

AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 11: The Contemporary Era – Separation of Powers

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

Binyam Mohamed and a group of other foreign nationals claimed that the Central Intelligence Agency detained them, transferred them to various other countries through a foreign rendition program, and interrogated and tortured them for information about terrorism. Jeppesen Dataplan was an American company that allegedly provided logistical support for the foreign rendition program. The plaintiffs filed suit for damages in federal district court under the Alien Tort Statute. Before Jeppesen could respond, the U.S. government intervened in the suit and requested that it be dismissed under the state secrets doctrine. The government contended that any litigation would require the disclosure of classified information essential to national security. The trial court dismissed the case. A three-judge panel of the Court of Appeals for the Ninth Circuit reversed and remanded the case back to the trial court for further review. The government appealed to the full circuit, and in a 6–5 en banc decision the court reversed the panel and affirmed the ruling of the district court. The U.S. Supreme Court refused to hear the case.

The case turned on the scope of the state secrets doctrine. The U.S. Supreme Court has held that the government has a privilege rooted in national security over some materials, and that such a privilege may preclude judicial proceedings that threaten to reveal classified information. The privilege has traditionally been applied narrowly, and this case involved the exclusion of privileged evidence at the very outset of a suit. While the dissent thought the district court dismissed the case too quickly and without an adequate independent review of the evidence in question, the majority of the circuit court argued that such an early dismissal of a suit was warranted if the privileged evidence was so entangled with the allegation that no reasonable defense could be made.

What is the constitutional basis for the state secrets doctrine? Why might it trump the due process rights of individual litigants? Should it matter that the litigants in this case are foreign nationals? How narrowly should courts apply the privilege? Should Jeppesen Dataplan be forced to defend itself, to the extent that it can, with publicly available information? Are Jeppesen Dataplan's due process rights violated if it is hamstrung in mounting a credible defense by the existence of classified information? How deferential should courts be to executive branch claims of national security privilege? Does the existence of the Alien Torts Statute, allowing such lawsuits, suggest that Congress meant to override executive claims of privilege? What kinds of alternative remedies might be available for these alleged human rights violations besides litigation?

JUDGE FISHER.

This case requires us to address the difficult balance the state secrets doctrine strikes between fundamental principles of our liberty, including justice, transparency, accountability and national security. Although as judges we strive to honor *all* of these principles, there are times when exceptional circumstances create an irreconcilable conflict between them. On those rare occasions, we are bound to follow the Supreme Court's admonition that "even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that [state] secrets are at stake." *United States v. Reynolds* (1953). After much deliberation, we reluctantly conclude this is such a case, and the plaintiffs' action must be dismissed. Accordingly, we affirm the judgment of the district court.

....

The Supreme Court has long recognized that in exceptional circumstances courts must act in the interest of the country's national security to prevent disclosure of state secrets, even to the point of dismissing a case entirely. See *Totten v. United States* (1876). The contemporary state secrets doctrine encompasses two applications of this principle. One completely bars adjudication of claims premised on state secrets (the "*Totten* bar"); the other is an evidentiary privilege (the "*Reynolds* privilege") that excludes privileged evidence from the case and may result in dismissal of the claims. . . .

....
[E]ven if the claims and defenses might theoretically be established without relying on privileged evidence, it may be impossible to proceed with the litigation because — privileged evidence being inseparable from nonprivileged information that will be necessary to the claims or defenses — litigating the case to a judgment on the merits would present an unacceptable risk of disclosing state secrets. . . .

....
The categorical, "absolute protection [the Court] found necessary in enunciating the *Totten* rule" is appropriate only in narrow circumstances. The *Totten* bar applies only when the "very subject matter" of the action is a state secret — i.e., when it is "obvious" without conducting the detailed analysis required by *Reynolds* "that the action [c]ould never prevail over the privilege." . . . Because the *Totten* bar is rarely applied and not clearly defined, because it is a judge-made doctrine with extremely harsh consequences and because conducting a more detailed analysis will tend to improve the accuracy, transparency and legitimacy of the proceedings, district courts presented with disputes about state secrets should ordinarily undertake a detailed *Reynolds* analysis before deciding whether dismissal on the pleadings is justified.

....
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. . . .

....
We have thoroughly and critically reviewed the government's public and classified declarations and are convinced that at least some of the matters it seeks to protect from disclosure in this litigation are valid state secrets, "which, in the interest of national security, should not be divulged."

... . The government's classified disclosures to the court are persuasive that compelled or inadvertent disclosure of such information in the course of litigation would seriously harm legitimate national security interests. In fact, every judge who has reviewed the government's formal, classified claim of privilege in this case agrees that in this sense the claim of privilege is proper

We are precluded from explaining precisely which matters the privilege covers lest we jeopardize the secrets we are bound to protect. . . . We can say, however, that . . . we have independently and critically confirmed that their disclosure could be expected to cause significant harm to national security.

Having determined that the privilege applies, we next determine whether the case must be dismissed under the *Reynolds* privilege. We have thoroughly considered plaintiffs' claims, several possible defenses and the prospective path of this litigation. We also have carefully and skeptically reviewed the government's classified submissions, which include supplemental information not presented to the district court. We rely heavily on these submissions, which describe the state secrets implicated here, the harm to national security that the government believes would result from explicit or implicit disclosure and the reasons why, in the government's view, further litigation would risk that disclosure.

... [W]e assume without deciding that plaintiffs' prima facie case and Jeppesen's defenses may not inevitably depend on privileged evidence. Proceeding on that assumption, we hold that dismissal is nonetheless required under *Reynolds* because there is no feasible way to litigate Jeppesen's alleged liability *without creating an unjustifiable risk of divulging state secrets*. . . .

We reach this conclusion because all seven of plaintiffs' claims, even if taken as true, describe Jeppesen as providing logistical support in a broad, complex process, certain aspects of which, the government has persuaded us, are absolutely protected by the state secrets privilege. Notwithstanding that some information about that process has become public, Jeppesen's alleged role and its attendant liability cannot be isolated from aspects that are secret and protected. Because the facts underlying plaintiffs' claims are so infused with these secrets, any plausible effort by Jeppesen to defend against them would create an unjustifiable risk of revealing state secrets, even if plaintiffs could make a prima facie case on one or more claims with nonprivileged evidence. . . .

Our holding today is not intended to foreclose — or to prejudge — possible nonjudicial relief, should it be warranted for any of the plaintiffs. Denial of a judicial forum based on the state secrets doctrine poses concerns at both individual and structural levels. For the individual plaintiffs in this action, our decision forecloses at least one set of judicial remedies, and deprives them of the opportunity to prove their alleged mistreatment and obtain damages. At a structural level, terminating the case eliminates further judicial review in this civil litigation, one important check on alleged abuse by government officials and putative contractors. Other remedies may partially mitigate these concerns, however, although we recognize each of these options brings with it its own set of concerns and uncertainties.

[T]hat the judicial branch may have deferred to the executive branch's claim of privilege in the interest of national security does not preclude the government from honoring the fundamental principles of justice. The government, having access to the secret information, can determine whether plaintiffs' claims have merit and whether misjudgments or mistakes were made that violated plaintiffs' human rights. Should that be the case, the government may be able to find ways to remedy such alleged harms while still maintaining the secrecy national security demands. . . .

For the reasons stated, we hold that the government's valid assertion of the state secrets privilege warrants dismissal of the litigation, and *affirm* the judgment of the district court. . . .

JUDGE BEA, concurring.

JUDGE HAWKINS, joined by JUDGE SCHROEDER, JUDGE CANBY, JUDGE THOMAS, and JUDGE PAEZ, dissenting.

I agree with my colleagues in the majority that *Reynolds* is a rule of evidence, requiring courts to undertake a careful review of evidence that might support a claim or defense to determine whether either could be made without resort to legitimate state secrets. I part company concerning when and where that review should take place.

This is important, because an approach that focuses on specific evidence after issues are joined has the benefit of confining the operation of the state secrets doctrine so that it will sweep no more broadly than clearly necessary. The state secrets doctrine is a judicial construct without foundation in the Constitution, yet its application often trumps what we ordinarily consider to be due process of law. . . . The majority opinion here accepts that threshold objection by the government, so Plaintiffs' attempt to prove their case in court is simply cut off. They are not even allowed to attempt to prove their case by the use of nonsecret evidence in their own hands or in the hands of third parties.

It is true that, judicial construct though it is, the state secrets doctrine has become embedded in our controlling decisional law. Government claims of state secrets therefore must be entertained by the judiciary. But the doctrine is so dangerous as a means of hiding governmental misbehavior under the guise of national security, and so violative of common rights to due process, that courts should confine its application to the narrowest circumstances that still protect the government's essential secrets. . . .

But a proper invocation of the privilege does not excuse a defendant from the requirement to file a responsive pleading; the obligation is to answer those allegations that can be answered and to make a specific claim of the privilege as to the rest, so the suit can move forward. . . .

. . . . The state secrets privilege, as an evidentiary privilege, is relevant not to the sufficiency of the *complaint*, but only to the sufficiency of evidence available to later *substantiate* the complaint.

[The *Reynolds* privilege] cannot be invoked to prevent a litigant from persuading a jury of the truth or falsity of an allegation by reference to non-privileged evidence, regardless of whether privileged evidence might also be probative of the truth or falsity of the allegation.

. . . .

The majority's analysis here is premature. This court should not determine that there is no feasible way to litigate Jeppesen's liability without disclosing state secrets; such a determination is the district court's to make once a responsive pleading has been filed, or discovery requests made. We should remand for the government to assert the privilege with respect to secret evidence, and for the district court to determine what evidence is privileged and whether any such evidence is indispensable either to Plaintiffs' *prima facie* case or to a valid defense otherwise available to Jeppesen. Only if privileged evidence is indispensable to either party should it dismiss the complaint.

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