



Supreme Court of the United States

Abdul Shareef v. Barack Obama

By Jean-Paul Jacquet

Summary of the Facts

The case of Shareef v. Obama, et al. involves a variety of issues; however, the principle issue to be decided is the application and scope of the “state secrets privilege.” Abdul Shareef, a citizen of Saudi Arabia, is suing the United States federal government (USFG) for alleged unlawful rendition and torture. Shareef filed suit in the US District Court for the District of Columbia. Following an assertion of the state secrets privilege by the USFG, the case was summarily dismissed. Shareef appealed the decision, which was upheld on two additional occasions before reaching the Supreme Court of the United States (SCOTUS).

The state secrets privilege functions as a limited assurance for the preservation of national security. In this case, the USFG is arguing that the trial proceedings could reveal information that must remain secret in the interest of national security. The state secrets privilege allows the government to keep such information hidden whenever revealing such information would threaten the security of the United States.

This court must decide whether or not the state secrets privilege applies, and if so, what the scope of that privilege is. Does the state secrets privilege require the dismissal of the case, or does it merely require the exclusion of specific pieces of evidence which may threaten national security? Additionally, does use of the state secrets privilege represent an undue preference for executive power over judicial power? In light of today’s volatile global political climate, do national security interests outweigh a potential imbalance in the separation of powers guaranteed by the United States Constitution?

Relevant Precedents

UNITED STATES v. REYNOLDS, 345 U.S. 1 (1953)

Background

In 1948, a B-29 Superfortress crashed in Waycross, Georgia, killing three civilians on board. Their widows brought suit against the United States under the Federal Tort Claims Act. When asked to produce the accident report for the crash, the federal government refused, claiming that the release of the documents would reveal information that would threaten national security. The trial court issued a directed verdict in favor of the plaintiffs. This means that the judge ruled in favor of the plaintiffs without the jury, as a matter of law. The judge came to this decision because of the government’s failure to produce documents substantive to the outcome of the case. This judgment was affirmed in the United States Court of Appeals for the Third Circuit. The United States appealed the decision to the Supreme Court.

Opinion of the Court by Chief Justice Vinson

The plaintiffs in this case have a valid claim of production on the government for the purposes of criminal procedure. Under the Federal Rules of Civil Procedure applicable under the Tort Claims Act, the Government is compelled to produce necessary documents. However, the Government is only compelled to production of matters “not privileged.” Therefore, the question at hand is whether or not the documents in question are privileged. This court finds that, as an evidentiary matter, the documents are privileged. Such privilege against revealing military secrets is well established in the law of evidence.

“Judicial experience with the privilege which protects military and state secrets has been limited in this country. English experience has been more extensive, but still relatively slight compared with other evidentiary privileges. Nevertheless, the principles which control the application of the privilege emerge quite clearly from the available precedents. The privilege belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party. It is not to be lightly invoked. There must 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. The court itself must 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. The latter requirement is the only one which presents real difficulty. As to it, we find it helpful to draw upon judicial experience in dealing with an analogous privilege, the privilege against self-incrimination.”

Mohamed, et al. v. Jeppesen Dataplan
United State Court of Appeals for the Ninth Circuit

Background

In May of 2007, the American Civil Liberties Union (ACLU) filed suit against Jeppesen Dataplan, Inc. for its involvement in the United States Central Intelligence Agency’s (CIA) secret extraordinary rendition program. The suit alleged that Jeppesen Dataplan provided logistical support for the CIA by transporting detainees overseas to be detained and interrogated. The suit was filed on behalf of five individuals, citizens of various countries, who allege that they were captured as part of the extraordinary rendition program and transferred to various other countries to be tortured. This suit followed an October 2006 article in *The New Yorker* (an American magazine) indicating that Jeppesen Dataplan was employed by the CIA to aid in the extraordinary rendition program.

After the suit was filed, but before Jeppesen filed an answer to the plaintiff’s complaint, the United States Federal Government (USFG) intervened, filing a motion to dismiss the case by reason of the state secrets privilege. The district court summarily dismissed the case, and the plaintiffs appealed, arguing that the state secrets privilege was misapplied and that the case should not have been dismissed.

Opinion of the Court by Judge Hawkins

Historically, two cases describe the application of the state secrets privilege. *Totten v. United States* discusses the injudicability of cases when the subject of such cases would necessarily be secret, pertaining to a secret agreement between parties. On the other hand, *United*

States v. Reynolds discusses the state secrets privilege as an evidentiary matter, such that specific pieces of evidence which might threaten national security would be excluded from trial, although the trial would proceed without that evidence. The court found that the plaintiffs could argue that Jeppesen is liable for damages without presenting evidence of a secret agreement between Jeppesen Dataplan, Inc. and the CIA. Further, the court interprets *Totten* such that invocation of the state secrets privilege would require a secret agreement between the plaintiff and the government. This interpretation indicates that any “secret agreement” between Jeppesen Dataplan and the CIA is inconsequential. Even further, the court finds that the broad interpretation of *Totten* as excluding any case for which the “very subject matter” of the suit involves a state secret potentially violates the separation of powers provided in the United States Constitution. The court ultimately adopts the precedent provided by *United States v. Reynolds* and rules that the state secrets privilege may only apply as an evidentiary rule, potentially excluding specific pieces of evidence which may pose a threat to national security.