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STATE SECRETS ARE A PRIVILEGE, NOT A RIGHT: CAN FOREIGN VICTIMS OF EXTRAORDINARY RENDITION AND TORTURE OVERCOME THE STATE SECRETS PRIVILEGE USING THE ALIEN TORT STATUTE?

I. INTRODUCTION

Torture: Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

United Nations Convention Against Torture, Article 1.1

I continue to believe that brutal methods of interrogation are inconsistent with our values, undermine the rule of law, and are not effective means of obtaining information. They alienate the United States from the world, and serve as a recruitment and propaganda tool for terrorists. They increase the will of our enemies to fight against us, and endanger our troops when they are captured. The United States will not use or support these methods.

President Barack Obama on the International Day in Support of Victims of Torture, June 26, 2010

At the time of his abduction, Binyam Mohamed was a twenty-eight-year-old Ethiopian citizen and legal resident of the United Kingdom.¹ United States officials arrested him in Pakistan on immigration charges and transported him to Morocco, shackled and blindfolded, while wearing a diaper and overalls.² After placing him in Moroccan custody, agents

¹ Mohamed v. Jeppesen Dataplan, Inc. (*Mohamed II*), 579 F.3d 943, 950 (9th Cir. 2009).

² *Id.* at 949-50.

routinely beat him to the point of breaking his bones.³ While blindfolded, he was forced to listen to loud music for hours at a time.⁴ Most disturbingly, Mohamed was cut with a scalpel all over his body, including his penis, while authorities poured a “hot, stinging liquid” into his open wounds.⁵ He was subsequently transferred back to American authorities and transported to Afghanistan, where he was forced to listen to the screams of women and children for twenty-four hours per day.⁶ Officials eventually transferred him to Guantanamo Bay, Cuba, and held him for nearly five years.⁷

While the policy of rendition has existed as a counterterrorism tool since the Clinton administration, President Bush expanded the program to its current state.⁸ The legality of the program, as well as legal violations in its pursuit, have thus far been insulated by the executive branch’s use of the state secrets privilege.⁹ The privilege is an evidentiary privilege that existed in common law and has evolved into a formalized judicial inquiry.¹⁰

Mohamed’s abduction is merely one story among countless others who have suffered similar treatment since September 11, 2001.¹¹ That

³ *Id.* at 949.

⁴ *Id.*

⁵ *Id.* at 950.

⁶ *Mohamed II*, 579 F.3d 943, 950 (9th Cir. 2009).

⁷ *Id.*

⁸ See Robert Johnson, Note, *Extraordinary Rendition: A Wrong Without A Right*, 43 U. RICH. L. REV. 1135, 1139-41 (2009) (examining evolution of extradition procedures). While rendition extradition is not a novel concept, using it as a national security measure began in the latter half of the twentieth century. *Id.* at 1138. When the United States started engaging Al-Qaeda in the mid-1990s, President Clinton directed the CIA to turn over terrorist suspects to foreign governments with existing legal processes for them. *Id.* at 1139. This program permitted the United States to return terrorist suspects and allow foreign governments to interrogate, try, and sentence them. *Id.* at 1140. After September 11, 2001, President Bush authorized an expansion of the rendition program. *Id.* This expansion included two important components: (1) the CIA no longer needed case-by-case approval from the State Department, White House, or Justice Department; and (2) renditions no longer required the terrorist suspect to be wanted in connection with a particular crime. *Id.* at 1141.

⁹ See Rita Glasionov, Note, *In Furtherance of Transparency and Litigants’ Rights: Reforming the State Secrets Privilege*, 77 GEO. WASH. L. REV. 458, 471 (2009) (arguing privilege’s contemporary application results in plaintiff routinely losing before reaching merits of case). Glasionov further argues the courts have applied the privilege as a presumption favoring governmental secrecy. *Id.* at 486.

¹⁰ See generally Michael H. Page, Note, *Judging Without the Facts: A Schematic for Reviewing State Secrets Privilege Claims*, 93 CORNELL L. REV. 1243, 1247-53 (2008) (describing evolution of state secrets privilege).

¹¹ See, e.g., *Mohamed II*, 579 F.3d 943, 949-50 (9th Cir. 2009) (describing claims of four other plaintiffs in case); *El-Masri v. United States*, 479 F.3d 296, 300 (4th Cir. 2007) (describing plaintiff’s allegations of kidnapping, transport, and torture); *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 253-55 (E.D.N.Y. 2006), *cert. denied*, 130 S. Ct. 3409 (2010) (alleging kidnapping and

day's events not only fundamentally changed the global paradigm in which the United States functioned, the events also provoked the Bush administration and Congress to "take the gloves off" when it came to interrogating terrorist suspects.¹² Since President Barack Obama's election in November 2008, the United States aggressively continues to assert the state secrets privilege despite its stated policies to the contrary.¹³ These alterations in domestic and foreign policy, however, have radical and far-reaching legal implications that still have yet to be fully realized.¹⁴ The executive branch and the national security infrastructure, firmly opposed to public scrutiny of its counter-terrorism operations, have repeatedly asserted the state secrets privilege not to safeguard information vital to national security, but to prevent plaintiffs from seeking *any* legal recourse.¹⁵

torture at U.S. and foreign officials' hands).

¹² See Johnson, *supra* note 8, at 1140 (citing *Joint Inquiry Into Intelligence Community Activities Before and After the Terrorist Attacks of September 11, 2001: Hearing Before the J. Inquiry of S. Select Comm. on Intelligence and H. Permanent Select Comm. on Intelligence*, 107th Cong. (Sept. 26, 2002) (testimony of Dir. Cofer Black, CIA Counterterrorist Center)).

¹³ See Memorandum from the Attorney General to Heads of Exec. Dep'ts. and Agencies, "Policies and Procedures Governing Invocation of the State Secrets Privilege" (Sept. 23, 2009) [hereinafter Holder memo] (available at <http://www.justice.gov/opa/documents/state-secrets-privileges.pdf>). The Holder memo aims to provide "greater accountability and reliability in the invocation of the state secrets privilege in litigation." *Id.* at 1. These new standards were proposed to "strengthen public confidence that the U.S. Government will invoke the privilege in court only when genuine and significant harm to national defense or foreign relations is at stake and only to the extent necessary to safeguard those interests." *Id.* According to the Holder memo, the Department of Justice will invoke the state secrets privilege in areas involving classified information. *Id.* When dealing with classified information, the Obama administration will assert the state secrets privilege when the unauthorized disclosure "reasonably could be expected to cause significant harm" to national security. *Id.* For information that is nonpublic but not classified, the United States will assert the privilege using the same standard. *Id.* The administration will do so with narrow tailoring, "only to the extent necessary to protect against the risk of significant harm to national security." *Id.* The Holder memo explicitly states the administration will not assert the privilege "in order to: (i) conceal violations of the law, inefficiency, or administrative error." *Id.* at 2; see also Spencer S. Hsu, *Obama Invokes 'State Secrets' Claim to Dismiss Suit Against Targeting of U.S. Citizen al-Aulaqi*, WASH. POST, Sept. 25, 2010 (available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/25/AR2010092500560.html>).

¹⁴ See Johnson, *supra* note 8, at 1160 (noting United States and its agents "largely insulated themselves from accountability" for extraordinary rendition program). The legal maneuvers involved have resulted in extraordinary rendition plaintiffs facing "unrealistic obstacles" in bringing suit against the U.S. *Id.* at 1166; see also Jason A. Crook, *From the Civil War to the War on Terror: The Evolution and Application of the State Secrets Privilege*, 72 ALB. L. REV. 57, 77 (2009) (noting privilege has "potential to radically alter the scope of litigation available to aggrieved parties"). Prospectively, the very existence of the privilege may have a chilling effect on future litigation. *Id.*

¹⁵ See Johnson, *supra* note 8, at 1166 (describing effect of Court's invocation of political question doctrine and executive branch assertion of privilege). Thus far, the United States has prevented *any* legal claim arising from extraordinary rendition. *Id.* (emphasis added).

This Note will explore whether individuals who have been abducted under the U.S. extraordinary rendition policy, and subjected to severe interrogation methods by both U.S. and foreign officials, have a remedy under the Alien Tort Statute (“ATS”).¹⁶ Part II will explore the factual and procedural history of Mohamed’s suit, and Part III will examine whether the ATS still provides a meaningful enforcement mechanism after lying dormant for nearly 180 years.¹⁷ Part III will also examine the context in which the state secrets privilege arose, and compare it with factual situations such as the one presented in *Mohamed I*.¹⁸ Finally, Part IV will argue for a narrow application of the state secrets privilege to counter its frequent use by the executive branch in cases where either foreign nationals or U.S. citizens are taken by extraordinary rendition and tortured.¹⁹ The recent ruling by the Supreme Court of the United States denying certiorari in *Arar v. Ashcroft*²⁰ in addition to the Ninth Circuit’s decision *en banc* in *Mohamed v. Jeppesen Dataplan, Inc.*²¹ have, as of this moment, denied an entire class harmed by the U.S. government from pursuing a judicial remedy.²²

II. MOHAMED V. JEPPESEN DATAPLAN, INC.: A SHELL GAME OF RESPONSIBILITY

This Note explores the confluence of international law, federal statute, and national security.²³ The plaintiffs’ allegations in the *Mohamed* cases, excruciating though they may be in their catalogue of human rights abuses, offer a guide to navigating the complexities inherent in such an expansive study.²⁴ In the *Mohamed* cases, the five plaintiffs allegedly suffered disparate—but schematically similar—treatment at the hands of both the U.S. and foreign governments.²⁵ The plaintiffs sought a remedy

¹⁶ See *infra* note 49 (citing text of ATS).

¹⁷ See *infra* Part III(B) (analyzing ATS’s evolution and contemporary application).

¹⁸ See *infra* Part III (examining whether plaintiffs’ claim in *Mohamed I* should be barred by state secrets privilege).

¹⁹ See *infra* Parts IV-V (stating analysis and conclusion).

²⁰ 130 S. Ct. 3409 (2010).

²¹ *Mohamed v. Jeppesen Dataplan, Inc. (Mohamed III)*, 614 F.3d 1070 (9th Cir. 2010).

²² See Crook, *supra* note 14, at 77 (warning future litigants of courts’ willingness to bar claims based on privilege).

²³ See *supra* Part I (introducing Note).

²⁴ See *Mohamed II*, 579 F.3d 943, 951-53 (9th Cir. 2009) (categorizing factual claims and legal elements of case).

²⁵ See *id.* at 949-50 (describing each plaintiff’s treatment). Swedish authorities captured Plaintiff Agiza, an Egyptian national, and transferred him to American custody. *Id.* at 949. Authorities flew him to Egypt, held him for five weeks in a windowless cell, and beat him

under the ATS for harms suffered during their rendition and subsequent interrogations.²⁶ After filing a complaint against Jeppesen, a corporation the plaintiffs asserted transported them during the rendition process, the U.S. government intervened as a defendant and obtained a dismissal from the federal district court.²⁷ The government asserted the state secrets privilege, and without the protected information, the plaintiffs had no justiciable action.²⁸ However, on appeal, a three-judge panel of the Ninth Circuit reversed and remanded the district court's decision for further examination.²⁹

Before further examination in the district court occurred, the entire Ninth Circuit granted an *en banc* rehearing to determine whether the plaintiffs' action could be dismissed.³⁰ Though the *Mohamed II* court voted unanimously to reverse and remand the case, the decision in

severely. *Id.* They also shocked him using electrodes attached to his ear lobes, nipples, and genitals. *Id.* Authorities detained Plaintiff Agiza for two-and-a-half years, gave him a six-hour trial, and sentenced him to fifteen years in Egyptian prison. *Id.* Plaintiff Britel is an Italian citizen of Moroccan origin detained by Pakistani officials and eventually transferred to American custody. *Id.* American officials dressed him in a diaper and overalls, shackled him, and blindfolded him during the flight to Morocco. *Id.* Once in Moroccan prison, "he was beaten, deprived of sleep and food, and threatened with sexual torture." *Id.* at 950. Authorities released Britel, re-detained him, and sentenced him to fifteen years in Moroccan prison. *Id.* Plaintiff Mohamed, an Ethiopian citizen who resided legally in the United Kingdom, was detained in Pakistan and also flown to Morocco. *Id.* While in Moroccan custody: officials brutally tortured Mohamed, beat him until he sustained broken bones; cut his penis with a scalpel; poured a "hot stinging liquid" on his wounds; and blindfolded and handcuffed him day and night. *Id.* (citations omitted). After transfer to CIA custody, he underwent further torture, including detainment in total darkness and he was subjected to recorded screams of women and children for twenty-four hours per day. *Id.* Furthermore, he was starved. *Id.* Eventually he was transferred to the Guantanamo Bay, Cuba, detention facility, where he remained for five years. *Id.* Authorities arrested Plaintiff al-Rawi, an Iraqi citizen and legal resident of Great Britain, in Gambia. *Id.* Authorities placed him in a diaper and overalls and shackled him for his transportation. *Id.* Kept in the same "dark prison" as Mohamed, Plaintiff al-Rawi was deprived of sleep in the same manner. *Id.* (citation omitted). Authorities transferred him to Bagram Air Force Base, where he was beaten, deprived of sleep, and threatened with death. *Id.* He suffered the same treatment upon his subsequent transport to Guantanamo Bay, where he remained until his release back to Great Britain. *Id.* Finally, Plaintiff Bashmilah is a Yemeni citizen whom Jordanian agents detained while he visited his sick mother. *Id.* Transferred to U.S. custody in Afghanistan, Plaintiff al-Rawi was placed in solitary confinement in twenty-four hour darkness. *Id.* He was then moved to a cell where he was subjected to twenty-four-hour light and loud noise. *Id.* He attempted suicide three times. *Id.* Eventually, a Yemeni court convicted him of a trivial crime and released him. *Id.*

²⁶ See *Mohamed II*, 579 F.3d at 951-52 (describing procedural posture of case).

²⁷ *Id.*

²⁸ See *infra* Part III (discussing effect of successful state secrets privilege claim).

²⁹ See *Mohamed II*, 579 F.3d 943, 962 (9th Cir. 2009), *aff'd*, *Mohamed III*, 614 F.3d 1070 (9th Cir. 2010).

³⁰ See *Mohamed III*, 614 F.3d 1070, 1083 (9th Cir. 2010).

Mohamed III was a 6-5 decision voting to dismiss the plaintiffs' claims.³¹ All three judges who presided over *Mohamed II* dissented in *Mohamed III*.³² The ruling was both substantively and strategically significant.³³ The decision in *Mohamed III* eliminated the split between the Fourth and Ninth Circuit on whether the privilege can be used at the outset of a case to achieve dismissal under the *Reynolds* doctrine.³⁴ However, the lack of a circuit split decreases the likelihood that the United States Supreme Court will grant certiorari to determine the proper interpretation.³⁵

III. STRANGE BEDFELLOWS: INTERNATIONAL LAW, U.S. FEDERAL COURTS, AND THE EXECUTIVE BRANCH

A. Contemporary International Legal Norms

In a global environment where information technology, economies of scale, and a decreased emphasis on sovereignty have created a more connected and more mobile human experience, international law remains an enigma—difficult both to define and to enforce.³⁶ Since the end of

³¹ *Id.* at 1072.

³² *Id.*

³³ See Lyle Denniston, "Rendition" Challenge Scuttled, SCOTUSBLOG (Sept. 8, 2010, 9:37 PM), <http://www.scotusblog.com/2010/09/rendition-challenge-scuttled> (noting decision raises prospect courts may never rule on CIA's rendition program).

³⁴ See *infra* notes 147-151 and accompanying text (discussing effect of *Mohamed III* decision); see also Lyle Denniston, *State Secrets Doctrine Narrowed*, SCOTUSBLOG (Apr. 28, 2009, 6:16PM), <http://www.scotusblog.com/2009/04/state-secrets-doctrine-narrowed> (describing nature of circuit split between Fourth and Ninth Circuit).

³⁵ See Denniston, *supra* note 34 (analyzing whether Supreme Court will hear case). Denniston notes that while the decision in *Mohamed III* will most likely be appealed, the outcome of that decision, coupled with the *El-Masri* decision, "goes far toward insulating the 'rendition' program from judicial review – unless the Supreme Court took on that case and reversed the result." *Id.* Currently, the Court is consolidating two cases, *General Dynamics Corp. v. United States*, 2010 WL 1698039 (pet. for writ of certiorari), and *Boeing Co. v. United States*, 2010 WL 1698042 (pet. for writ of certiorari), to determine whether the government improperly asserted the state secrets privilege, and in so doing prevented the defense contractors from defending themselves against government claims that they breached contracts with the government. See also Lyle Denniston, *A Review of "State Secrets"*, SCOTUSBLOG (Sept. 28, 2010, 10:26AM), <http://www.scotusblog.com/2010/09/a-review-of-state-secrets/> (discussing cases for which Supreme Court granted certiorari for October 2010 term).

³⁶ See Debra A. Harvey, Comment, *The Alien Tort Statute: International Human Rights Watchdog or Simply 'Historical Trivia'?*, 21 J. MARSHALL L. REV. 341, 344 n.19 (1988) (citing *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 159 (1820)). Harvey cites Chief Justice Story's opinion where he noted an "explicit definition of the Law of Nations was almost impossible because '[o]ffences, too, against the law of nations, cannot, with any accuracy, be said to be completely ascertained and defined in any public code decognized by the common consent of nations.'" *Id.*; see also Hari M. Osofsky, Article, *Environmental Human Rights Under the Alien*

World War II, a hierarchy of norms have emerged so that various human rights infractions can at least be categorized, if not prosecuted.³⁷

The most fundamental of international law norms is Customary International Law ("CIL").³⁸ To be classified as part of the CIL, the norm must arise "from a general and consistent practice of states followed by them from a sense of legal obligation."³⁹ It is, then, those norms of human behavior by which all nations must feel constrained and bound in their treatment of citizens.⁴⁰ However, even at this fundamental level, there is yet a more restrictive subset termed *jus cogens*.⁴¹ Although CIL requires only general acceptance by the international community, *jus cogens* is held to a higher standard.⁴² While a CIL norm requires many states to accept it as such, *jus cogens* encompasses those norms from which no nation can deviate without violating them.⁴³ In *Filartiga v. Pena-Irala*,⁴⁴ the first modern American case in which international law is discussed, the court determined that for a suit to be brought under the ATS, the violation must be one of CIL.⁴⁵ Since then, however, there has been a trend among federal courts requiring a violation of *jus cogens* to state a cause of action under the ATS.⁴⁶ While this trend is more restrictive than proponents of

Tort Statute: Redress for Indigenous Victims of Multinational Corporations, 20 SUFFOLK TRANSNAT'L L. REV. 335, 348-49 (1997) (describing elusiveness of clear definition for "international law"). Osofsky writes that while "courts and scholars have spilt much ink explaining the content of [international law's] definition, its exact nature remains quite unclear." *Supra*, at 348-49.

³⁷ See Joshua Ratner, Note, *Back to the Future: Why a Return to the Approach of the Filartiga Court is Essential to Preserve the Legitimacy and Potential of the Alien Tort Claims Act*, 35 COLUM. J.L. & SOC. PROBS. 83, 90 (2002) (discussing evolution of international law). Ratner notes the Nuremberg Tribunals presented "a marked departure from traditional notions of State sovereignty and individual rights under international law." *Id.*

³⁸ See Osofsky, *supra* note 36, at 348 (explaining CIL norms as general, consistent practices viewed by states as law).

³⁹ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987).

⁴⁰ See Ratner, *supra* note 37, at 85 (discussing CIL). Ratner notes that sovereign states must not only generally abide by a given norm, but also must feel accountable to other nations and international consensus to maintain said norm. *Id.*

⁴¹ See *id.* at 85 (classifying *jus cogens* as "narrow subset" of CIL).

⁴² See *id.* (citing Vienna Convention on the Law of Treaties, art. 53, 8 I.L.M. 679, 698-99 (May 23, 1969)). Ratner cites Article 53 defining *jus cogens* norms as "accepted and recognized by the international community of states as a whole . . . from which no derogation is permitted . . ." *Id.* (citation omitted).

⁴³ See *id.* (distinguishing CIL and *jus cogens*).

⁴⁴ 630 F.2d 876 (2d Cir. 1980).

⁴⁵ See *id.* at 884-85 (holding torture prohibited by Law of Nations, thus meeting jurisdictional requirement for ATS).

⁴⁶ See, e.g., *Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294, 1303 (C.D. Cal. 2000); *Nat'l Coal. Gov't of the Union of Burma v. Unocal, Inc.*, 176 F.R.D. 329, 345 (C.D. Cal. 1997); *Beanal v.*

international law would like, it has allowed the courts time to fully conceptualize the ramifications of incorporating international law into domestic law.⁴⁷ Though there may be some debate as to what tortious actions constitute violations of CIL but not *jus cogens*, torture, as defined in the United Nations Convention Against Torture (“CAT”), is undoubtedly a *jus cogens* offense.⁴⁸

B. Alien Tort Statute

The Alien Tort Statute (also known as the “Alien Tort Claims Act”) grants original jurisdiction to federal district courts when a foreign national files a complaint against a person or entity for committing a tort in violation of the Law of Nations.⁴⁹ Enacted as part of the 1789 Judiciary Act, this one-sentence statute likely carries with it a far different meaning today than its drafters intended.⁵⁰ Eighteenth century legal thinkers regarded the “Law of Nations” as those laws which all civilized people were bound to uphold.⁵¹ In essence, the Law of Nations is no more than

Freeport-McMoRan, Inc., 969 F. Supp. 362, 366 (E.D. La. 1997); *Xuncax v. Gramajo*, 886 F. Supp. 162, 179 (D. Mass. 1995); see also Ratner, *supra* note 37, at 85 (citing aforementioned cases as limiting actionable ATS claims to “narrow subset of the CIL of human rights”).

⁴⁷ See William S. Dodge, *Which Torts in Violation of the Law of Nations?*, 24 HASTINGS INT’L & COMP. L. REV. 351, 352-53 (2001) (arguing for expansive reading of ATS). Dodge notes that because jurisprudence has evolved to be more positivist, “modern courts feel less comfortable ‘creating’ international law,” *id.* at 353, and that subsequently “[i]t is as hard to justify limiting jurisdiction under the Alien Tort Statute to *jus cogens* norms as it is to justify limiting the Statute to rules that are ‘universal, definable, and obligatory.’” *Id.* at 357-58.

⁴⁸ See *Filartiga*, 630 F.2d at 883 (discussing torture’s place within Law of Nations). The court stated with regard “to the act of torture, we have little difficulty discerning its universal renunciation in the modern usage and practice of nations.” *Id.* at 883; see also RESTATEMENT, *supra* note 39, at § 702 cmt. n (listing torture as *jus cogens* norm).

⁴⁹ See 28 U.S.C. § 1350 (2006) (“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”).

⁵⁰ See Edwin D. Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. PA. L. REV. 26, 34-46 (1952) (discussing founders’ attitudes toward Law of Nations). Dickinson notes the Law of Nations was embodied in the Declaration of Independence, which he argues was a set of legal principles. *Id.* at 34-35. He notes that the Declaration’s language claiming the “[f]ull power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which Independent States may of right do” came straight from that universal jurisprudence.” *Id.* at 35 (citation omitted).

⁵¹ See 4 WILLIAM BLACKSTONE, COMMENTARIES 66 (1769) (describing Law of Nations). Blackstone wrote “the Law of Nations is a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world,” but sovereign legislative acts implementing these rules “are not to be considered as introductive of any new rule, but merely as declaratory of the old fundamental constitutions of the kingdom; without which it must cease to be a part of the civilized world.” *Id.*

the doctrinal common law.⁵² *United States v. Smith*⁵³ was the first and only time in 165 years that the Supreme Court grappled with the Law of Nations.⁵⁴ While American jurisprudence avoided confrontation with the Alien Tort Statute, international law grew into an entity with far more doctrinal breadth than it had possessed in the late eighteenth century.⁵⁵

In 1980, after the ATS laid dormant for a century and a half, a Paraguayan family brought suit against a member of the Paraguayan government in the *Filartiga* case.⁵⁶ The plaintiffs, a husband and wife, sued the defendant claiming that he kidnapped and tortured their son, resulting in his death.⁵⁷ The alleged kidnapping and torture took place in Paraguay, but the defendant was living in the United States on a visitor's visa.⁵⁸ The district court dismissed the case, asserting that the plaintiff

⁵² See Dickinson, *supra* note 50, at 32 (noting "the Law of Nations was part of the law of England.").

⁵³ 18 U.S. (5 Wheat.) 153 (1820).

⁵⁴ See *id.* at 162 (discussing whether piracy violated Law of Nations). In looking at the Law of Nations, Chief Justice Story wrote that "it is manifest from the language of Sir William Blackstone, in his comments on piracy, that he considered the common law definition as distinguishable in no essential respect from that of the law of nations." *Id.*

⁵⁵ See U.N. Charter art. 1, para. 1 (defining purpose of the United Nations). The Charter of the United Nations ("the Charter") was signed on June 26, 1945, and took effect upon its ratification by the original members: the Republic of China; France; the Union of Soviet Socialist Republics; the United Kingdom of Great Britain and Northern Ireland; and the United States of America. *Id.* at art. 110, para. 3. One purpose of the U.N. is to "maintain international peace and security, and to that end . . . bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace . . ." *Id.* at art. 1, para. 1; see also *id.* at art. 55 (stating "U.N. shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."); Universal Declaration of Human Rights, art. 5, December 10, 1948 ("No one shall be subjected to torture or to cruel inhuman, or degrading treatment or punishment."); U.N. Convention Against Torture, art. 1.1, February 4, 1985 (defining torture). This section requires each signatory to the treaty to ensure that torture victims have a forum for redress and an "enforceable right to fair and adequate compensation . . ." *Id.* at art. 14.1, 15.1 (requiring signatories "[to] ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made."); Ratner, *supra* note 38, at 92 (noting U.N.'s prolific production of documents has "expanded the general corpus of international law.").

⁵⁶ See *Filartiga v. Pena-Irala*, 630 F.2d 876, 878-80 (2d Cir. 1980) (describing nature of lawsuit); Eric Gruzen, Comment, *The United States as a Forum for Human Rights Litigation: Is this the Best Solution?*, 14 TRANSNAT'L LAW. 207, 214-15 (2001) (describing arrest of Paraguayan defendant).

⁵⁷ See *Filartiga*, 630 F.2d at 878-79.

⁵⁸ See Karen E. Holt, *Filartiga v. Pena-Irala After Ten Years: Major Breakthrough or Legal Oddity?*, 20 GA. J. INT'L & COMP. L. 543, 543-44 (1990) (describing case facts). The victim's father, Dr. Joel Filartiga, was a vocal critic of the Paraguayan government. *Id.* The Filartiga family alleged that Joelito, the son, was kidnapped by Pena-Irala, the Inspector General of Police in their region, and tortured to death in retaliation for Dr. Filartiga's opposition to government

lacked federal jurisdiction.⁵⁹ However, the Second Circuit Court of Appeals reversed and remanded the case to district court.⁶⁰ With one decision, the appellate court breathed new life into a dormant doctrine and forced the federal courts to begin sifting through foreign nationals' claims to determine whether they had jurisdiction over actions by, at the outer limits, non-U.S. citizens against non-U.S. citizens, on foreign soil.⁶¹ Though the court in *Filartiga* attempted to keep its holding narrow, the implication was clear: violations of fundamental international law could now be litigated in U.S. federal courts.⁶²

Over the next twenty-five years, the courts would hear several cases brought under the auspices of the ATS.⁶³ One of those cases, *Tel-Oren v. Libyan Arab Republic*,⁶⁴ demonstrated the distinct judicial viewpoints regarding international law's applicability to the United States, and foreshadowed the domestic separation-of-powers questions piqued by a

policy. *Id.* Joelito was found dead of cardiac arrest, caused by electric shock treatment. *See* Gruzen, *supra* note 56, at 215.

⁵⁹ *See Filartiga*, 630 F.2d at 880 (noting district court decision).

⁶⁰ *See id.* at 889 (holding federal jurisdiction under ATS may be exercised over plaintiffs' claim). In reaching this decision, the court thoroughly examined the meaning of the Law of Nations both during the early period of U.S. jurisprudence and in contemporary times. *See id.* at 880-90. The court asserted that at the very least, the Law of Nations prohibited torture, and that "the international community has come to recognize the common danger posed by the flagrant disregard of basic human rights" *Id.* at 890.

⁶¹ *See Filartiga*, 630 F.2d at 890; *see also id.* at 888 (noting outer limits of ATS). The court opined that hypothetically, the ATS would not confer jurisdiction over a "Luxembourgish international investment trust's suit for fraud, conversion and corporate waste." *Filartiga*, 630 F.2d at 888.

⁶² *See Filartiga*, 630 F.2d at 887-88 (discussing ATS jurisdiction). The court noted that the Law of Nations covers only norms where "mutual, and not merely several" agreement exists among nations, and that it is only those norms that fall within the ATS. *Id.* at 888; *see also* Gruzen, *supra* note 56, at 216-17 (summarizing significance of *Filartiga* ruling). Gruzen noted three distinct, significant aspects of the ruling. *Id.* at 216. First, torture, and more generally, human rights violations, fell within the Law of Nations. *Id.* at 216. Second, the ATS was the proper statute under which to bring human rights violations. *Id.* Finally, that torture violated customary international law. *Id.* But *cf.* Holt, *supra* note 58, at 549-54 (discussing criticism of *Filartiga* decision). Some commentators doubted *Filartiga*'s central holding—torture violates customary international law—based on the fact that so many nations still practiced it, and thus it could not be considered universally outlawed. *Id.* at 550. Others criticized the decision for taking non-binding treaties (for example, the U.N. Convention Against Torture) and elevating them into binding law. *Id.* at 550-57. Lastly, some commentators worried that this decision would negatively impact U.S. foreign policy, both because it would be morally imperialistic, and also because it would create friction with allies who practiced torture. *Id.* at 551.

⁶³ *See, e.g., In re Estate of Ferdinand E. Marcos Human Rights Litig.*, 978 F.2d 493 (9th Cir. 1995) (alleging cause of action under ATS); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1992) (initiating cause of action for violating ATS); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984) (using ATS as basis for claim).

⁶⁴ 726 F.2d 774 (D.C. Cir. 1984).

plaintiff's invocation of international law.⁶⁵ The case involved plaintiffs who survived an armed attack on a civilian bus by the paramilitary Palestine Liberation Organization ("PLO").⁶⁶ The plaintiffs brought suit against the PLO in the U.S. District Court for the District of Columbia.⁶⁷ The three judges empanelled to hear the case each wrote a concurring opinion explaining their denial of jurisdiction.⁶⁸ Judge Edwards noted the *Filartiga* court's emphasis on the ATS's narrow construction, and reasoned that this act did not fall into the category of harms that the *Filartiga* court elucidated.⁶⁹

In his concurring opinion, Judge Bork reasoned that the phrase "Law of Nations," as embodied in the statute, referred to a concept far different than the modern twentieth century international law paradigm.⁷⁰ As such, he noted that the statute was obsolete, or, were the statute still to retain some vitality, it would be narrowly limited only to those acts originally considered illegal or tortious in 1789.⁷¹ Furthermore, Judge Bork

⁶⁵ See *id.* at 775 (affirming district court decision, but for three separate reasons).

⁶⁶ See *id.* at 776 (describing facts in complaint).

⁶⁷ See *id.* (outlining procedural posture of case).

⁶⁸ See *id.* at 775 (noting three concurring opinions).

⁶⁹ See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 778 (D.C. Cir. 1984) (Edwards, J., concurring) (reasoning that ATS is not applicable to factual situation in instant case). Judge Edwards reasoned that the Law of Nations has never been viewed as creating statutory requirements for domestic law, and that doing so would be unworkable. *Id.* As a result, he notes that requiring an international consensus on a right to sue is at odds with the method of statutory interpretation constructing a statute to avoid rendering any portion of it "inoperative or superfluous, void or insignificant." *Id.* (citation omitted). He also noted this logic did not apply to treaties, suggesting that a violation of an international treaty would create a cause of action under the ATS. *Id.* at n.2; see also Holt, *supra* note 58, at 557 (describing Edwards' reasoning). Judge Edwards agreed with the *Filartiga* court, but thought the instant claim was not proper under the ATS, as it "alleged acts by persons operating outside the dictates of international law." *Id.*; see Gruzen, *supra* note 56, at 218 (noting Edwards' belief that under ATS, international law applied only to actions by sovereign state).

⁷⁰ *Tel-Oren*, 726 F.2d at 811 (Bork, J., concurring) (critiquing appellants' argument). Judge Bork found that appellants' argument confused the dichotomous meaning of common law. *Id.* He reasoned that while the term has referred to common law, traceable to medieval England, it also refers to non-statutory or constitutional law. *Id.* Judge Bork believed amalgamating international law into federal common law, while it is nonstatutory, is entirely distinct from positing that, "[un]like the common law of contract and tort . . . by itself it affords individuals the right to ask for judicial relief." *Id.*; see also Allison J. Flom, Note, *Human Rights Litigation Under the Alien Tort Statute: Is the Forti v. Suarez-Mason Decision the Last of its Kind?*, 10 B.C. THIRD WORLD L.J. 321, 330 (1990) (discussing Judge Bork's reasoning). Judge Bork disagreed with Judge Edwards' reasoning regarding whether private causes for actions were implied in the ATS language. Flom, *supra*, at 330. Such a construction would contradict both the drafters' intent and the proper role of courts in foreign policy. *Id.*

⁷¹ See *Tel-Oren*, 726 F.2d at 813 (noting types of offenses drafters may have intended to include within ATS). Judge Bork looks to Blackstone's Commentaries to deduce three main offenses: (1) Violation of safe-conducts; (2) Infringements on the rights of ambassadors; and (3)

reasoned that to find a cause of action where he saw none existing would usurp the separation of powers doctrine, as embodied in the act of state doctrine.⁷²

Judge Robb, the third judge on the panel, addressed the separation of powers issue by invoking the political question doctrine, as well as by noting the impracticability of making a U.S. district court a de facto international tribunal.⁷³ Judge Robb sided more closely with Judge Bork's view that the statute should be allowed to fade into the depths of the federal

Piracy. See *id.* at 813-14; see also Blackstone, *supra* note 51, at 66 (describing further Blackstone's definition of "Law of Nations"). Judge Bork also cites Article I, section 8 of the Constitution as giving Congress the power to "define and punish Piracies and Felonies committed on the high Seas and Offences against the Law of Nations." *Tel Oren*, 726 F.2d at 814 (quoting U.S. CONST. art. I, § 8). He also cites Article III, section 2, giving the Supreme Court original jurisdiction over "all Cases [sic] affecting Ambassadors, other Public Ministers and Consuls." *Id.* (quoting U.S. CONST. art. III, § 2).

⁷² See *Tel-Oren*, 726 F.2d at 799 (Bork, J., concurring) (explaining rationale for dismissing case). Judge Bork admits in reaching his conclusion that he was "guided chiefly by separation of powers principles." *Id.* He notes that the act of state doctrine prevents courts from deciding whether foreign nations' acts are valid or not. *Id.* at 802. He further writes that while originally this doctrine focused on issues of state sovereignty, it has more recently focused on concerns "for preserving the basic relationships between branches of government in a system of separation of powers." *Id.* (citations omitted). As such, Judge Bork reasoned that to view the ATS as granting both jurisdiction and a cause of action, the international community would come to "justly" view the United States "not as a nation magnanimously refereeing international disputes, but as an officious interloper and an international busybody." *Id.* at 821; see also Harvey, *supra* note 36, at 351 (describing Judge Bork's opinion). Judge Bork contended that the statute ignored explicit constitutional divisions in the area of foreign affairs, and that allowing suits of this nature to proceed would ignore the drafters' intentions, as it would have created international tensions a young nation would have desired to avoid. *Tel-Oren*, 726 F.2d at 821-22; Holt, *supra* note 58, at 558.

⁷³ See *Tel-Oren*, 726 F.2d at 823 (Robb, J., concurring). Judge Robb noted that a tort action must have agreement on both the action at issue and the standards by which it must be judged. *Id.* Judge Robb opined that as such, federal courts do not have the proper vantage point from which to determine the international status of terrorist attacks. *Id.*; see also Flom, *supra* note 70, at 329 (analyzing *Tel-Oren* decision). Flom notes Judge Robb did not address the ATS's construction, but instead Robb reasoned international political terrorism, as presented in the instant case, was a nonjusticiable political question. *Id.* Judge Robb reasoned that issues of this nature should be deferred to the executive branch. *Id.*; see also Holt, *supra* note 58, at 559 (discussing *Tel-Oren* concurring opinions); Harvey, *supra* note 36, at 351 (describing Judge Robb's approach as "pragmatic" due to difficulty of court's role as fact-finder); Harvey concludes Judge Robb feared courts would become no more than a professorial debating court, and consequently they would become overwhelmed by problems of this nature. *Id.*; see *Tel-Oren*, 726 F.2d at 826 (Robb, J., concurring) (considering impact of granting jurisdiction under ATS); Holt, *supra*, at 559. Looking at ruling in an alternative manner, whereby foreign nationals would have jurisdiction under the ATS, Judge Robb noted "[i]t is not implausible that every alleged victim of violence . . . in such places as Nicaragua and Afghanistan could argue just as compellingly as the plaintiffs here do, that they are entitled to their day in the courts of the United States." *Tel-Oren*, 726 F.2d at 826 (Robb, J., concurring).

code, never to be heard from again.⁷⁴ In response to Judge Bork's opinion and a fear that the ATS would open a Pandora's Box of burdensome legal claims, Congress passed the Torture Victim Protection Act⁷⁵ in 1992.⁷⁶ While this Act purported to eliminate judges' needs to further define international law's role in American jurisprudence, key differences between the ATS and the Torture Victim Protection Act make the ATS a more viable option under which to bring torture and extraordinary rendition claims.⁷⁷

In the cases of *Forti v. Suarez-Mason*⁷⁸ and *Kadic v. Karadzic*⁷⁹ courts laid the foundation for ATS claims centered on international terrorism.⁸⁰ The *Forti* case arose after a military takeover in Argentina.⁸¹ Soldiers acting under the commanding general, Suarez-Mason, detained the plaintiff and his family after they debarked from an airplane.⁸² The

⁷⁴ See *Tel-Oren*, 726 F.2d at 827 (Robb, J., concurring) (discussing evolution of ATS). Judge Robb writes that to take an ambiguous, two-hundred-year-old statute and inject it into sensitive matters of international law would be to give the statute a new life, separate from that which the drafters intended. *Id.* He notes that to do so would cause the statute not to evolve, but to impermissibly "mutate." *Id.*

⁷⁵ Pub. L. No. 102-256, 106 Stat. 73 (1992) [hereinafter TVPA].

⁷⁶ See Gruzen, *supra* note 56, at 230-31 (describing TVPA's passage). The law was a reaction to the "confused analysis" of the *Tel-Oren* opinion. *Id.*

⁷⁷ See *id.* (discussing congressional objectives in passing TVPA). Gruzen writes Congress addressed Judge Bork's objection that the ATS created no explicit cause of action. *Id.* at 231. In passing the TVPA, Congress granted a cause of action for both U.S. and foreign citizens victimized by torture. *Id.* It also clearly defined torture, thus eliminating the need for judges to rely on ambiguous or non-binding sources of international law. *Id.* However, Gruzen also notes several distinctions between the ATS and the TVPA. *Id.* at 232. First, the TVPA is restricted to the torts of torture and extrajudicial killing. *Id.* Thus, it does not cover any other tort, such as unlawful detention. *Id.* Second, the TVPA is limited to individual defendants acting under the authority of a sovereign state, while the ATS leaves open the possibility of a non-state actor as defendant. *Id.*; see also *infra* note 88 (describing *Kadic* holding). Finally, the TVPA includes a provision requiring that the plaintiff exhaust all local remedies before proceeding with a claim under this act. See Gruzen, *supra* note 56, at 232 (describing differences between TVPA and ATS). The distinctions between the acts imply that not all cases arising under the ATS could be brought under the TVPA. *Id.* at 233; see also *Kadic v. Karadzic*, 70 F.3d 232, 241 (2d Cir. 1995) (stating "the scope of the Alien Tort Act remains undiminished by enactment of the Torture Victim Act.").

⁷⁸ 672 F. Supp. 1531 (N.D. Cal. 1987).

⁷⁹ 70 F.3d 232 (2d Cir. 1995).

⁸⁰ See *infra* notes 81-86, 88 and accompanying text (discussing factual allegations, holdings, and analyses of *Forti* and *Kadic*).

⁸¹ See *Forti*, 672 F. Supp. at 1536 (describing facts of case). In March of 1976, the Armed Forces staged a coup d'état and took the government from President Peron. *Id.* General Suarez-Mason was commander of the zone where the plaintiff lived. *Id.*

⁸² See *id.* at 1537 (noting allegations of complaint). The complaint alleges that the military authorities also took all of the family's personal possessions, as well as several thousand dollars in cash. *Id.* One of the plaintiffs was then blindfolded and held at a police station for a month, deprived of communication to the outside world. *Id.* She was handcuffed with her hands behind

defendant moved to dismiss the case, and a central issue was whether the plaintiffs' prolonged detention constituted a tort in violation of the Law of Nations.⁸³ The court found that the prolonged detention violated customary international law.⁸⁴

In *Kadic*, Croat and Muslim citizens of Bosnia-Herzegovina sued the defendant for atrocities he ordered when he was leader of Bosnian military forces.⁸⁵ However, due to the armed conflict occurring in the region, there was no recognized state where the defendant could be considered a citizen.⁸⁶ Thus, the court was tasked with determining whether a non-state actor could be held liable for violating the ATS, as it referenced only the "Law of Nations."⁸⁷ While the district court ruled that non-state actors could not be held liable under the ATS, the U.S. Court of Appeals for the Second Circuit decided that the modern conception of international law demanded that non-state actors and state actors alike were

her back for the first week of the detention. *Id.* The authorities did not give her either food or clean clothing. *Id.* Another of the plaintiffs was severely beaten and then shot. *Id.*

⁸³ See *id.* at 1541-42 (discussing count four in complaint). The plaintiffs alleged that the defendant held two of them "arbitrarily and without justification, cause or privilege," and that the defendant "forcibly confined both plaintiff Benchoam and [Forti] for a prolonged period." *Id.* at 1541 (internal quotations omitted).

⁸⁴ *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1541 (N.D. Cal. 1987) (holding detention violates international human rights norms). The court held that sufficient case law existed to hold that arbitrary detention constituted a violation of CIL. *Id.* The court also went further, reasoning that the consensus became even clearer in the case of a sovereign state detaining its own citizens for a prolonged period of time. *Id.* at 1541-42. The court stated, "[t]he norm is obligatory, and is readily definable in terms of the arbitrary character of the detention." *Id.* at 1542; see also Flom, *supra* note 70, at 335 (discussing holding of *Forti*). The court found that prolonged, arbitrary detention violated CIL because it was precisely definable. *Id.* But see *Forti*, 672 F. Supp. at 1543 (holding "cruel, inhuman, and degrading treatment" not within CIL or ATS because it is not precisely definable).

⁸⁵ *Kadic v. Karadzic*, 70 F.3d 232, 236-37 (2d Cir. 1995) (providing basis for complaint). The plaintiffs alleged the defendants committed the following atrocities as part of a systematic genocidal campaign: rape; forced prostitution; forced impregnation; torture; and summary execution. *Id.* at 236-37. The court referenced the district court decision, which granted defendant's motion to dismiss, because "the members of Karadzic's faction do not act under the color of any recognized state law." *Id.* at 237 (quoting *Doe v. Karadzic*, 866 F. Supp. 734, 741 (S.D.N.Y. 1994) (internal quotation marks omitted)).

⁸⁶ See *id.* at 236 (stating issues in cases). Judge Newman noted the case posed "significant issues as to the scope of the Alien Tort Act," the most relevant of which included "whether some violations of the law of nations may be remedied when committed by those not acting under the authority of a state; [and] if so, whether genocide, war crimes, and crimes against humanity are among the violations that do not require state action...." *Id.*; see also Gruzen, *supra* note 56, at 220 (calling *Kadic* "[p]erhaps the most significant post-*Filartiga* decision" in ATS jurisprudence because it expanded ATS jurisdiction to non-state action).

⁸⁷ See *supra* note 85 and accompanying text (noting reason for district court granting defendant's motion to dismiss).

liable under the ATS.⁸⁸

In *Argentine Republic v. Amerada Hess Shipping Corp.*,⁸⁹ the Supreme Court wrestled with the Alien Tort Statute.⁹⁰ This case involved an Argentine military strike against a Liberian oil tanker during the Falkand Islands War.⁹¹ The tanker's owner, Amerada Hess Shipping Corporation, filed suit against Argentina in United States District Court for the Southern District of New York under the ATS.⁹² The District Court dismissed the complaint because they found that it conflicted with the Foreign Sovereign Immunities Act, but the Second Circuit Court of Appeals reinstated the case, finding sufficient jurisdiction under the ATS.⁹³ The Supreme Court held that the ATS does not grant plaintiffs jurisdiction over foreign sovereign states.⁹⁴ Thus, for a successful claim to move forward, the suit must be directed against either a state actor acting outside his official

⁸⁸ *Kadic*, 70 F.3d at 239. Disagreeing with the circuit court's decision, the Second Circuit rejected the proposition that "the law of nations, as understood in the modern era, confines its reach to state action." *Id.* (providing prohibition against piracy as early example of application to acts of private individuals); see also Gruzen, *supra* note 56, at 222 (stating significance of *Kadic* decision). Gruzen noted that while susceptible to criticism, *Kadic*'s significance lay in its central holding that in certain circumstances, non-state actors could be international law violators, and that official recognition of a state is not required. *Id.*; *supra* note 54 (citing Blackstone's writings on piracy).

⁸⁹ 488 U.S. 428 (1989).

⁹⁰ See Graham Ogilvy, Note, *Belhas v. Ya'Alon: The Case For A Jus Cogens Exception to the Foreign Sovereign Immunities Act*, 8 J. INT'L BUS. & L. 169, 173-75 (2009) (describing procedural posture of *Hess*). After the Southern District Court of New York dismissed the case, the Second Circuit reversed the district court's decision. *Id.* at 174. The Supreme Court then granted certiorari to determine how the Foreign Sovereign Immunity Act of 1976 intersected with the ATS. *Id.* at 174-75.

⁹¹ See *Amerada Hess*, 488 U.S. at 431 (providing facts of case).

⁹² See *id.*

⁹³ 28 U.S.C. § 1604 (1976) [hereinafter FSIA]. The statute states in relevant part: "Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States" *Id.*; see also *Amerada Hess*, 488 U.S. at 433 (discussing circuit court opinion). Justice Rehnquist, writing for the majority, noted that the Second Circuit viewed the ATS as "no more than a jurisdictional grant based on international law," and Congress did not enact the FSIA intending to eliminate existing remedies for international law violations. *Amerada Hess*, 488 U.S. at 433.

⁹⁴ See *Amerada Hess*, 488 U.S. at 434-35 & n.3. The Court, in examining the FSIA's structure and text, determined that Congress intended the statute to be the "sole basis for obtaining jurisdiction over a foreign state" in United States courts. *Id.* at 434. In regards to how the FSIA interacts with the ATS, the Court implied that each statute dealt with a different situation: the FSIA is applicable when a sovereign state is involved; the ATS applies when a plaintiff wishes to sue an individual acting under the color of a sovereign state, or alternatively, a non-state actor. *Id.* at 437. The Court noted Congress' failure to expressly repeal the ATS in enacting the FSIA "speaks only faintly, if at all, to the issue involved in [*Amerada Hess*]." *Id.*

capacity, or against a non-state actor.⁹⁵

As the twentieth century gave way to the twenty-first, the forces of globalization allowed and encouraged the rise of non-state actors.⁹⁶ The 1993 World Trade Center bombing, the attack on the U.S.S. Cole, the bombing of the American embassies in Kenya and Tanzania, and most notably, the events of September 11, 2001, revealed the threat of non-state sponsored terrorism to both western democracies and the public consciousness.⁹⁷

In response, the United States accelerated a counterterrorism, counterintelligence program widely known as “extraordinary rendition.”⁹⁸ The heart of this program was rendering suspected terrorists to their nation of origin for interrogation.⁹⁹ In several circumstances that have come to light, government officials have interrogated detained individuals who have provided no intelligence of any value to the U.S. government.¹⁰⁰ In the

⁹⁵ See *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428, 436-37 (1989) (discussing holding’s effect on ATS). The Court implied that this decision may limit the ATS’s jurisdiction, but largely in the abstract. *Id.* Justice Rehnquist, discussing the jurisprudential history, noted that the Court of Appeals “did not cite any decision in which a United States court exercised jurisdiction over a foreign state under the Alien Tort Statute . . .” *Id.* at 436; see also Holt, *supra* note 58, at 560-61 (discussing effect of *Amerasia Hess* on ATS). Holt notes the Court’s holding does not directly affect the ATS, but merely limits its jurisdiction to preclude suits against a foreign, sovereign state. *Id.*; see also Ogilvy, *supra* note 90, at 173-75 (analyzing implications of *Amerasia Hess* decision). While the decision clearly stated that jurisdiction for a suit against a sovereign state could come only from the FSIA, the ATS “could be interpreted so as to grant jurisdiction over foreign, non-sovereign defendants, while the FSIA conferred jurisdiction over foreign states.” Ogilvy, *supra* note 90, at 173-75. But see Gruzen, *supra* note 56, at 227-30 (discussing effect of *Amerasia Hess* on human rights litigation). Gruzen theorized that this decision “severely curtailed the use of the Alien Tort Statute as a human rights tool.” *Id.* at 228.

⁹⁶ See generally PHIL WILLIAMS, INT’L RELATIONS & SECURITY, *Violent Non-State Actors and National and International Security* Zurich (2008).

⁹⁷ See Johnson, *supra* note 8, at 1135 (discussing impact of September 11, 2001 terrorist attacks). Following the September 11 attacks, the United States entered a new era of national security. *Id.*

⁹⁸ See *supra* note 8 and accompanying text (outlining rise of extraordinary rendition program).

⁹⁹ See *supra* note 8 and accompanying text (outlining use of extraordinary rendition program); see also Lucien J. Dhooze, *The State Secrets Privilege And Corporate Complicity In Extraordinary Rendition*, 37 GA. J. INT’L & COMP. L. 469, 473 (2009) (providing background on extraordinary rendition program). The CIA removed high value targets from the states where they were found to locations such as Afghanistan, Egypt, Iraq, Pakistan, Thailand, and Uzbekistan. Dhooze, *supra*, at 473. In these locations, the targets were subjected to detention and interrogation methods, allegedly in violation of both U.S. law and international standards. *Id.* The nations allowing extraordinary rendition to occur included Bosnia, Canada, Indonesia, Iraq, Italy, Macedonia, Pakistan, Turkey, and the United Kingdom. *Id.* at 473 n.17.

¹⁰⁰ See Peter Johnston, Note, *Leaving The Invisible Universe: Why All Victims of Extraordinary Rendition Need a Cause of Action Against the United States*, 16 J.L. & POL’Y 357, 375-76 (2007) (citing cases of innocent individuals tortured after extraordinary rendition).

span of twenty-five years, the ATS has gone from an historical footnote to a key weapon in detainees' struggles to hold those actors responsible for the harms perpetrated against them.¹⁰¹ As innocent victims of both foreign and domestic interrogation programs emerge and seek remedies for their harms suffered in U.S. courts, there is perhaps no bigger hurdle to leap than that of the state secrets privilege.¹⁰²

C. From Shield to Sword: The State Secrets Privilege

Like the Alien Tort Statute, the state secrets privilege can be traced back to the nascent days of American government, though it has its roots in English common law.¹⁰³ *United States v. Burr*,¹⁰⁴ the first notable case in the United States, involved the treason trial of Aaron Burr.¹⁰⁵ There, Burr attempted to force the prosecution to produce a letter between President Jefferson and General Wilkinson.¹⁰⁶ Burr asserted that the letter contained information that would aid his defense.¹⁰⁷ Chief Justice John Marshall overruled the prosecution's objection by noting "[t]here is certainly nothing

Johnston cites the case of Maher Arar, who was extraordinarily rendered and tortured based on false intelligence. *Id.* at 375 n.106. Johnston also cites the case of Ibn al Sheikh al Libi, "one of the greatest intelligence failures in American history," as someone whom the CIA rendered, waterboarded, and turned over to Egypt, where he was buried alive for seventeen hours. *Id.* at 375-76. After this treatment, al Libi confessed to being a member of al-Qaeda, and gave the CIA information regarding Iraq's weapons of mass destruction ("WMD") program. *Id.* at 376. Then-Secretary of State Colin Powell used some of al Libi's statements at his United Nations presentation to help make the case that Iraq was pursuing a WMD program. *Id.* In 2004, al Libi recanted his statements, claiming he gave them only because he was being tortured. *Id.*

¹⁰¹ See, e.g., *Mohamed II*, 579 F.3d 943, 949-50 (9th Cir. 2009) (describing allegations in case); *Arar v. Ashcroft*, 585 F.3d 559, 565-67 (2d Cir. 2009) (describing allegations in case); *El-Masri v. United States*, 479 F.3d 296, 300 (4th Cir. 2007) (describing allegations in case).

¹⁰² See *infra* note 103 and accompanying text (describing consequence of successful invocation of privilege).

¹⁰³ See Glasionov, *supra* note 9, at 461 (explaining history of state secrets privilege). The precursor to the common law privilege is the English "crown privilege." *Id.* This privilege allowed the monarch's ministers to keep communications private if the subject matter referred to state secrets. *Id.*; see also Kristian W. Murray, *National Security Veiled in Secrecy: an Analysis of the State Secrets Privilege in National Security Agency Wiretapping Litigation*, 199 MIL. L. REV. 1, 6-7 (2009) (describing history of privilege). The privilege was notably used in the trial of Bishop Atterbury on treason and sedition charges in 1723. *Id.* at 7. Atterbury, to prove his innocence, wanted to examine the cryptographers who had decoded his messages alleged to be treasonous. *Id.* The House of Lords denied his request, however, because they thought information that revealed the methods by which the messages were decoded would threaten England's national security. *Id.*

¹⁰⁴ 25 F. Cas. 30 (C.C.D.Va. 1807) (No. 14692D).

¹⁰⁵ See Glasionov, *supra* note 9, at 461 (stating root of privilege in American law goes back to *Burr* proceeding).

¹⁰⁶ *Id.* (describing facts of *Burr* case).

¹⁰⁷ See *id.* (describing facts of case).

before the court which shows that the letter in question contains any matter the disclosure of which would endanger the public safety.”¹⁰⁸ In overruling the objection, however, Chief Justice Marshall implied that when national security was at stake, courts could keep government information hidden from public disclosure.¹⁰⁹

The next case of note was *Totten v. United States*¹¹⁰ in 1875.¹¹¹ The case involved the estate of a deceased spy that sued the United States for breaching a compensation contract between the spy and the government.¹¹² The Supreme Court dismissed the case, holding that while a secret contract between the government and a private actor could exist, the private actor had no cause of action on that contract if the very subject matter of the case—the secret contract—could not be disclosed in court.¹¹³ This case established the *Totten* doctrine, whereby a case merited dismissal before trial if the case’s subject matter was that which the government could not litigate without threatening national security or military necessity.¹¹⁴

¹⁰⁸ *Burr*, 25 F. Cas. at 37 (responding to prosecution’s objection).

¹⁰⁹ *See id.* (noting if letter had, hypothetically, contained information threatening national security, it would be suppressed). Chief Justice Marshall wrote that while balancing national security against an individual’s right to his own defense presented “a delicate question, the discussion of which, it is hoped, will never be rendered necessary in this country,” if the letter did contain “any matter which it would be imprudent to disclose, which it is not the wish of the executive to disclose, such matter . . . will, of course, be suppressed.” *Id.*

¹¹⁰ 92 U.S. 105 (1875).

¹¹¹ *See Crook*, *supra* note 14, at 58 (noting *Totten* was first time state secrets privilege was used in American jurisprudence).

¹¹² *See Totten*, 92 U.S. at 105 (stating facts of case). The plaintiff, William Lloyd, allegedly made a contract with President Lincoln in 1861 requiring Lloyd to perform reconnaissance and determine Confederate troop numbers in various locations. *Id.* In return, he was to be paid, by the Union, \$200 per month. *Id.* at 106.

¹¹³ *See id.* at 107. The Court wrote, “[t]he secrecy which such contracts impose precludes any action for their enforcement.” *Id.*; *see also Murray*, *supra* note 103, at 8-9 (discussing implications of *Totten* ruling). The Court’s ruling in this case was the first time national security was used as a rationale to preclude the disclosure of evidence. *Murray*, *supra* note 103, at 8.

¹¹⁴ *See Totten*, 92 U.S. at 107 (stating Court’s rationale for holding). Justice Field wrote:

It may be 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, and respecting which it will not allow the confidence to be violated.

Id.; *see also Mohamed III*, 614 F.3d 1070, 1077-78 (9th Cir. 2010) (analyzing *Totten* in context of plaintiff’s claims). The court noted the bar “has evolved into the principle that where the very subject matter of a lawsuit is a matter of state secret, the action must be dismissed without reaching the question of evidence.” *Id.* (quoting *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1197 (9th Cir. 2007)). *But see id.* at 1096-97 (Hawkins, J., dissenting) (noting extremely limited application of *Totten*). While conceding that the majority correctly stated the

In *United States v. Reynolds*,¹¹⁵ the Court issued an alternative formulation of the privilege.¹¹⁶ In this case, an Air Force B-29 bomber tasked with testing secret electronic systems crashed, killing several crew members.¹¹⁷ The crewmembers' widows sued the government under the Federal Tort Claims Act.¹¹⁸ The plaintiffs sought to compel production of the accident reports, as well as the statements of the surviving crew.¹¹⁹ The Secretary of the Air Force filed a claim of privilege with the court, and the Judge Advocate General of the Air Force filed a sworn affidavit.¹²⁰ Both documents testified to the highly secretive nature of the information contained within the accident report.¹²¹ Because the government refused to provide the documentation, the district court entered a default judgment for the plaintiffs, which the appeals court upheld.¹²²

However, the Supreme Court reversed, holding that the government had asserted a proper claim of privilege.¹²³ In doing so, the

Totten language, Justice Hawkins emphasized that the bar has only been applied in two extremely limited scenarios: (1) when the plaintiff is party to a secret agreement with the government; and (2) when the plaintiff sues to solicit information from the government regarding state secrets. *Id.*; see also Murray, *supra* note 103, at 9 (noting *Totten* aftermath). The case established a precedent whereby covert contracts could be barred from litigation based on national security concerns. Murray, *supra* note 103, at 9; see also Crook, *supra* note 14, at 59 (noting holding's significance). Notably, the plaintiff's case was not dismissed because it had disclosed confidential information. *Id.* Rather, the case was dismissed because it had "the mere possibility of doing so." *Id.* (emphasis added).

¹¹⁵ 345 U.S. 1 (1953).

¹¹⁶ See Glasionov, *supra* note 9, at 463 (noting *Reynolds* was first explicit mention of state secrets privilege). *Reynolds* still serves as the modern, more common assertion of the privilege, as it deals directly with the U.S. government seeking to forbid the production of evidence based on national security concerns. *Id.*

¹¹⁷ See *Reynolds*, 345 U.S. at 2-3 (stating facts of case).

¹¹⁸ *Id.* at 3.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 3-4 (discussing procedural posture of case). The government, in moving to quash the motion, claimed that the matters invoked confidential Air Force regulations. *Id.*; see also Murray, *supra* note 103, at 10 (stating facts of case). The Judge Advocate General of the Air Force also submitted an affidavit positing that the release of the information would seriously compromise flying safety, national security, and equipment development. Murray, *supra* note 103, at 10.

¹²¹ See *Reynolds*, 345 U.S. at 4-5 (discussing lower court posture). The documents emphasized that the aircraft and soldiers were "engaged in a highly secret mission of the Air Force," and that exposing the information during the discovery would threaten national security. *Id.* at 4 (internal quotation marks omitted). The government did offer to allow the three surviving witnesses to testify to anything other than matters of a classified nature. *Id.* at 5.

¹²² See Crook, *supra* note 14, at 59-61 (explaining how *Reynolds* reached Supreme Court). Because the Air Force refused to turn over the documents, the district court entered a final judgment for the plaintiffs. *Id.* at 61. The Third Circuit Court of Appeals denied the Air Force's appeal. *Id.*

¹²³ See *United States v. Reynolds*, 345 U.S. 1, 6 (1953) (stating holding of case). The suit

Court recognized the implications of its ruling.¹²⁴ It laid out several important requirements necessary for the government to assert a claim of privilege over state secrets.¹²⁵ First, the Court noted that the trial judge was not properly able to evaluate the degree of confidentiality of the materials sought for production.¹²⁶ Therefore, there must first be a formal claim of privilege, “lodged by the head of the department which has control over the matter, after actual personal consideration by that officer.”¹²⁷ Next, the court must then determine “whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect.”¹²⁸ This desire to strike a balance led to the Court’s formulation of the “reasonable danger” test.¹²⁹

was brought under the Tort Claims Act. *Id.* The lower court held that under Rule 34 of the Federal Rules of Civil Procedure, which compels document production of non-privileged matters, the Government was liable. *Id.* However, the Court ruled that because the Government’s claim of privilege was proper, it precluded disclosure of the documents plaintiff sought. *Id.* Thus, the district court had incorrectly assigned liability to the Air Force. *Id.*

¹²⁴ See *El-Masri v. United States*, 479 F.3d 296, 302-03 (4th Cir. 2007) (discussing history of state secrets privilege). The court in *El-Masri* noted the *Reynolds* court itself suggested the state secrets privilege was designed to avoid the constitutional implications of the judiciary demanding information that the executive branch refused to provide. *Id.* at 302-03. *El-Masri* also noted the limited role the judiciary has traditionally played in placing a check on the executive’s foreign policy role. *Id.*; see also *Reynolds*, 345 U.S. at 8 (discussing difficulty in applying privilege). However, the Court in *Reynolds* also realized that “[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers.” *Reynolds*, 345 U.S. at 9-10. The Court analogized the state secrets privilege to the Fifth Amendment privilege against self-incrimination. *Id.* at 8. The Court recognized that in that situation, where there is too much inquiry the privilege becomes useless. *Id.* Conversely, a “complete abandonment” of any inquiry at all would lead to “intolerable abuses.” *Id.*; see also Crook, *supra* note 14, at 61 (analyzing the *Reynolds* holding). The Court in *Reynolds* realized that there exists an inherent conflict between the threat of disclosing secret military matters and the ability of a plaintiff to try a case on its merits. Crook, *supra* note 14, at 61; Page, *supra* note 10, at 1250 (analyzing impact of *Reynolds*). The Court reversed the Third Circuit, although it did uphold the appellate court’s ruling that it was the judiciary, not the executive, who ultimately must decide whether the privilege applies. Page, *supra* note 10, at 1250.

¹²⁵ See *infra* notes 126-132 and accompanying text (discussing framework of *Reynolds* decision).

¹²⁶ See *Reynolds*, 345 U.S. at 10 (explaining logistics of privilege’s application). The Court reversed the district court, at the same time noting that until a formal claim of privilege was lodged, the district court judge was in no position to declare the accident report as beyond the reach of the plaintiff. *Id.* The Court further implied, however, that a mere invocation of the privilege would be enough for a district judge to rule that the plaintiffs could not access the document. *Id.* at 10-11.

¹²⁷ *Id.* at 7-8; see also Page, *supra* note 10, at 1255 (noting private party cannot claim or invoke privilege).

¹²⁸ *Reynolds*, 345 U.S. at 8. The Court invoked the Fifth Amendment claim against self-incrimination as an analogous analytical framework due to the “real difficulty” of determining the appropriate level of inquiry. *Id.*

¹²⁹ See *id.* at 10 (discussing how to determine proper invocation of privilege). Along with the three part test, the Court put forth language from which all modern cases have drawn:

Finally, the Court noted the strength of the privilege, holding “the claim of privilege should not be lightly accepted, but even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake.”¹³⁰ As such, the Court was able to provide guidance to future claimants of the privilege regarding both the substantive and procedural requirements, while reaffirming that the privilege’s successful invocation resulted in immediate dismissal of the plaintiff’s claim.¹³¹ Thus, the state secrets privilege exists on a dual plane: either under the *Totten* bar, whereby a court must dismiss a claim if the very subject matter of the litigation is a state secret, or under the *Reynolds* evidentiary privilege, whereby courts must determine whether evidence involved in the litigation is subject to protection from the privilege.¹³²

After the September 11 attacks, the United States drastically increased its counterterrorism operations, and the state secrets privilege took on a more visible role in the legal field.¹³³ Instead of merely asserting the evidentiary privilege when the government was sued, the United States began proactively intervening in cases where it was not named as a defendant, claiming the subject of the lawsuit would frustrate and threaten national security measures.¹³⁴ While the Obama administration established policies that theoretically would restrict its assertion of the state secrets privilege, in practice, it has continued the Bush administration’s policies of seeking dismissal during the pleading stages in cases where both U.S. and foreign nationals were abducted, detained, and tortured.¹³⁵

It may be possible to satisfy the court, from all the circumstances of the case, that 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. When this is the case, 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.

Id.

¹³⁰ *Id.* at 11.

¹³¹ *See id.* (implying dismissal will result when government properly satisfies “reasonable danger” test).

¹³² *See supra* notes 113, 123 and accompanying text (describing holdings of *Totten* and *Reynolds*).

¹³³ *See supra* note 8 (describing evolution of state secrets privilege in context of post-September 11, 2001 counterterrorism landscape).

¹³⁴ *See Mohamed II*, 579 F.3d 943, 951 (9th Cir. 2009) (noting United States intervened before defendant Jeppesen answered complaint). The state secrets privilege in this case was asserted by the then-Director of the CIA, Michael Hayden. *Id.* He filed two statements in support of a motion to dismiss, one classified, and the other unclassified. *Id.*

¹³⁵ *See Mohamed III*, 614 F.3d 1070, 1077 (9th Cir. 2010) (stating procedural posture of case); *supra* note 13 and accompanying text (detailing Holder memo policies effective October 1,

These two recent, notable cases clearly elucidate not only the executive branch's determination to acquire the dismissal of all cases of extraordinary rendition and torture, but also evidence the judicial branch's excessive deference to both the Bush and Obama administrations' efforts.¹³⁶ They are *El-Masri v. United States*,¹³⁷ as well as the aforementioned *Mohamed* (both *II* and *III*).¹³⁸ The two cases are factually very similar. Both involve CIA detention, transfer by corporate charter, and foreign detention including torture and interrogation.¹³⁹

El-Masri, confined by the limits of the ATS under *Amerada Hess*, brought suit not against any sovereign nation, but against George Tenet, then-CIA Director, and a number of private companies that he alleged were complicit in his detention and torture.¹⁴⁰ The United States, not a party to the case, then filed a statement of interest, asserting the state secrets privilege, and moving to have the case dismissed.¹⁴¹ The district court upheld the government's motion to dismiss.¹⁴²

On appeal, the Fourth Circuit conducted an exhaustive analysis of the privilege.¹⁴³ After determining that the claim of privilege was properly asserted, it stated that the government bears the burden of proving that the *Reynolds* standard—whether “there is a reasonable danger that [the information's] disclosure will expose military matters which . . . should not

2009). The Obama administration certified both in its briefs and at oral argument during rehearing that “officials at the highest levels of the Department of Justice of the new administration had reviewed the assertion of privilege in this case and determined that it was appropriate” *Mohamed III*, 614 F.3d at 1077; Brief of Appellee-Defendant Neal Kumar Katyal, Acting Solicitor General at 1, *Arar v. Ashcroft*, 130 S. Ct. 3409 (2010) (No. 09-923), 2010 WL 1932623 at *1.

¹³⁶ See *supra* notes 134, 135 and accompanying text (describing executive branch efforts to achieve dismissal).

¹³⁷ 479 F.3d 296 (4th Cir. 2007).

¹³⁸ See *El-Masri*, 479 F.3d at 300 (discussing facts of case); *supra* notes 25-26 and accompanying text (describing allegations of *Mohamed* plaintiffs). El-Masri was a German citizen of Lebanese descent. *El-Masri*, 479 F.3d at 300. He was traveling in Macedonia on December 31, 2003, when Macedonian law enforcement arrested him. *Id.* After transfer to CIA agents, the CIA detained him near Kabul, Afghanistan until May 28, 2004. *Id.* During his captivity, he alleges he was “beaten, drugged, bound, and blindfolded during transport; confined in a small, unsanitary cell, interrogated . . . and consistently prevented from communicating with anyone outside the detention facility.” *Id.* El-Masri further alleges the corporate defendants named in the suit, Premier Executive Transport Services and Keeler & Tate Management Group, LLC, provided the transport during El-Masri's extraordinary rendition. *Id.*

¹³⁹ See *supra* note 138 and accompanying text (outlining allegations in *El-Masri* complaint).

¹⁴⁰ See *El Masri*, 479 F.3d at 301.

¹⁴¹ See *id.* at 301 (discussing case's procedural posture).

¹⁴² See *El-Masri v. United States*, 479 F.3d 296, 301 (4th Cir. 2007).

¹⁴³ See *id.* at 302-07 (reviewing evolution of privilege).

be divulged.”¹⁴⁴ Here, because the subject of the suit centered on the United States’s policy of extraordinary rendition and interrogation of terrorist suspects, the court found that the case could not be litigated, and dismissal was appropriate.¹⁴⁵

When the Ninth Circuit reversed and remanded *Mohamed II*, it created a circuit split regarding when the state secrets privilege can be used.¹⁴⁶ While the *El-Masri* decision allowed the *Reynolds* test to be used to dismiss an entire lawsuit at the pleadings stage (essentially achieving a confluence of the *Reynolds* and *Totten* standards), the Ninth Circuit disagreed.¹⁴⁷ *Mohamed II* emphasized that “to conclude that *Reynolds*, like *Totten*, applies to prevent the litigation of allegations, rather than simply discovery of evidence, would be to destroy the distinction between the two versions of the doctrine.”¹⁴⁸ The court also addressed the separation of powers issues raised by the government’s assertion of the privilege at the pleadings stage.¹⁴⁹ It stated a strong preference for analyzing state secrets claims under the auspices of the *Reynolds* framework rather than under the *Totten* bar.¹⁵⁰ The *Mohamed II* decision by the en banc Ninth Circuit validated the *Mohamed I* court’s fears of destroying the distinction between the *Reynolds* and *Totten* analyses, and of according too much deference to the executive branch’s claims of secrecy.¹⁵¹ *Mohamed III*’s holding is

¹⁴⁴ *Id.* at 302 (quoting *United States v. Reynolds*, 345 U.S. 1, 10 (1953)).

¹⁴⁵ *See id.* at 312-13 (stating case’s holding).

¹⁴⁶ *See supra* note 34 and accompanying text (stating nature of circuit split).

¹⁴⁷ *See id.* at 957-58 (analyzing purpose and nature of evidentiary privileges). The court held the *Reynolds* privilege operated no differently than any other privilege, and it “extends only to [evidence] and not to facts.” *Id.* at 957 (citations omitted). Consequently, “it cannot be invoked to prevent a litigant . . . of the truth or falsity of an allegation by reference to non-privileged evidence, regardless whether privileged evidence might also be probative of the truth or falsity of the allegation.” *Id.* at 957-58.

¹⁴⁸ *Mohamed II*, 579 F.3d at 957 (analyzing implications of government’s claim in context of *Reynolds* standard).

¹⁴⁹ *See id.* at 956 (noting “[s]eparation-of-powers concerns take on an especially important role in the context of secret Executive conduct.”).

¹⁵⁰ *See id.* (discussing separation of powers issues raised by state secrets privilege). The court noted when individual civil liberties are at stake, the Constitution “most assuredly envisions a role for all three branches . . .” *Id.* Whereas the *Totten* framework allows the executive branch total immunity from judicial scrutiny, analyzing the privilege under the *Reynolds* standard preserves separation of powers concerns by allowing a more precise examination. *Id.*

¹⁵¹ *See Mohamed III*, 614 F.3d 1070, 1087 (9th Cir. 2010) (discussing prospective paths of litigation). The court concluded while “some information” about the extraordinary rendition program has been made public, and this public information would allow the plaintiffs’ claims, if true, to make out a *prima facie* case against Jeppesen, “Jeppesen’s alleged role and 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 . . .” *Id.* at 1088 (emphasis added).

significant because it not only eliminated this circuit split, but it also affirmed a deferential posture toward the executive branch by holding that a defendant could assert an evidentiary privilege at the pleadings stage, and achieve dismissal of the entire case.¹⁵² Furthermore, the court implies that though the rendition program is no longer a state secret, that while the government itself has disclosed the program's existence, the circumstances of its use and abuse may not be litigated using publicly available information.¹⁵³ Effectively, the Ninth Circuit's decision serves to bar a plaintiff's claim on evidentiary grounds, even when the plaintiff can make a *prima facie* case using publicly available information, simply due to the risk that the discovery process may unearth a state secret.¹⁵⁴

IV. ANALYSIS: FORGING AHEAD

While the state secrets privilege serves an important role, the deference accorded by courts to the executive branch represents an abdication of judicial authority and review that has empowered the executive branch to assert the privilege in increasingly broader contexts.¹⁵⁵ Despite promises of more careful review and the implementation of the privilege, the Obama administration has extended the Bush administration's use of it.¹⁵⁶ When the executive branch oversteps its constitutional boundaries, the responsibility falls upon the judiciary and the legislature to rein in its excesses.¹⁵⁷ The logical question becomes how these branches can do so, and allow innocent individuals properly to be made whole for violations of international and domestic law committed by

¹⁵² *Id.* (holding executive branch properly invoked *Reynolds* state secrets privilege during pleadings stage).

¹⁵³ See *supra* note 152 and accompanying text.

¹⁵⁴ See *supra* note 152 and accompanying text.

¹⁵⁵ See, e.g., *United States v. Reynolds*, 345 U.S. 1, 10-11 (1953) (holding state secrets privilege was valid); *Kasza v. Browner*, 133 F.3d 1159, 1169-70 (9th Cir. 1998) (dismissing case based on valid assertion of state secrets privilege); *Mohamed v. Jeppesen Dataplan, Inc. (Mohamed I)*, 539 F. Supp. 2d 1128, 1134 (N.D. Cal. 2008), *rev'd*, 579 F.3d 943 (9th Cir. 2009) (holding privilege may be asserted at pleadings stage using *Reynolds* test to achieve dismissal); see also *supra* note 13 (citing Obama administration's use of privilege preventing disclosure of assassination of U.S. citizen in Yemen).

¹⁵⁶ See *supra* note 13 and accompanying text (citing recent Washington Post article).

¹⁵⁷ See *Mohamed III*, 614 F.3d at 1101 (Hawkins, J., dissenting) (criticizing majority's suggested remedies for plaintiffs). The majority suggested "that the Executive could 'honor [] the fundamental principles of justice' by 'determining whether plaintiffs' claims have merit' and compensating them on a case-by-case basis. *Id.* The dissent rebuts this, stating that allowing the executive branch to police itself "disregards the concept of checks and balances" and "deprive[s] the judiciary of its role." *Id.*

the United States.¹⁵⁸

A. Continue Bringing Claims Under ATS

In *Sosa v. Alvarez-Machain*,¹⁵⁹ Justice Souter's opinion indicated the potential for future human rights victims to bring an ATS suit, but endorsed a narrow construction of the statute that granted jurisdiction but provided no cause of action.¹⁶⁰ While the Torture Victim Protection Act may be a useful tool, there is less case law under this statute and thus a lack of certainty as to how a plaintiff may successfully bring a claim.¹⁶¹ The ATS also allows courts to be flexible and incrementalist in determining what customary international law norms should be accorded: CIL or *jus cogens* status.¹⁶² The *Kadic* decision has already established that the statute can be applied flexibly while still adhering to the drafters' intentions.¹⁶³ Finally, the statute is flexible because it evolves as the body of international law itself evolves.¹⁶⁴ Not only is international law expanding, it is becoming more clearly defined from both a procedural and a substantive perspective.¹⁶⁵ As such, torture and extraordinary rendition victims should continue to keep the ATS as a prominent tool in their arsenal.¹⁶⁶ If any silver lining exists in the *Mohamed III* decision, it is the court's failure to question the Ninth Circuit's ability to acquire jurisdiction over the matter

¹⁵⁸ See *supra* note 155 and accompanying text (describing increasingly broader use of state secrets privilege).

¹⁵⁹ 542 U.S. 692 (2004).

¹⁶⁰ See *id.* at 724 (holding ATS as "jurisdictional statute creating no new causes of action"). However, the majority opinion did not end its inquiry there. Responding to Justice Scalia's dissenting opinion, the majority wrote:

Whereas Justice Scalia sees these developments as sufficient to close the door to further independent judicial recognition of actionable international norms, other considerations persuade us that the judicial power should be exercised on the understanding that the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today.

Id. at 729.

¹⁶¹ See *supra* notes 76-77 and accompanying text (describing legislative history of TVPA).

¹⁶² See *supra* notes 90-95 and accompanying text (analyzing Supreme Court's construction of ATS).

¹⁶³ See *supra* note 77 and accompanying text (discussing *Kadic* holding).

¹⁶⁴ See *supra* notes 38-43 and accompanying text (implying Law of Nations may adapt when CIL changes).

¹⁶⁵ See *supra* notes 38-48 and accompanying text (analyzing evolution of CIL).

¹⁶⁶ See *supra* note 88 (explaining that ATS grants jurisdiction and may encompass certain violations of international law).

through the ATS.¹⁶⁷ As its usage grows, the challenges to its legitimacy should diminish.¹⁶⁸

B. Pass the “State Secrets Protection Act of 2009”

While plaintiffs may continue bringing suits under the ATS, the United States has clearly indicated that even a whiff of its potential involvement will trigger a state secrets privilege claim.¹⁶⁹ The mere fact that the government has asserted the privilege does not guarantee that the matter is truly a matter of state secrets.¹⁷⁰ While the *Reynolds* court strongly implied that *in camera* reviews would be inappropriate, it is the lack of transparency in the process, along with the aforementioned revelations, that has created a lack of faith in the government’s assertions.¹⁷¹ Plaintiffs’ cases are being dismissed without the case getting to the discovery stage, much less a trial on the merits.¹⁷²

Instead of requiring a judge to take the government’s word, based only on a “reasonable” danger, Congress should pass the State Secrets Act of 2009, which would go far in narrowing the executive branch’s ability to assert the state secrets privilege.¹⁷³ Not only does it require *in camera* examinations by the presiding judge, but it also prohibits the application of the *Reynolds* standard during the pleadings stage.¹⁷⁴ While the *in camera* examination would contravene a strong implication of the *Reynolds* decision, it would, more importantly, keep with the larger spirit of allowing a judge to balance more precisely the information that truly threatens national security protocols and that information which both the plaintiff and the defendant can use to adjudicate the merits of their respective

¹⁶⁷ See *Mohamed III*, 614 F.3d 1070 (9th Cir. 2010) (omitting discussion of jurisdiction).

¹⁶⁸ See *supra* note 167.

¹⁶⁹ See *Mohamed II*, 579 F.3d 943, 949 (9th Cir. 2009) (noting the United States intervened as defendant before Jeppesen had answered complaint).

¹⁷⁰ See Glasionov, *supra* note 9, at 466 (discussing “ironic twist” in *Reynolds*). The report that the government sought to keep classified, based on information regarding secret electronic equipment, was recently declassified. *Id.* Contrary to the government’s assertion of what the report contained, it in fact attributed the crash to the military’s negligence. *Id.* Thus, *Reynolds*, the landmark case outlining the state secrets privilege, was itself based on wrongly concealed information. *Id.*

¹⁷¹ *Id.* at 467-68.

¹⁷² See *id.* at 469 (noting effect of successful claim of privilege is dismissal at pleadings stage).

¹⁷³ H.R. 984, 111th Cong. (2009); S. 417, 111th Cong. (2009).

¹⁷⁴ Cf. *United States v. Reynolds*, 345 U.S. 1, 10 (1953) (“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.”).

claims.¹⁷⁵ By introducing a greater level of transparency, those lawsuits that are dismissed will garner far more credibility and avoid the situation presented in *Reynolds*.¹⁷⁶ Furthermore, *in camera* reviews will introduce a level of procedural integrity that dovetails with the executive branch's renewed focus on respect for international law.¹⁷⁷

Both the Ninth Circuit, in *Mohamed II* and *III*, as well as the Fourth Circuit, in *El-Masri*, expressed a reluctance to invoke the *Totten* bar beyond its present scope.¹⁷⁸ Prohibiting the dismissal at the pleadings stage using the *Reynolds* analysis will force the executive to identify specific pieces of evidence it seeks to avoid disclosing.¹⁷⁹ The House version was reported out of committee favorably, but the full House did not vote on the bill before it recessed.¹⁸⁰ The State Secrets Protection Act of 2009 should be refiled during the next legislative session and passed into law, as it makes significant strides toward restoring the state secrets privilege as a shield, rather than a sword.¹⁸¹

C. Carefully Select Appellate Jurisdiction

Until *Mohamed I*, no recent case, in which extraordinary rendition and torture were at stake, survived the invocation of the state secrets privilege.¹⁸²

The Fourth Circuit seems a likely circuit to avoid, based on the similar facts presented in *El-Masri*.¹⁸³ Although in that case the defendant was not a private company, but rather the U.S. government, the court dismissed the claim.¹⁸⁴ Despite widely available public documents on the nature of the plaintiff's rendition, the court found that the "main avenues" of the government's defense would be precluded by vital national security

¹⁷⁵ See *supra* note 174 and accompanying text.

¹⁷⁶ See *supra* notes 126-131 and accompanying text (explaining *Reynolds* reasoning and standard).

¹⁷⁷ See *supra* note 13 and accompanying text.

¹⁷⁸ See *supra* note 150 and accompanying text.

¹⁷⁹ See H.R. 984, § 7(c) (2009) (prohibiting dismissal at pleadings stage).

¹⁸⁰ H.R. 984 (as reported by H. Comm. on the Judiciary, Nov. 5th, 2009).

¹⁸¹ See generally H.R. 984, 111th Cong. (2009); S. 417, 111th Cong. (2009).

¹⁸² See *Mohamed II*, 579 F.3d 943, 949 (9th Cir. 2009) (stating conclusion of opinion). The court noted in this case that Jeppesen had not yet filed an answer to the complaint, and on a Rule 12(b)(6) motion, the court will inquire only as to whether the complaint "state[s] a claim upon which relief can be granted." *Id.* at 960-61 (quoting FED. R. CIV. P. 12(b)(6)). Because the plaintiffs here did not state such a claim, the court denied the government's motion to dismiss. *Id.* at 960-61.

¹⁸³ See *supra* note 138 (discussing facts of *El-Masri*).

¹⁸⁴ See *supra* note 138 (discussing facts and holding of *El-Masri*).

information.¹⁸⁵ They also implied they would rule the same way if there was a corporate defendant in place of the government.¹⁸⁶

Even after its decision in *Mohamed III*, the Ninth Circuit remains the most likely forum in which to bring torture and rendition claims that violate the ATS.¹⁸⁷ While this does not guarantee that each case filed will get to trial, it is a forum in which plaintiffs can expect to find a more willing audience.¹⁸⁸ The court noted the “reluctance” of its decision and voted 6-5 in favor of the defendant.¹⁸⁹ If the next plaintiff is able to convince even one justice to switch his or her vote, then the cases have a much greater chance of ultimately getting either to the pleadings stage, or being granted certiorari by the Supreme Court of the United States.

D. Rely on Non-Traditional Media Reporting

In *El-Masri*, the court refused to acknowledge the reliability of non-legal journalism.¹⁹⁰ Yet, up to this point, such media’s veracity has never been disputed.¹⁹¹ Courts should consider not only governmental materials and statements, but also the information available in the public domain.¹⁹² To assert the state secrets privilege, the government is forced to reveal very little of the information it seeks to protect.¹⁹³ Considering news reports, public statements, and interviews can help paint a clearer picture of the evidence a lawsuit is likely to extrapolate.¹⁹⁴

¹⁸⁵ *El-Masri v. United States*, 479 F.3d 296, 309 (4th Cir. 2007).

¹⁸⁶ *See id.* at 310 (noting “[s]imilar concerns would attach to evidence produced in defense of the corporate defendants”).

¹⁸⁷ *See supra* note 29 and accompanying text (discussing holding of *Mohamed II*).

¹⁸⁸ *See supra* notes 151-152 (analyzing effect of *Mohamed III* decision).

¹⁸⁹ *See Mohamed III*, 614 F.3d 1070, 1073 (9th Cir. 2010) (listing vote count and “reluctantly conclud[ing] . . . plaintiffs’ action must be dismissed”).

¹⁹⁰ *See El-Masri v. United States*, 479 F.3d 296, 309 (4th Cir. 2007); *see also* *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 986-990 (N.D. Cal. 2006) (discussing impact of numerous media reports without disputing reliability).

¹⁹¹ *See id.* at 990 (suggesting factors of reliability to be considered by courts). “[T]he court should look only at publicly reported information that possesses substantial indicia of reliability and whose verification or substantiation possesses the potential to endanger national security.” *Id.*

¹⁹² *See supra* note 191 and accompanying text (analyzing courts’ treatment of media reports).

¹⁹³ *See supra* note 126 (describing logistics of asserting state secrets privilege).

¹⁹⁴ *See Hepting*, 439 F. Supp. 2d at 990-92 (describing publicly available documents and reports regarding government wiretapping program).

V. CONCLUSION

It is patently illogical to concede that the U.S. government may assert a privilege designed to safeguard national security when that very security allegedly rests on performing acts apposite with compacts, treaties, and domestic statutes of which it has been both a party and a sponsor. The post-September 11, 2001 paradigm requires vigilant counterterrorist and counterintelligence operations. At the same time, no nation should be immune from acknowledging its errors, particularly when it attempts to hold other nations accountable for the very same actions. The Alien Tort Statute provides a valuable tool for victims of human rights violations to gain redress for unthinkable harms perpetrated against them. Certainly, the U.S. government has legitimate and pressing reasons to safeguard our intelligence processes. That it has successfully avoided an attack on American soil since September 11, 2001 is a strong testament to the dedication and efficacy of these processes. However, the state secrets privilege has become a catch-all, handcuffing a judge's ability to determine what evidence should rightfully be excluded on national security grounds and what would reasonably give a plaintiff the proper ability to present a case. Furthermore, courts must cease deferring to the executive branch as a matter of course. Many of the cases plaintiffs have sought to bring pose reasonable questions about exactly how much of the U.S. intelligence process is actually covert and secret. Throughout its existence, the United States has served as a clarion call to freedom, liberty, and the rule of law. Its frequent application of the state secrets privilege undermines those most essential values.

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