state secrets privilege over subject matter that has been widely exposed through FOIA requests.

Thousands of pages of documents obtained through FOIA requests expose specific details about the CIA’s Extraordinary Rendition Program, including specific torture methods and techniques.¹⁵⁰ For example, a declassified CIA Inspector General’s Report from May 7, 2004, entitled “Counterterrorism Detention and Interrogation Activities” describes specific confinement and interrogation methods.¹⁵¹ And, a declassified CIA “Background Paper” describes the specific manner in which detainees were transported to CIA black sites as part of the rendition program.¹⁵² The document describes how detainees experience “significant apprehension . . . because of the enormity and suddenness of the change in environment” and “the uncertainty about what will happen next” while being “flown to a Black Site . . . securely shackled and . . . deprived of sight and sound through the use of blindfolds, earmuffs, and hoods.”¹⁵³ Moreover, the plaintiffs in *Jeppesen* proffered hundreds of pages of non-secret information, including media reports, flight records, and foreign investigations, to support their allegations that Jeppesen provided flight and logistical support to extraordinary rendition that they knew or reasonably should have known would result in plaintiffs’ being tortured.¹⁵⁴ Yet even the mountain of publicly available information did not assuage the fears of the *Jeppesen* court that proceeding with the case posed an unjustifiable risk of disclosing state secrets.¹⁵⁵

Beyond their value in supporting allegations of government misconduct, FOIA-obtained documents revealing specific detention and interrogation means and methods signify a broader policy shift that cuts through the reasoning of the *Jeppesen* court. The amount and type of information about extraordinary rendition in the public realm changed significantly

149. 5 WRIGHT & MILLER, *supra* note 111, at § 1357 (3d ed. 2004).

150. *The Torture Database*, ACLU, <https://www.thetorturedatabase.org> [perma.cc/JE2L-YDNJ] (last visited Jan. 29, 2016).

151. Special Review: Counterterrorism Detention and Interrogation Activities (May 7, 2004), <https://fas.org/irp/cia/product/ig-interrog.pdf> [perma.cc/J2D6-UTVJ].

152. Background Paper on CIA’s Combined Use of Interrogation Techniques (Dec. 30, 2004), <https://www.aclu.org/sites/default/files/torturefoia/released/082409/olcremand/2004olc97.pdf> [perma.cc/E7DE-UNDT].

153. *Id.*

154. *Mohamed v. Jeppesen*, 614 F.3d 1070, 1089, 1102–1131 (9th Cir. 2010).

155. *See id.* at 1089–90.

from the time of General Hayden's first formal claim of privilege in the case to the time the Ninth Circuit conducted the en banc rehearing.¹⁵⁶ By the time the final disposition of the case was underway, General Hayden's claim of privilege rested on an outdated premise that the CIA's detention and interrogation program was one of the government's most important tools in combating terrorism.¹⁵⁷ To the contrary, President Obama had formally eliminated the detention and interrogation program and ordered the CIA to close any currently operating detention facilities in a 2009 Executive Order entitled "Ensuring Lawful Interrogations."¹⁵⁸ Further, the president declassified key memos in addition to the FOIA-obtained documents mentioned above that confirm interrogation methods like "prolonged sleep deprivation, forced nudity, dietary manipulation, and stress positions."¹⁵⁹

Two additional points that accentuate the significance of this policy shift should provide greater persuasive force to plaintiffs seeking to overcome a motion to dismiss based on the state secrets privilege. First, when put into perspective, FOIA-obtained documents containing gritty details about extraordinary rendition are noteworthy not just for their content, but for the fact that they were released at all. This is because, in the years following 9/11, the government proved to be nearly impervious to attacks by FOIA requesters, especially in cases involving exemption one.¹⁶⁰ In a 2001 memorandum, Attorney General John Ashcroft gave the following message to executive agencies regarding FOIA requests: "[Y]ou can be assured that the Department of Justice will defend your decisions unless they lack a sound legal basis."¹⁶¹ Rhetoric from other Bush Administration officials showed support for the policy promulgated by the Attorney General that harm to national security, rather than openness, should be presumed.¹⁶² Second, among those executive agencies that have processed FOIA requests, the CIA has consistently been the most resistant to grant requests and the most impervious to court ordered disclosure.¹⁶³ In *CIA v. Sims*, the Supreme Court endorsed a highly deferential view to CIA withholding decisions, stating that "the Director [of Central Intelligence] . . . has power to withhold superficially innocuous informa-

156. Reply Brief of Plaintiffs-Appellants on Rehearing En Banc at 18–21, *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010) (No. 08-15693).

157. *Id.* at 19.

158. *Id.*

159. *Id.* at 20.

160. David E. Pozen, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 *YALE L.J.* 628, 637–38 (2005).

161. Memorandum for Heads of All Federal Departments and Agencies, OFFICE OF THE ATTORNEY GENERAL (Oct. 12, 2001), <http://www.justice.gov/archive/oip/011012.htm> [<https://perma.cc/L9KW-WYMB>].

162. See Memorandum from Laura L.S. Kimberly, Acting Dir., Info. Sec. Oversight Office, to Departments and Agencies (March 19, 2002), <http://www.fas.org/sgp/bush/wh031902.html> [<https://perma.cc/N734-BMNA>] (instructing agencies to take "appropriate actions to safeguard sensitive but unclassified information related to America's homeland security").

163. Pozen, *supra* note 160, at 635, 638.

tion on the ground that it might enable an observer to discover [through mosaic-making] the identity of an intelligence source” and that the CIA Director’s decisions “are worthy of great deference.”¹⁶⁴

The declassification of documents related to enhanced interrogation and detention marks a shift in government policy that should favor plaintiffs seeking similar information from the government during discovery. Under Exemption Five of FOIA, the same privileges that the government routinely asserts in the civil litigation context may be asserted to deny a FOIA request.¹⁶⁵ In theory, plaintiffs who make a particularized showing of need during discovery should have greater access to privileged information than a FOIA requester where such a showing will not help.¹⁶⁶ Declassification of information about rendition through FOIA demonstrates a shift toward greater transparency on the subject and should thus increase a plaintiff’s ability to compel related information from the government during discovery where a particularized showing of need exists.

Given what is known about extraordinary rendition, Jeppesen’s involvement, and Mohamed’s torture as a matter of public record, the more unjustifiable risk lies in allowing a potential abuse of the privilege to go unchecked to the detriment of enforcement of the rule of law. In addition to FOIA’s value as a supplementary tool and indicator of policy change, its principles and procedures should serve as a model for courts handling assertions of the state secrets privilege in the extraordinary rendition context.

C. THE FOIA MODEL FOR COMPELLING INFORMATION FROM THE GOVERNMENT

The Obama Administration has issued a number of guidelines and explanatory materials to assist executive agencies in complying with (or denying) FOIA requests. In a 2009 memorandum, the president stated unequivocally that “[t]he Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails.”¹⁶⁷ The president called upon executive agencies not to withhold information on account of embarrassing facts, mistakes, and failures or because of “speculative or abstract fears.”¹⁶⁸ A variety of procedures contribute to carrying out the presumption of openness that in practice has led to the declassification of thousands of pages of documents concerning extraordinary rendition.¹⁶⁹

164. *CIA vs. Sims*, 471 U.S. 159, 178–79 (1985); *see also* Pozen, *supra* note 160, at 643.

165. P. STEPHEN GIDIÈRE III, *THE FEDERAL INFORMATION MANUAL: HOW THE GOVERNMENT COLLECTS, MANAGES, AND DISCLOSES INFORMATION UNDER FOIA AND OTHER STATUTES* 332 (2006).

166. *Id.*

167. Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4683 (Jan. 21, 2009).

168. *Id.*

169. *The Torture Database*, *supra* note 150.

FOIA strengthens the judiciary's position in compelling disclosure and authorizes judicial review in camera of records over which the government has claimed an exemption.¹⁷⁰ Litigation to compel disclosure under FOIA does not occur until a request has been made and records are improperly withheld.¹⁷¹ The court reviews the agency's decision to withhold de novo and the agency must overcome the presumption of openness by justifying its claim of exemption.¹⁷² In a suit to obtain compliance with a FOIA request seeking information about rendition, treatment, and deaths of detainees in U.S. custody, a U.S. district court ordered the Department of Defense to produce the requested documents or "a log identifying each and a specific claim of exemption."¹⁷³ Moreover, "[a]s to documents the existence of which the government contends it may be unable to confirm or deny, procedures can be established to identify such documents in camera or to a special master with proper clearance."¹⁷⁴ Ultimately, this litigation led to disclosure of the CIA's "Counterterrorism Detention and Interrogation Activities," which detailed egregious interrogation techniques that prompted a criminal investigation regarding CIA mistreatment of detainees abroad.¹⁷⁵

Procedures utilized in this example of FOIA litigation could be valuable tools for courts handling assertions of privilege. The *Vaughn* index, or privilege log, forces a government agency to provide an exemption for each specific record or portion of record it seeks to withhold and an accompanying affidavit to explain the decision.¹⁷⁶ Agencies are required to disclose "any reasonably segregable portion of a record" even if other portions are exempt.¹⁷⁷ Courts in extraordinary rendition cases should adopt a similar approach to force the government to assert privilege claims over specific documents. Individuals seeking records in a typical FOIA request must "reasonably describe[]" the records sought.¹⁷⁸ Describing features of a particular document or explaining a requester's needs should suffice, even if broadly stated.¹⁷⁹ Similarly, in complex civil litigation, document requests must describe each individual item or category of items with "reasonable particularity."¹⁸⁰

170. *See supra* text accompanying notes 140–41; 5 U.S.C. § 552(a)(4)(B).

171. 5 U.S.C. § 552(a)(4)(B) (2012).

172. *Id.*

173. *ACLU v. Dep't of Defense*, 339 F. Supp. 2d 501, 503 (S.D.N.Y. 2004).

174. *Id.* at 504.

175. *CIA Inspector General Reports on Detainee Abuse FOIA*, ACLU (Sept. 25, 2012), <https://www.aclu.org/cases/national-security/cia-inspector-general-reports-detainee-abuse-foia?redirect=NAtional-security/cia-inspector-general-reports-detainee-abuse-foia> [https://perma.cc/D8RJ-S3B5].

176. *See Vaughn v. Rosen*, 484 F.2d 820, 827-28 (D.C. Cir. 1973) (outlining a system of itemizing and indexing to support specific claims of exemptions as to particular portions of the document).

177. 5 U.S.C. § 552(b) (2012).

178. 5 U.S.C. § 552(a)(3)(A).

179. *A Citizen's Guide on Using the Freedom of Information Act and the Privacy Act of 1974 to Request Government Records*, H.R. 108-172, at 8, 108th Cong., 2d sess. (2003).

180. FED. R. CIV. P. 34(b).

Had the *Jeppesen* case proceeded to discovery, there was adequate information available to describe needed documents with reasonable particularity during discovery. Beyond the public records, Mohamed kept a detailed diary of his rendition experience, including approximate dates and the physical descriptions of his captors, and the government had conceded his torture in an earlier case.¹⁸¹ Further, all the plaintiffs had sufficient knowledge of their personal experiences¹⁸² that would allow them to make specific showings of need, such that the documents would not be difficult to describe. Assertion of privilege over documents relating to their rendition could be vetted via a *Vaughn* indexing procedure, followed by in camera review of documents the existence of which the government could neither confirm nor deny.

In certain cases in the Exemption One context, courts have not required a *Vaughn* index if it would reveal classified information itself.¹⁸³ Executive agencies, in response to requests for information in the Exemption One category, have in some cases responded with what is termed a “Glomar denial.”¹⁸⁴ A Glomar response is simply a refusal by the executive agency to either confirm or deny the existence of requested documents.¹⁸⁵ The underlying rationale in the FOIA context is that even acknowledging the existence of a requested record would “reveal classified sources or methods of obtaining foreign intelligence.”¹⁸⁶ Yet the court in *Bassiouni*, a FOIA case denying the requester a *Vaughn* index, indicated that had the requester asked the court for an in camera review of any existing records about him, the court could have judged his request by that method.¹⁸⁷ Courts have broad discretion to conduct in camera examinations of records in FOIA cases as a result of the 1974 amendments.¹⁸⁸

In *Jeppesen*, Mohamed’s request for information relating to his transfer from Moroccan to American custody and subsequent detention in a CIA “dark prison,” for instance, would likely be met with a Glomar response from the government. But given the broad public knowledge of the sources and methods of extraordinary rendition and Jeppesen’s involvement in it, not to mention President Obama’s formal elimination of the program, greater use of in camera review would be helpful to ensure that the government’s assertion is valid. In addition, courts have employed use of a special master to review privilege claims under Federal Rule of Civil Procedure 53 when the judge lacks the time or ability to effectively assess

181. *Mohammed v. Obama*, 689 F. Supp. 2d 38, 62 (D.D.C. 2009).

182. First Amended Complaint and Demand for Jury Trial at ¶¶ 90–235, *Mohamed v. Jeppesen Dataplan, Inc.*, 539 F. Supp. 2d 1128 (N.D. Cal. Aug. 1, 2007) (No. 5:07-cv-02798 JW).

183. See *Bassiouni v. CIA*, 392 F.3d 244, 247 (7th Cir. 2004).

184. John Y. Gotanda, *Glomar Denials Under FOIA: A Problematic Privilege and a Proposed Alternative Procedure of Review*, 56 U. PITT. L. REV. 165, 166 (1994).

185. *Id.*

186. *Bassiouni*, 392 F.3d at 246.

187. *Id.* at 247–48.

188. GIDIERE, *supra* note 165, at 312.

the claim.¹⁸⁹

IV. CONCLUSION

Federal courts have dramatically altered the scope and function of the state secrets privilege in extraordinary rendition cases, causing premature dismissal of well-pleaded complaints. This is especially true when the very subject matter of the suit is not a state secret and the parties' claims and defenses do not inevitably depend on privileged matter, as was the case in *Jeppesen*.¹⁹⁰ What is a common law evidentiary privilege has transformed into something more akin to an immunity doctrine.¹⁹¹ Rethinking the way courts handle invocations of the privilege could result in fewer dismissals on the pleadings in many types of cases while still maintaining the government's valid interest in not disclosing truly sensitive information. Reforming *Reynolds* could help clarify the courts' role in reviewing claims of state secrets and provide greater uniformity and fairness in judicial decision-making in this area.

Plaintiffs' necessity for information the government controls in extraordinary rendition cases is highly compelling as a general proposition. That necessity combined with allegations of torture and what is known about extraordinary rendition from government disclosures should, "from all the circumstances in the case,"¹⁹² prompt deeper judicial inquiry into the true motivation for the privilege's invocation. The Justice Department itself has stated in clear terms that it will not defend use of the privilege to hide governmental wrongdoing.¹⁹³ In keeping with the Obama Administration's theme of eliminating unlawful interrogation and detention techniques and promoting transparency about them, courts should remain highly skeptical of governmental assertions of the privilege in cases like *Jeppesen* where the motivation to conceal wrongdoing and embarrassment appears exceedingly high. The clear policy shift in the executive branch that has led to the disclosure of numerous documents describing extraordinary rendition should further bolster this skepticism and cause courts to probe deeper into invocation of the state secrets privilege.

FOIA may provide a powerful tool for litigants seeking to overcome assertions of the state secrets privilege in extraordinary rendition and other national security cases for both its ability to supplement discovery and for its procedures that could serve as a model for courts handling such cases. As a supplementary tool, FOIA requests have already produced thousands of pages of documents concerning the extraordinary rendition program.¹⁹⁴ Further, the increase in FOIA disclosures along

189. *Id.* at 341.

190. *See* Mohamed v. Jeppesen Dataplan Inc., 614 F.3d 1070, 1087 (9th Cir. 2010).

191. *See id.* at 1098 (Hawkins, J., dissenting).

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

193. Holder Memo, *supra* note 53, at 2.

194. *See supra* text accompanying note 150.

with other measures that the Obama Administration has taken to stop unlawful detention and interrogation signify a policy shift toward transparency that should favor litigants challenging government conduct in federal court in this area.¹⁹⁵

Procedures for asserting and responding to requests for records under FOIA may provide a framework for courts burdened with the difficult task of weighing significant public and private interests in privilege cases. Courts in extraordinary rendition cases, where an interest arguably much greater than the public's right to know is at stake,¹⁹⁶ should adopt some of these principles to encourage enforcement of the rule of law. Specifically, a presumption of openness should prevail and courts should make greater use of in camera review of specific documents as well as a *Vaughn* indexing procedure. As scholar Henry Shue put it, an intolerance for secret torture programs may lead to acts of terror that harm the public, but at least "civilized principles will survive for future generations, who may be grateful for our sacrifice so that they could lead decent lives."¹⁹⁷

195. See *supra* Part III(B),(C).

196. See *supra* text accompanying notes 128–29.

197. Henry Shue, *Torture in Dreamland: Disposing of the Ticking Bomb*, 37 CASE W. RES. J. INT'L. L. 231, 239 (2006).