No. 08-15693

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BINYAM MOHAMED, ABOU ELKASSIM BRITEL, AHMED AGIZA, MOHAMED FARAG AHMAD BASHMILAH, BISHER AL-RAWI,

Plaintiffs-Appellants,

v.

JEPPESEN DATAPLAN, INC.,

Defendant,

UNITED STATES OF AMERICA,

Intervenor-Appellee.

Appeal from the United States District Court
for the Northern District of California
Case No. 5:07-CV-02798-JW
The Honorable Judge James Ware

Brief of Plaintiffs-Appellants

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JURISDICTIONAL STATEMENT

The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 (federal question), 1332 (diversity), and 1350 (Alien Tort Statute). On February 13, 2008, the district court entered an order dismissing the action. Plaintiffs timely appealed. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Did the district court err in dismissing this action on the basis of the evidentiary state secrets privilege, prior to discovery, without first allowing plaintiffs to prove their claims with nonprivileged evidence and without adequately considering alternatives to dismissal?

STATEMENT OF THE CASE

On May 30, 2007, Binyam Mohamed, Abou Elkassim Britel, and Ahmed Agiza filed this action against Jeppesen Dataplan, Inc. ("Jeppesen"), and on August 1, 2007, Mohamed Farag Ahmad Bashmilah and Bisher Al-Rawi joined as plaintiffs in an amended complaint. Plaintiffs alleged that, through its knowing participation in the CIA's extraordinary rendition program, Jeppesen was either directly or indirectly liable for the forced disappearance, torture, and other cruel, inhuman, or degrading treatment to which they were subjected.

Although not named as a defendant, the United States government successfully intervened in this matter and moved for dismissal pursuant to the evidentiary state secrets privilege. The district court held oral argument on the United States' motion on February 5, 2008. In an order dated one week later, three pages of which addressed the issues in dispute, the court held that it "lack[ed] subject matter jurisdiction" over the case and dismissed the complaint as "non-justiciable." This appeal followed.

STATEMENT OF FACTS

A. The Plaintiffs

Each of the five plaintiffs in this action was forcibly disappeared and transported to torture on flights organized by Jeppesen. The information collected below is hardly secret – rather, it is corroborated by sworn declarations, government documents, flight records, official reports, and other reliable evidence.

Ahmed Agiza

On December 18, 2001, Plaintiff Ahmed Agiza, a 45-year-old Egyptian father of five, was summarily expelled from Sweden, where he and his family had been seeking asylum. First Amended Compl. ¶¶ 126-33; ER 784-86. Swedish authorities seized Mr. Agiza, drove him to an airport, and handed him to agents of the U.S. and Egyptian governments. Mr. Agiza's

clothes were sliced from his body and a suppository was forced into his anus. He was then dressed in a diaper and overalls and dragged barefooted, blindfolded, and shackled to an awaiting aircraft where he was strapped to a mattress on the floor. The flight planning and logistical support for this aircraft – a Gulfstream V jet, registered with the U.S. Federal Aviation Administration (FAA) as N379P – were organized by Jeppesen. *Id.* at ¶¶ 133-38, 243-45; ER 786-87, 816.

Mr. Agiza was flown to Egypt and transferred to authorities there. For five weeks, he was held incommunicado in a squalid, windowless, and frigid cell approximately two square meters in size, and interrogated under torture. *Id.* at ¶¶ 140-42; ER 787-88. Interrogators routinely beat him and strapped him to a wet mattress and subjected him to electric shock through electrodes attached to his ear lobes, nipples, and genitals. *Id.* at ¶¶ 143-45; ER 788-89. After two and a half years in detention, Mr. Agiza was given a six-hour show trial before a military court. He was convicted of membership in a banned Islamic organization and is presently serving a 15-year sentence in an Egyptian prison. *Id.* at ¶ 148; ER 789.

Virtually every aspect of Mr. Agiza's rendition, including his torture in Egypt, has been publicly acknowledged by the Swedish government. Jeppesen's involvement is also a matter of public record. The Swedish

government's decision to expel Mr. Agiza to Egypt and its subsequent decision to repeal that expulsion are substantiated in government documents. Declaration of Anna Wigenmark in Support of Plaintiffs' Opposition to United States' Motion to Dismiss, or, in the Alternative, for Summary Judgment ("Wigenmark Decl.") at ¶2 and ¶ 7; ER 491 and 493. The decision-making process of the Swedish government leading up to Mr. Agiza's expulsion, as well as its involvement with the U.S. and Egyptian governments, have been exhaustively and publicly investigated by the Chief Parliamentary Ombudsman and the Swedish Parliament's Standing Committee of the Constitution.

The Ombudsman's report explicitly discusses contacts between the CIA and the Swedish government over Mr. Agiza's transport to Egypt: "Some time before the expulsion decision was made . . . the Security Police received an offer from the American Central Intelligence Agency (CIA) of the use of a plane that was said to have what was referred to as direct access so that it could fly over Europe without having to touch down." Wigenmark Decl. at ¶ 11; ER 495. Quoting from a memorandum drawn up by the Swedish security police on February 7, 2002, the Ombudsman also notes: "After some consultation with the staff of the Ministry for Foreign Affairs the Foreign Minister then gave approval of the acceptance by SÄPO/RPS of

the help offered by the USA for the transport of A. [Mr. Agiza]." *Id.* The Ombudsman further documents the disturbing details of Mr. Agiza's mistreatment and humiliation at Bromma airport. *Id.* at ¶ 14; ER 496. The Political Director at the Ministry for Foreign Affairs at the time of Mr. Agiza's rendition, Mr. Sven-Olof Petersson, advised the Standing Committee of the Constitution of the involvement of the U.S. government in initially providing information about Mr. Agiza and in convincing Egypt to accept his return. Wigenmark Decl. at ¶ 20; ER 498.

The fact of Mr. Agiza's torture and the negotiation between Sweden and Egypt of "diplomatic assurances" for his well-being following his removal to Egypt were reviewed by the United Nations Committee Against Torture (CAT). The Committee, which based its conclusions in part on documents obtained from the Swedish government, found that Sweden had violated its obligations under international human rights law. Wigenmark Decl. ¶ 6; ER 492-93. The Standing Committee on the Constitution acknowledged that Mr. Agiza may have been tortured and, to comply with the findings of the CAT, the Swedish government has referred Mr. Agiza's request for compensation to the Office of the Chancellor of Justice to attempt to reach an agreement with him on the issue of compensation, including an amount to compensate for his torture. Wigenmark Decl. at ¶ 7

ER 493. On May 16, 2007, the Swedish government, recognizing the illegality of the order that expelled Mr. Agiza from Sweden, repealed that order and reopened his application for a residence permit in Sweden.

Separate inquires by the Council of Europe and the European Parliament identified the aircraft – a Gulfstream V jet, then registered with the FAA, as N379P – used to transport Mr. Agiza to Egypt. Wigenmark Decl. at ¶ 21; ER 499. These inquiries, as well as investigations by plaintiffs' attorneys, have also produced three documents confirming that Jeppesen provided flight planning and logistical support to the aircraft and crew used for this rendition flight. First, the local "data string" for the flight plan filed for this flight contains an originator code, KSFOXLDI, uniquely identifying Jeppesen as the entity having filed the plan with European air traffic control authorities. Declaration of Steven Macpherson Watt in Support of Plaintiffs' Opposition to United States' Motion to Dismiss, or, in the Alternative, for Summary Judgment ("Watt Decl.") at ¶ 57; ER 298.[1] Second, an invoice, numbered 19122416, from Luftfartsverket Division,

[1] "KSFOXLDI" is the originator code assigned to Jeppesen in the Aeronautical Fixed Telecommunication Network (AFTN). Every flight plan submitted by Jeppesen to air traffic control authorities, including Eurocontrol, includes this originator code, which indicates the entity responsible for filing the plan. Eurocontrol's Integrated Initial Flight Plan Processing System, IFPS Users Manual notes that the "AFTN address KSFOXLDI is a collective address for Jeppesen flight planning services in San Francisco." Watt Decl. at ¶ 51; 294-295.

Stockholm to Jeppesen, notes that Jeppesen was billed for noise, landing, terminal navigation, emission, passenger, and security fees for a Gulfstream V aircraft with registration N379P for December 18, 2001. Watt Decl. at ¶ 56; ER 297. Third, the information in the Luftfartsverket invoice is corroborated by a record from the Swedish Civil Aviation Administration, which also notes that the aircraft landed at Bromma airport at 19:54 and departed for Cairo at 20:49 on December 18, 2001 with nine passengers on board. *Id.*

Abou Elkassim Britel

On March 10, 2002, Plaintiff Abou Elkassim Britel, a 40-year-old Italian citizen of Moroccan origin, was arrested and detained in Pakistan on immigration charges. First Amended Compl. at ¶¶ 90, 94; ER 777-78. While detained, Mr. Britel was interrogated by Pakistani and U.S. officials. His Pakistani captors subjected him to torture for weeks, including beating him repeatedly and suspending him from the ceiling of his cell. His numerous requests to both Pakistani and U.S. officials to meet with the Italian Embassy were refused. *Id.* at ¶¶ 94-8; ER 777-79. To escape further torture, Mr. Britel confessed falsely to being a "terrorist."

On May 24, 2002, Mr. Britel was handed over to the exclusive custody of U.S. officials. After stripping him of his clothing, dressing him

in a diaper and overalls, and chaining, shackling, and blindfolding him, U.S. officials transported Mr. Britel on board the same Gulfstream V jet aircraft that had been used five months earlier to transport Mr. Agiza to Egypt. The flight planning and logistical support for the aircraft and its crew were once again provided by Jeppesen. *Id.* at ¶¶ 96, 100, 102, 241-42; ER 778, 779-80, 815. Upon arrival in Morocco, Mr. Britel was handed over to agents of the Moroccan security services who detained him incommunicado at the notorious Temara prison.

For eight months, Mr. Britel was interrogated and tortured by his Moroccan captors. He was severely beaten, deprived of sleep and food, and threatened with forms of sexual torture, including being sodomized with a bottle and having his genitals cut off. *Id.* at ¶¶ 104-5; ER 780. On February 11, 2003, Mr. Britel was released without charge. *Id.* at ¶ 107; ER 781. With the assistance of his Italian wife and the Italian Embassy, Mr. Britel made arrangements to return to his home in Italy. On the eve of his return, however, Mr. Britel was caught up in a government dragnet in the wake of the May 16, 2003 bombings in Casablanca. He was once again detained incommunicado at the Temara prison, where he was coerced into signing a false confession he was never permitted to read. *Id.* at ¶¶ 111, 113-4; ER 781-82. On October 3, 2003, Mr. Britel was convicted of a terrorism-related

charge by a Moroccan court and sentenced to 15 years in prison. An observer from the Italian Embassy reported that the trial was fundamentally flawed and failed to meet universally accepted minimum fair trial standards.

On September 29, 2006, Italian authorities closed an exhaustive six-year investigation into Mr. Britel's alleged involvement in terrorist activities, citing a complete lack of evidence of any criminal wrongdoing on his part. Declaration of Abou Elkassim Britel in Support of Plaintiffs' Opposition to the United States' Motion to Dismiss or, in the Alternative, for Summary Judgment ("Britel Decl.") at ¶ 27; ER 93. In January 2007, nearly one hundred Italian parliamentarians and members of the European Parliament supported a request calling on Moroccan authorities to pardon Mr. Britel. The Italian government also separately sought a pardon from the King of Morocco, as well as Mr. Britel's immediate release and repatriation to Italy. Mr. Britel remains incarcerated in Ain Bourja prison in Casablanca. Britel Decl. at ¶ 28; ER 94.

Mr. Britel's allegations of forced disappearance and torture in Morocco have been investigated and corroborated by the European Parliament and by the International Federation for Human Rights (FIDH). Watt Decl. at ¶ 33; ER 272-73. The European Parliament has identified the aircraft used to transport Mr. Britel from Pakistan to Morocco as a

Gulfstream V jet aircraft, then registered with the FAA as N379P. Flight records examined by the European Parliament also confirm that on May 24, 2004, this aircraft flew from Pakistan to Rabat and then on to Porto, Portugal. Britel Decl. at ¶ 14; ER 91-92. Jeppesen's involvement in providing the flight planning and logistical support to the aircraft and crew is also substantiated by flight records. The local "data string" for the flight plan filed with European air traffic control authorities for this flight contains an originator code, KSFOXLDI, uniquely identifying Jeppesen as the entity having filed the flight plan. Britel Decl. at ¶ 14-15; ER 91-92.

Binyam Mohamed

On April 10, 2002, Plaintiff Binyam Mohamed, a 28-year-old Ethiopian citizen and legal resident of the United Kingdom, was arrested at the airport in Karachi, Pakistan on immigration charges. For more than three months, Mr. Mohamed was held in secret detention, interrogated, and subjected to torture by his Pakistani captors. During this time, he was also interrogated by agents of the U.S. and British governments. First Amended Compl. at ¶¶ 59-60; ER 771. On July 21, 2002, Mr. Mohamed was handed over to the exclusive custody of U.S. officials, who stripped, shackled, blindfolded, and dressed him in a tracksuit before dragging him on board a Gulfstream V jet aircraft, then registered with the FAA as N379P – the same

aircraft used to render plaintiffs Agiza and Britel to Egypt and Morocco just several months before – and flying him to Morocco. On information and belief, Jeppesen provided the flight and logistical support for this aircraft and its crew. *Id.* at ¶¶ 65-68, 238; ER 772-73, 814.

In Morocco, Mr. Mohamed was handed over to agents of the Moroccan security services, who for the next 18 months detained, interrogated, and tortured him. Mr. Mohamed was routinely beaten to the point of losing consciousness, and a scalpel was used to make incisions all over his body, including his penis, after which a hot stinging liquid was poured into his open wounds. *Id.* at ¶¶ 69-71; ER 773. On January 22, 2004, Mr. Mohamed was returned to the custody of U.S. officials. These officials photographed him, stripped him, dressed him in overalls, handcuffed, shackled, and blindfolded him, and thereafter put him on board an aircraft and flew him to Afghanistan. The flight planning and logistical support to the aircraft – a Boeing 737 business jet, then registered with the FAA as N313P – were provided by Jeppesen. Two days after transporting Mr. Mohammed to Afghanistan, the same aircraft was used to transport

another rendition victim, German citizen Khaled El-Masri,[2] from Macedonia to Afghanistan. *Id.* at ¶¶ 73-75, 239-240; ER 774, 814-15.

Immediately after arriving in Afghanistan, Mr. Mohamed was taken to a CIA-run prison outside Kabul commonly known as the "Dark Prison." There, for the next four months, Mr. Mohamed was detained, interrogated, tortured, and otherwise abused by his jailers. He was physically beaten, had his head repeatedly slammed against a wall, and was suspended by his arms from a pole. He was deprived of sleep by being subjected to excruciatingly loud noises, including the screams of women and children, thunder, and loud rock music 24 hours a day. *Id.* at ¶¶ 76-80; ER 774-75. Under coercive interrogation, Mr. Mohamed invented stories to please his captors. *Id.* at ¶ 81; ER 775. Throughout, Mr. Mohamed was kept in a tiny, pitch-black, cold, damp cell with only a bucket for a toilet. Deprived of adequate food, Mr. Mohamed lost between 40 and 60 pounds. He was permitted outside once during this time and then only for five minutes – the only time he had seen the sun in two years. *Id.* at ¶¶ 78, 80, 83; ER 775-76. In September

[2] El-Masri, a German citizen of Lebanese origin, was detained in Macedonia on December 31, 2003 and later transferred to secret CIA detention in Afghanistan, where he was subjected to physical and psychological torture. El-Masri was released on May 28, 2004, flown to Albania, and left on a hilltop at night. He was never charged with a crime. *See El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007).

2004, Mr. Mohamed was transferred to Guantánamo, where he remains. *Id.* at ¶ 88; ER 777.

Mr. Mohamed's allegations have also been extensively investigated and his account corroborated by the Council of Europe, the European Parliament, and human rights organizations. Inquiries by both the European Parliament and the Council of Europe have, through examination of flight records, identified the aircraft used in both Mr. Mohamed's rendition from Pakistan to Morocco in 2002 and his rendition from Morocco to Afghanistan in 2004, determining that the aircraft – respectively, a Gulfstream V jet, registered N379P and a Boeing Business Jet, then registered N313P – had been involved in numerous other rendition flights. Stafford-Smith Decl. at ¶¶ 6-7; ER 21-22.

British and U.S. authorities have disclosed information about the role of both U.K. and U.S. intelligence services in Mr. Mohamed's initial detention in Pakistan. The European Parliament's report noted the admission of "former U.K. Secretary of State for Foreign and Commonwealth Affairs, Jack Straw . . . in December 2005 that U.K. intelligence officials met Binyam Mohamed when he was arrested in Pakistan." Stafford-Smith Decl. at ¶ 7; ER 22. A more recent inquiry by the U.K. Parliament's Security and Intelligence Committee found that a

"member of the [U.K.] Security Service . . . interview[ed] [Mr. Mohamed] once, for approximately three hours, while he was detained in Karachi in 2002." Stafford-Smith Decl. at ¶ 11; ER 23. Moreover, in testimony before the Committee, Dame Eliza Manningham-Buller, the Director General of the U.K. Security Service, confirmed that U.S. authorities were in charge of determining Mr. Mohamed's fate even before he was flown from Pakistan to Morocco in July 2002: "[A]t the beginning, it was thought [Mr. Mohamed] was [a British national], we were told by [the U.S.] that they were going to move him to Afghanistan." Watt Decl. at ¶ 34 (xiii), ER 274-79.

Documentation uncovered in a criminal investigation by a Spanish prosecutor concerning the CIA's use of Spanish airports as a "staging post" for unlawful rendition flights and by the Council of Europe's inquiry into the same matter substantiates Jeppesen's role in furnishing the flight planning and logistical support to the aircraft and crew used for Mr. Mohamed's second rendition. The Spanish prosecutor obtained a telex from Jeppesen to its agent in Mallorca, Spain, Mallorcair, requesting that Mallorcair provide ground handling services and pay airport fees for N313P from January 25-27, 2004. Stafford-Smith Decl. at ¶ 8; ER 22. In a statement to Spanish police, Mallorcair confirmed receipt of instructions for this aircraft from Jeppesen. Stafford-Smith Decl. at ¶ 9; ER 22-23. And, in the course of its

examination of flight records relative to this aircraft and itinerary, the Council of Europe concluded that this aircraft was used to transport Mr. Mohamed from Morocco to Afghanistan just two days before landing in Mallorca from Budapest, where it had landed briefly after having been used in the rendition of German citizen Khaled El-Masri from Macedonia to Afghanistan on January 22, 2004. The Council of Europe concluded that both flights were part of the same extended circuit of rendition flights originating from Washington, D.C. and back from January 16-28, 2004. Watt Decl. at ¶ 34; ER 274-79.

Bisher Al-Rawi

On November 8, 2002, Plaintiff Bisher Al-Rawi, a 39-year-old Iraqi citizen and legal resident of the United Kingdom, was arrested at the international airport in Banjul, Gambia, where he had traveled with several colleagues to commence a legitimate business venture. First Amended Compl. at ¶¶ 193, 203; ER 800, 803. On the first day of his detention, U.S. officials, who appeared to be in control of the situation, met with and interrogated Mr. Al-Rawi. *Id.* at 204; ER 803-04.

On December 8, 2002, Mr. Al-Rawi was driven to an airport. There, agents of the U.S. government stripped him, dressed him in a diaper and overalls, chained and shackled him, and dragged him on board an awaiting

aircraft. The flight planning and logistical support services for this aircraft – a Gulfstream V jet, then registered with the FAA as N379P – were provided by Jeppesen. *Id.* at ¶¶ 204, 212, 215, 248-49; ER 803-04, 806, 816-17; *see also* Declaration of Bisher Al-Rawi in Support of Plaintiffs' Opposition to the United States' Motion to Dismiss or, in the Alternative, for Summary Judgment ("Al-Rawi Decl.") at ¶¶ 43-44; ER 116.

Mr. Al-Rawi was flown to Afghanistan and detained at the CIA-run "Dark Prison" where, for two weeks, he was held in isolation in a tiny, pitch-black cell, chained and shackled the entire time. Loud noises were blasted into his cell 24 hours a day, making sleep almost impossible. First Amended Compl. at ¶¶ 215-17; ER 806-07. Mr. Al-Rawi was later transferred to the U.S.-run Bagram Air Base, where he was beaten, kept shackled with heavy chains for extended periods, and deprived of adequate sleep, water, and clothing. *Id*. at ¶¶ 219-22; ER 807-808. In January 2003, Mr. Al-Rawi was transferred to the Guantánamo Bay Naval Station and, on March 20, 2007, after four and a half years in detention without charge, he was released back to his home and family in the United Kingdom. *Id.* at ¶¶ 223, 227; ER 808, 809.

The British government has made numerous public statements and disclosed multiple documents corroborating Mr. Al-Rawi's allegations.

According to a report published by the U.K. Parliamentary Intelligence and Security Committee on July 25, 2007, the British Security Service "was informed by the U.S. authorities that they intended to conduct . . . a 'Rendition to Detention' operation, to transfer [Mr. Al-Rawi and others] from The Gambia to Bagram Air Base in Afghanistan. The Service registered strong concerns, both orally and in writing, at this suggestion and alerted the FCO (U.K. Home, Foreign and Commonwealth Office)." British diplomats in both Gambia and the United States raised protests with their counterparts at the U.S. State Department and the National Security Council. Al-Rawi Decl. ¶¶ 44-45; ER 116-17.

The Council of Europe has publicly discussed a number of telegrams sent by the British security services to the CIA about Mr. Al-Rawi in November 2002, prior to his initial detention in Gambia. Al-Rawi Decl. ¶¶ 2 – 5; ER 106-07. These telegrams included allegations immediately determined to be false but which nevertheless appeared in Mr. Al-Rawi's Combatant Status Review Tribunal hearings in Guantánamo as "evidence" against him in October 2004. See Watt Decl. at ¶ 34; ER 274-79. Documents from the International Committee of the Red Cross (ICRC) confirm that the ICRC visited Mr. Al-Rawi while he was in U.S. custody at

Bagram on January 4, 2003 and that he was transferred to Guantánamo on February 7, 2003. Al-Rawi Decl. at ¶ 56; ER 120.

Separate inquires by the Council of Europe and the European Parliament identified the aircraft – a Gulfstream V jet, then registered with the FAA, as N379P – used to transport Mr. Al-Rawi to Afghanistan. Al-Rawi Decl. at ¶ 42; ER 116. These flight records also confirm that Jeppesen provided flight planning and logistical support to the aircraft and crew used for this rendition flight. The local "data string" for the flight plan filed for this flight contains an originator code, KSFOXLDI, uniquely identifying Jeppesen as the entity having filed the flight plan with European air traffic control authorities. Al-Rawi Decl. ¶¶ 42-43; ER 116.

Mohamed Farag Ahmad Bashmilah

On October 21, 2003, Plaintiff Mohamed Farag Bashmilah, a 39-year-old Yemeni citizen, was apprehended by agents of the Jordanian government while he was visiting Jordan to assist his ailing mother. First Amended Compl. at ¶ 152, 154; ER 790-91. After several days of detention and interrogation under brutal torture, Mr. Bashmilah was coerced into signing a false confession. *Id*. at ¶ 156; ER 791. The Jordanians thereafter handed him over to agents of the U.S. government, who beat and kicked him, sliced off his clothes, replaced them with a diaper and blue outfit, shackled and

blindfolded him, then dragged him on board an awaiting aircraft. Declaration of Mohamed Farag Ahmad Bashmilah in Support of Plaintiffs' Opposition to the United States' Motion to Dismiss or, in the Alternative, for Summary Judgment ("Bashmilah Decl.") at ¶¶ 36-41; ER 311-313. The flight planning and logistical support for this aircraft – the same Gulfstream V jet that had been used in the transportation of the other four plaintiffs – were organized by Jeppesen. First Amended Compl. at ¶¶ 160, 246-47; ER 792, 816.

On October 26, 2003, Mr. Bashmilah was flown to Afghanistan where he spent nearly six months in secret incommunicado detention at a U.S.-run facility. *Id.* at ¶ 163; ER 793. For the first three months, he was held in a windowless six-square-meter cell with a bucket as a toilet; during his first 15 days, he was kept in the same diaper that had been forced on him in Jordan, and his hands and legs remained tied. Bashmilah Decl. at ¶¶ 56-64; ER 317-19. Excruciatingly loud music and noises were blasted into his cell 24 hours a day, depriving him of sleep for weeks on end. *Id.* at ¶ 64; ER 319. On three separate occasions during these initial months of detention, Mr. Bashmilah tried to end his life. *Id.* at ¶ 66; ER 319-20.

In April 2004, Mr. Bashmilah was "rendered" a second time to a site in an unknown country, where he was subjected to similar physical and

psychological torture. First Amended Compl. ¶¶ 171-72; ER 794-95. At one point during his detention in this facility, Mr. Bashmilah cut himself and used his own blood to write "I am innocent" and "this is unjust" on his cell walls. Bashmilah Decl. at ¶ 116; ER 336. On May 5, 2005, U.S. authorities transferred Mr. Bashmilah to Yemen, his country of birth, for further detention. Bashmilah Decl. at ¶¶ 172-76; ER 352-54. Yemeni authorities have informed the United Nations that they received files on Mr. Bashmilah from U.S. authorities on November 10, 2005. Bashmilah Decl. ¶ 175; ER 352-53. On February 13, 2006 Mr. Bashmilah was tried for the crime of forgery based on his admission that he had used a false identity document while living in Indonesia. *Id.* at ¶ 178; ER 354. On February 27, 2006, the Yemeni court sentenced him to time served both inside and outside of Yemen – which included the 18 months he was held and tortured in U.S. detention facilities. *Id.* at ¶ 181; ER 354-55. Even though it had been given files by the U.S. government that allegedly contained information concerning Mr. Bashmilah, the Yemeni government never filed terrorism-related charges against him. *Id.* at ¶¶ 175, 179; ER 352-54.

Documents emanating from official sources corroborate Mr. Bashmilah's allegations of forced disappearance and torture and Jeppesen's involvement therein. On at least three separate occasions, the Government

of Jordan has confirmed Mr. Bashmilah's departure from that country on October 26, 2003, in letters to the Embassy of the Republic of Yemen in Amman, the United Nations Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment ("U.N. Special Rapporteur on Torture"), and the United Nations Office of the High Commissioner for Human Rights. Bashmilah Decl. ¶¶ 44-45; ER 314. On March 27, 2006, the Embassy of Yemen in France confirmed in a letter to the Council of Europe that the Jordanians had handed Mr. Bashmilah over to another agency at a Jordanian airport. Bashmilah Decl. ¶ 46; ER 314.

The Yemeni government has made no secret of its cooperation with U.S. authorities in receiving, detaining, and questioning Mr. Bashmilah. On November 30, 2005, the United Nations Working Group on Arbitrary Detention stated that in official communications, the government of Yemen had confirmed that Mr. Bashmilah was handed over by the United States and detained pending receipt of his files from the United States. Bashmilah Decl. ¶ 174; ER 352. On December 20, 2005, the head of the Central Organization for Political Security in Yemen informed the U.N. Special Rapporteur on Torture and the U.N. Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism that the Yemeni government had received Mr.

Bashmilah from the United States government and was continuing to hold him. Bashmilah Decl. ¶ 175; ER 352-53. The letter from the Embassy of Yemen in France to the Council of Europe on March 27, 2006 also states that on March 5, 2005, the United States, through the Liaison Officer in Sana'a, informed the Central Organization for Political Security in Yemen that Mr. Bashmilah was in U.S. custody and that on May 5, 2005, Yemeni authorities received Mr. Bashmilah from U.S. authorities. Bashmilah Decl. ¶¶ 159, 183; ER 348, 355.

Flight records detail Mr. Bashmilah's rendition flight from Jordan to Afghanistan on October 26, 2003 on board a CIA-owned Gulfstream V jet, registered N379P. Jeppesen's involvement in providing the flight planning and logistical support services to the aircraft and crew is a matter of public record. The local "data string" for the flight plan filed for this flight contains an originator code, KSFOXLDI, uniquely identifying Jeppesen as the entity having filed this flight plan with European air traffic control authorities. Bashmilah Decl. at ¶ 42; ER 313.

B. Jeppesen's Role in the Rendition Program

Jeppesen's involvement in the rendition flights described above, as well as many others, is a matter of public record, traceable in flight plans and other documents filed with national and inter-governmental aviation

authorities across Europe. Jeppesen was not only providing crucial flight planning and logistical support services to the aircraft and crew – including filing flight plans, planning itineraries, obtaining landing permits, and arranging for fuel and ground handling – it was also using its legitimacy as a well-known aviation services company to enable the CIA to disguise the true nature of these flights. The Council of Europe has revealed that Jeppesen filed "multiple 'dummy' flight plans" for many of the CIA flights it supported, further contributing to the concealment of the flights' unlawful purposes. Exhibit S(b) to Watt Decl. at ¶ 34; ER 274-79**.**

Jeppesen participated in the rendition program in full knowledge of the horrific consequences of its actions. As the Declaration of Sean Belcher, a former Jeppesen employee, demonstrates, senior company officials spoke openly about Jeppesen's rendition work and its association with torture. On August 11, 2006, Belcher attended a meeting for new employees convened by Bob Overby, director of Jeppesen International Trip Planning Service at Jeppesen's San Jose office. During his presentation, Overby said: "We do all the extraordinary rendition flights." Apparently believing that only a few people present knew what he was referring to, Overby clarified that these were "torture flights," explaining, "let's face it, some of these flights end up this way," or words to that effect. He added that the flights paid very well

and that the government spared no expense. He also revealed that two employees, one mentioned by name, handled rendition flights for the company. Declaration of Sean Belcher in Support of Plaintiffs' Opposition to the United States' Motion to Dismiss or, in the Alternative, for Summary Judgment ("Belcher Decl.") at ¶4; ER 16.

SUMMARY OF ARGUMENT

On the very day that government lawyers appeared in the district court to demand the dismissal of this suit on the basis of CIA Director Michael Hayden's assertion that the government could neither confirm nor deny allegations concerning clandestine intelligence activities, General Hayden himself was testifying before the Senate Intelligence Committee and confirming, under oath, that the CIA had subjected three prisoners in its custody to the notorious torture technique known as "waterboarding."[3] The glaring juxtaposition between the Director's public disclosure in one forum and claim of secrecy in another is typical of the CIA's malleable and expedient approach to secrecy and accountability.

The United States moved to dismiss this action, which raises profoundly substantial allegations of unlawful abduction, forced

[3] *Senate Select Committee on Intelligence Holds a Hearing on the Annual Threat Assessment*: *Hearing Before the S. Select Comm. on Intelligence*, 110th Cong. 23 (2008).

disappearance, and torture, in order to protect the nation from disclosure of information that the entire world already knows. Government officials at the highest levels have spoken publicly, repeatedly, and in detail about the CIA's rendition and detention program. The plaintiffs' specific allegations of forced disappearance and torture are supported by abundant corroborating evidence. And Jeppesen's involvement in the transfer of plaintiffs and other terrorism suspects to countries where they faced brutal torture is a matter of public record, confirmed by documentary evidence and eyewitness testimony, including a sworn declaration by a former Jeppesen employee who was told by a senior company official of the profits derived from the CIA's "torture flights."

The government insists that it can neither confirm nor deny any allegations concerning the rendition program without causing harm to national security. In fact, as discussed below, government officials have done both, repeatedly – confirming and even defending the existence of the program and describing its parameters, and denying that the program is an instrument of coercive interrogation. Only in seeking to dismiss victims' suits does the United States insist that it can neither admit the former nor deny the latter. The government made the identical claim in a civil suit brought by Khaled El-Masri, a German citizen of Lebanese descent, who

was rendered to torture in a CIA-run prison in Afghanistan. *After* Mr. El-Masri's suit was dismissed with prejudice based on the government's alleged inability to confirm or deny his allegations, former CIA Director George Tenet – the defendant in that case – expressly *denied* Mr. El-Masri's allegations in a television interview.[4] This Court should regard the government's present assertions with such past conduct in mind.

The common-law state secrets privilege, which the United States has invoked to extinguish altogether plaintiffs' right of redress, is an evidentiary privilege, not an immunity doctrine. Its purpose is to block disclosure in litigation of information that will damage national security, and it is rare and drastic for invocation of the privilege to result in dismissal of an action. Plaintiffs do not dispute that, during the course of litigation, there may well be relevant evidence that may be properly withheld pursuant to the privilege. However, dismissal at this stage – before the defendant had so much as answered the complaint – was wholly improper. As this Court has made clear, only where the "very subject matter" of a suit is a state secret – a circumstance not remotely applicable here – is dismissal at the pleading stage permissible.

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[4] *The Situation Room* (CNN television broadcast May 2, 2007), *available at* http://transcripts.cnn.com/TRANSCRIPTS/0705/02/sitroom.02.htm. Watt Decl. at ¶ 19; ER 262

Recent events underscore the vital importance of ensuring that the Court – *not* the Director of the CIA – remains the arbiter of what evidence is relevant and necessary for this litigation to proceed. General Hayden has submitted two declarations in support of the government's assertion that the plaintiffs cannot prove their case, and Jeppesen cannot defend itself, without recourse to privileged evidence. General Hayden is well qualified to offer his views on national security, but he is *not* a federal judge, and he is not entrusted with determining the relevance of particular evidence at trial. Indeed, the CIA Director is no more qualified to determine what evidence *will* be relevant to a legal proceeding than he is to determine what evidence will *not* be relevant. *See* Greg Miller, *Destroyed Secret Tapes of Interrogations*, L.A. TIMES, Dec. 7, 2007 (noting CIA Director Hayden's comment that videotaped interrogations of high-level terrorism suspects were destroyed "only after it was determined that they were no longer . . . relevant to any internal, legislative, or judicial inquiries"). That is this Court's role, and it is virtually impossible to accomplish in the absence of actual evidence.

This Court's recent decision in *Al-Haramain v. Bush*, 507 F.3d 1190 (9th Cir. 2007) provides the legal framework for evaluating the government's motion. That decision makes clear that where, as here, the

government has revealed key details of an intelligence program in a public defense of its legality and efficacy, it cannot thereafter seek dismissal of a suit targeting that program on the ground that its "very subject matter" is a state secret. That is not to say that the government has waived its right to assert the privilege in this litigation, only that it must do so with respect to particular evidence, during discovery. Under the controlling law of this Court, the district court's order of dismissal must be reversed.

STANDARD OF REVIEW

This Court applies "[d]e novo review as to the legal application of the privilege and clear error review as to factual findings . . . ." *Al-Haramain*, 507 F.3d at 1196. Because this case was dismissed at the pleading stage, the Court "accept[s] all factual allegations in the complaint as true and construe[s] the pleadings in the light most favorable to the nonmoving party." *Outdoor Media Group, Inc. v. City of Beaumont*, 506 F.3d 895, 900 (9th Cir. 2007).

ARGUMENT

I. THE STATE SECRETS PRIVILEGE IS AN EVIDENTIARY PRIVILEGE, NOT AN IMMUNITY DOCTRINE

The premature and unwarranted dismissal of this suit on the basis of an evidentiary privilege – before there was any evidence at issue – reflected an expansive and overbroad construction of the state secrets privilege that

would virtually immunize the most egregious executive misconduct from judicial review. This sweeping theory of executive power and judicial "deference" – a theory that has been rejected in several recent "state secrets" decisions that the district court either ignored or misconstrued – constitutes an assault not only on the plaintiffs' right of access to an Article III forum, but to core separation of powers principles. If endorsed by this Court, it would upset the system of checks and balances necessary to sustain a free society by preventing courts from reviewing executive actions that violate the law and the Constitution, and would transform a narrow evidentiary privilege into a broad immunity doctrine**.** This departure from the evidentiary roots of the privilege, if ratified by this Court, would amount to a de facto rule of immunity for even the gravest violations of human rights.

The state secrets privilege is a "common-law evidentiary privilege that permits the government to bar the disclosure of information if there is a 'reasonable danger' that disclosure will 'expose military matters which, in the interest of national security, should not be divulged.'" *Al-Haramain*, 507 F.3d at 5 (quoting *United States v. Reynolds*, 345 U.S. 1, 10 (1953)). The privilege must be narrowly construed and may not be used to "shield any material not strictly necessary to prevent injury to national security." *Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983).

The Supreme Court outlined the proper use of the privilege 50 years ago in *Reynolds,* and has not considered the doctrine in depth since then. In *Reynolds*, the family members of three civilians who died in the crash of a military plane in Georgia sued for damages. In response to a discovery request for the flight accident report, the government asserted the state secrets privilege, arguing that the report contained information about secret military equipment that was being tested aboard the aircraft during the fatal flight. *Reynolds*, 345 U.S. at 3. The Court first held that the privilege could be invoked only by the government and then only upon "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." *Id*. at 7-8. In evaluating government's invocation of the privilege, the Court explained that the greater the plaintiff's necessity for the allegedly privileged information in presenting the case, the more a "court should probe in satisfying itself that the occasion for invoking the privilege is appropriate." *Id.* at 11.

The *Reynolds* Court then upheld the claim of privilege over the accident report but did *not* dismiss the suit. Rather, it remanded the case for further proceedings, explaining: "There is nothing to suggest that the electronic equipment, in this case, had any causal connection with the

accident. Therefore, it should be possible for respondents to adduce the essential facts as to causation without resort to material touching upon military secrets." *Id.* at 11. Upon remand, plaintiffs' counsel deposed the surviving crewmembers, and the case was ultimately settled.

The Supreme Court has never departed from its holding that the state secrets privilege is a rule of evidence, not justiciability, and has in fact recently distinguished the "evidentiary state secrets privilege" from the related nonjusticiability rule of *Totten v. United States*, 92 U.S. 105 (1875). *Tenet v. Doe*, 544 U.S. 1 (2005); *see also* note 7, *infra*. Accordingly, except in the narrowest of circumstances not applicable here (*see* Part II.A., *infra*), the privilege must be invoked with respect to discrete and specific evidence – not asserted as a sweeping justification for dismissing a suit on its pleadings. Indeed, *Reynolds*' instruction that courts are to weigh a plaintiff's showing of need for particular evidence in determining how deeply to probe the government's claim of privilege is rendered wholly meaningless where, as here, the privilege has been invoked before any request for evidence has even been made.

Although the government, in its pleadings below, paid lip service to the role of the Court in determining whether the privilege has been properly invoked, it advocated a standard of deference that would effectively render

the judicial role irrelevant and would allow for unilateral termination of unwanted litigation by the Executive Branch. Indeed, by the standard advocated by the government below – and adopted by the district court virtually without discussion – the Supreme Court erred in refusing to enjoin publication of the Pentagon Papers in the face of Executive Branch claims that the papers' release would harm national security. *See New York Times Co. v. United States*, 403 U.S. 713 (1971).[5]

The vital role of the courts in independently assessing whether the evidence at issue is genuinely secret; whether disclosure of particular information will reasonably cause harm to national security; and whether, even if state secrets are legitimately implicated, dismissal of an entire suit at the pleading stage is warranted, does not evaporate simply because the Executive contends unilaterally that its actions are too sensitive for judicial review. As this Court has made clear: "Simply saying 'military secret,' 'national security' or 'terrorist threat' or invoking an ethereal fear that disclosure will threaten our nation is insufficient to support the privilege." *Al-Haramain*, 503 F.3d at 1203; *see also, Hepting v. AT & T Corp.*, 439 F.

[5] *See* Brief for the United States in *New York Times, Co. v. United States*, *available at* 1971 WL 167581 at *18 ("In the present cases high government officials have explained the reasons for their concern; that judgment is enough to support the Executive Branch's conclusion, reflected in the top secret classification of the documents and in the in camera evidence, that disclosure would pose the threat of serious injury to the national security.").

Supp. 2d 974, 995 (N.D. Cal. 2006) ("[I]t is important to note that even the state secrets privilege has its limits. While the court recognizes and respects the executive's constitutional duty to protect the nation from threats, the court also takes seriously its constitutional duty to adjudicate the disputes that come before it.") (citations omitted).

II. DISMISSAL OF A SUIT PURSUANT TO THE STATE SECRETS PRIVILEGE IS PERMISSIBLE ONLY IN NARROW CIRCUMSTANCES NOT APPLICABLE HERE

Dismissal of an entire suit on the basis of the state secrets privilege is an extreme and "drastic remedy" that is strongly disfavored. *Fitzgerald v. Penthouse Int'l, Ltd*, 776 F.2d 1236, 1242 (4th Cir. 1985). That is because dismissal of otherwise worthy claims results in the "denial of the forum provided under the Constitution for the resolution of disputes," *id.*, and, in a case such as this one, forecloses any judicial accountability for grave violations of human rights. This principle is reflected in the history of the state secrets privilege, which in the overwhelming majority of cases since *Reynolds* has been considered in response to particular discovery requests, rather than in support of a motion to dismiss at the pleadings-stage.[6] The

[6] *See, e.g.*, *DTM Research, LLC v. AT&T Corp.*, 245 F.3d 327, 330 (4th Cir. 2001) (privilege invoked in response to subpoenas issued to federal agencies); *Linder v. Dep't of Defense*, 133 F.3d 17, 21 (D.C. Cir. 1998) (privilege invoked in response to third-party subpoenas); *Clift v. United States*, 597 F.2d 826, 828 (2d Cir. 1987) (privilege invoked in response to

propriety of evaluating the privilege "on the battlefield of discovery," *Halkin v. Helms*, 690 F.2d 977, 984 (D.C. Cir. 1982)("*Halkin II*"), rather than at the courthouse door, is even more apparent in a case such as this one, where alleged government contractor complicity in the kidnapping and torture of foreign citizens implicates not only the private interests of the individual plaintiffs, but also the vitally important public interest in ensuring that actions taken in the name of the United States comply with bedrock principles of U.S. and international law.

As discussed more fully below, in only two circumstances is dismissal of a suit on state secrets grounds permissible: first, in the extremely narrow category of cases in which the "very subject matter" of a suit is a state secret; and second, when a court determines, *after evaluating all nonprivileged evidence*, that one of the parties is unable to prove or validly defend against a claim without relying on privileged evidence. Because the former situation is inapplicable here, and the latter cannot yet be determined

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discovery requests, held to be pre-empted by statute); *Crater Corp. v. Lucent Technologies, Inc.*, 255 F.3d 1361 (Fed. Cir. 2001); *see also In re Under Seal*, 945 F.2d 1285, 1287 (4th Cir. 1991); *Fitzgerald v. Penthouse Int'l, Ltd.*, 776 F.2d at 1238 (4th Cir. 1985) (privilege invoked after discovery, on eve of trial); *Molerio v. FBI*, 749 F.2d 815 (D.C. Cir. 1984); *Ellsberg v. Mitchell*, 709 F.2d at 54-55; *Halkin v. Helms*, 690 F.2d 977, 985 (D.C. Cir. 1982) ("*Halkin II*"); *Att'y Gen. v. The Irish People, Inc.*, 684 F.2d 928 (D.C. Cir. 1982); *Jabara v. Webster*, 691 F.2d 272 (6th Cir. 1982); *Halkin v. Helms*, 598 F.2d 1, 4 (D.C. Cir. 1978) ("*Halkin I*").

at this stage of the proceedings, the government's premature and overbroad claim of privilege must be rejected.[7]

A. Under this Court's Jurisprudence, the "Very Subject Matter" of this Suit Is Not a State Secret

In concluding, without discussion or analysis, that this case must be dismissed on the ground that its very subject matter was a state secret, the district court entirely disregarded the controlling legal standard only recently articulated by this Court in the *Al-Haramain* case.

It is axiomatic that the "first step in determining whether a piece of information constitutes a 'state secret' is determining whether that

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[7] Distinct from both the evidentiary privilege described in *Reynolds* and the de facto nonjusticiability rule that allows pleadings-stage dismissals when the "very subject matter" of a suit is a state secret is a narrower nonjusticiability rule articulated by the Supreme Court in *Totten v. U.S.*, 92 U.S. 105. In *Totten*, the Supreme Court refused to hear a dispute about an alleged oral contract between a deceased Civil War spy and President Abraham Lincoln. As the Court recently made clear in a case involving a foreign spy who had been resettled in the United States by the CIA, *Totten* described a "unique and categorical" nonjusticiability doctrine designed to "preclude judicial inquiry" into "secret espionage relationship[s]" between the government and alleged former spies. *Tenet*, 544 U.S. at 6 n.4, 8. The *Totten* rule is a "threshold question" that is considered before jurisdiction, *id.* at 6 n. 4, and can therefore be thought of as a narrower and more categorical subset of the ability of courts to dismiss cases at the pleadings stage if their "very subject matter" is state secret. *Al-Haramain*, 507 F.3d at 1193. *See also In re Sealed Case*, 494 F.3d 139, 151 (D.C. Cir. 2007) ("[T]he Supreme Court clarified that *Totten*, which eliminates actions that 'depend[] upon the existence of [a] secret espionage relationship,' performs a different function than *Reynolds*, which merely affects the evidence available.").

information actually is a 'secret.'" *Hepting*, 439 F. Supp. 2d at 986. In making that assessment, a court should consider public information that possesses "substantial indicia of reliability" but that need not meet the standards required for considering strictly admissible evidence. *Id.* at 990-91 (quoting exemption of preliminary questions regarding the existence of a privilege from normal evidence rules in FRE 104(a)). To be sure, government officials have made a number of public statements that directly contradict the contention that the subject matter of this suit is a closely guarded secret.[8] While such high-level disclosures by themselves provide sufficient grounds to foreclose premature dismissal of this action, they need not be the only information considered by this court in its analysis.

There is a vast amount of public information exhibiting "substantial indicia of reliability" rising far above the level of mere speculation or rumor. *Id.* at 990. This includes results of investigations by allied governments and inter-governmental organizations of *specific cases* of rendition, including of

[8] CIA Director Hayden contends that he, Secretary of State Condoleezza Rice, and former CIA Director Porter Goss have "acknowledged no more" than the existence of renditions and the approximate numbers of detainees. Hayden Declaration at 10-11. The information summarized below, however, demonstrates that this assertion is palpably false.

the five plaintiffs' ordeals of forced disappearance and torture.[9] Ironically, much of this information comes directly from U.S. allies such as Egypt, the United Kingdom, Sweden, Yemen, and from Jeppesen itself – the very parties whose relationships with the CIA the government insisted below could not be confirmed or denied without harm to national security. Moreover, the U.S. government has itself publicly named governments with which it has cooperated in renditions, including Britain, France, and Jordan. This substantial and growing public record concerning the rendition program, the five plaintiffs' specific experiences of forced disappearance and torture, and the role of Jeppesen, amply demonstrates that the "very subject matter" of this action not only is not secret, but is a national and international scandal.

Although the Supreme Court has not directly addressed the application and scope of the state secrets privilege since *Reynolds,* in the intervening years some lower courts, including this Court, have recognized a narrow category of cases in which outright dismissal of a suit pursuant to the privilege is required because the "very subject matter" of the suit is a state

[9] These investigations and official documents are more reliable, concrete, and specific than the "publicly-filed pleadings, televised arguments in open court . . . and in the media and the blogosphere" that occurred around the warrantless wiretapping litigation without "disturbing the dark waters of privileged information." *Al-Haramain,* 507 F.3d at 1198.

secret.[10] In *Kasza v. Browner*, 133 F.3d 1159 (9th Cir. 1998), this Court upheld the dismissal of a suit on the ground that its very subject matter was a state secret, but that decision "provide[d] scant guidance" as to when a case could be dismissed on that ground. *Al-Haramain*, 507 F.3d at 1200. Only in the recent case of *Al-Haramain* did this Court establish a framework for assessing whether and when the very subject matter of a suit is a state secret. Under the clear rule of *Al-Haramain*, the subject matter of this suit – the CIA's rendition program – is decidedly *not* a state secret.

In *Al-Haramain*, the government sought pleading-stage dismissal of a suit alleging that plaintiffs had been unlawfully surveilled by the National Security Agency pursuant to the so-called "Terrorist Surveillance Program" ("TSP"). The government, relying in part on the Fourth Circuit's opinion in *El-Masri v. United States*, argued that the very subject matter of the suit – a classified intelligence program – was a state secret, and therefore that the case must be dismissed at its outset. *Al-Haramain*, 507 F.3d at 1193.

This Court rejected that argument. First, the Court explained that the question whether the "very subject matter" of a suit is a state secret is a

[10] The exceptional nature of this category is underscored by the fact that the Court of Appeals for the District of Columbia Circuit – a court that routinely considers national security-related matters – has *never* upheld the dismissal of a suit on this ground. *See In re Sealed Case*, 494 F.3d at 158 (Brown, J., dissenting) ("This court has had no occasion to apply the 'very subject matter' ground.").

"separate threshold determination" distinct from the question whether the privilege ultimately may deprive plaintiffs or defendants of *evidence* necessary to prosecute or defend a suit. *Id.* at 1201. In so holding, the Court expressly disavowed the Fourth Circuit's approach in *El-Masri*, which – like the government's motion below – illogically conflated those two inquiries. *Id.* ("Because the Fourth Circuit has accorded an expansive meaning to the 'subject matter' of an action, one that we have *not* adopted, *El-Masri* does not support dismissal based on the subject matter of the suit.") (emphasis added). Next, the Court made clear that when the government has publicly confirmed the existence of an intelligence program – and publicly defended its legality – it cannot thereafter secure dismissal of a suit challenging that program on the ground that its very subject matter is a state secret. The Court explained: "In light of extensive government disclosures about the TSP, the government is hard-pressed to sustain its claim that the very subject matter of the litigation is a state secret. Unlike a truly secret or 'black box' program that remains in the shadows of public knowledge, the government has moved affirmatively to engage in public discourse about the TSP." *Id.* at 1193.

The government's motion in this case falls squarely within this reasoning, and *Al-Haramain* controls its disposition. Like the TSP, the

rendition program – the officially-acknowledged CIA practice of transporting individuals on aircraft to locations overseas for detention and interrogation without judicial oversight and outside the protections of the Constitution and U.S. and international law – can hardly be described as a "black box" program. To the contrary, the President of the United States has publicly confirmed it; the Secretary of State has repeatedly defended it; and the Director of Central Intelligence – whose declarations form the basis for the government's premature motion – has offered numerous details about the program. All of these officials have vigorously defended the program's legality.

CIA Director Michael Hayden has discussed and defended the rendition, secret detention, and interrogation program in considerable detail on a number of separate occasions. For example, on September 7, 2007 – several months *after* this litigation was commenced – General Hayden openly discussed the program during a public speech and subsequent question-and-answer session at the Council on Foreign Relations in New York. General Hayden's speech focused on what he described as the CIA's "rendition, detention and interrogation programs" and the Agency's "close collaboration with allied intelligence services." Watt Decl. at ¶¶ 21-22; ER 263-65. In his remarks, General Hayden emphasized that the program is

"very closely controlled and lawfully conducted." He discussed the genesis of the current program, noting that "[i]t began with the capture of Abu Zubaydah in the spring of 2002." *Id.*

General Hayden provided detailed statistical data about the program: since its inception, "[f]ewer than 100 people had been detained at CIA's facilities," and "the number of renditions – that's moving a terrorist from A to B – apart from that 100 that [the CIA] has detained . . .is . . . mid-range two figures." *Id.* In disparaging the European Parliament's finding that "at least 1,245 flights operated by the CIA flew into European airspace and stopped over at European airports between the end of 2001 and the end of 2005," General Hayden insisted that the "actual number of rendition flights ever flown by CIA is a tiny fraction of that." *Id.*

General Hayden acknowledged that the CIA had detained terrorism suspects itself and turned others over to foreign governments. With respect to the latter, General Hayden was adamant that the CIA did not employ renditions to facilitate the use of unlawful interrogation methods:

> [W]e do not circumvent any restrictions that we have on ourselves. There is a standard that we have to – have to apply in each and every case. We have to receive assurances and we have to have confidence in the assurances that this individual will be handled in a way that is consistent with international law. And we are required to maintain awareness of how this individual is handled. Now that's not an invasive right to go to an ally with a clip board and see how they're running day-to-day activity with a detainee, but as an intelligence

> agency we have a broad responsibility that the assurances we receive at the beginning – that we continue to have confidence that we should have in those assurances . . . . We have to believe that it is less rather than more likely that the individual will be tortured.

General Hayden explained that this standard was derived from the "legislative history for the Senate working to pass the International Covenant Against Torture." *Id.* Months later, in sworn congressional testimony, General Hayden confirmed that the CIA had employed the notorious "waterboarding" technique against three terrorism suspects in its custody. *See* note 3, *supra.*

General Hayden's immediate predecessors, former CIA Directors Porter Goss and George Tenet, were similarly willing to defend the rendition program publicly when it was expedient to do so. For example, Mr. Goss testified to the Senate Armed Services Committee on March 17, 2005 that "[t]he idea of moving people around, transferring people for criminal or other reasons, by government agencies is not new . . . . We also have liaison partners [i.e., other governments] who make requests of us, and we try to respect not only the sovereign rights of other countries, but all of the conventions and our own laws and, of course, the Constitution." *Threats to U.S. National Security: Hearing of the Senate Armed Services Committee* (Watt Decl. ¶ 20; ER 263). In written testimony submitted to the Congressional 9/11 Joint Inquiry Committee, Mr. Tenet revealed that the

CIA had worked "with numerous European governments, such as the Italians, Germans, French, and British," and "[by] 11 September, the CIA (in many cases with the FBI) had rendered 70 terrorists to justice around the world." *Written Statement for the Record of the Director of Central Intelligence Before the Joint Inquiry Committee* (Watt Decl. at ¶ 16; ER 261).

Mr. Tenet went further in a May 2, 2007 interview on CNN, *specifically* denying allegations made by Khaled El-Masri in a lawsuit challenging his rendition to Afghanistan and his torture by the CIA. Responding to a question about whether Mr. El-Masri's allegations were true, Mr. Tenet stated: "I don't believe that what he [El-Masri] says is true." *The Situation Room's Interview With Former CIA Director George Tenet* (Watt Decl. at ¶ 19; ER 262). Yet in an unclassified declaration asserting the state secrets privilege in that case, former CIA Director Goss had earlier argued that "damage to the national security could result if the defendants in this case were required to admit or deny El-Masri's allegations." *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 537 (E.D. Va. 2006).

Secretary of State Condoleezza Rice, too, has publicly described the parameters of the rendition program and defended its legality. For example, on December 5, 2005, Secretary Rice told reporters that the rendition

program was "a vital tool in combating transnational terrorism." *Secretary of State Condoleezza Rice's Remarks Upon Her Departure for Europe* (Watt Decl. at ¶ 8; ER 257). She continued: "For decades, the United States and other countries have used 'renditions' to transport terrorist suspects from the country where they were captured to their home country or to other countries where they can be questioned, held, or brought to justice." Secretary Rice denied that detainees were abused: "The United States has not transported anyone, and will not transport anyone, to a country when we believe he will be tortured. Where appropriate, the United States seeks assurances that transferred persons will not be tortured." She also confirmed that foreign governments "choose to cooperate" in the program in exchange for intelligence information from the United States. *Id.*

Even President Bush has publicly discussed the CIA's rendition, detention, and interrogation program and defended its utility and legality on several occasions. On September 6, 2006, in a speech announcing the transfer of 14 so-called "high value detainees" from secret CIA detention overseas to Guantánamo, President Bush described and defended the CIA's program of detention and interrogation. The President acknowledged that among the "thousands of terrorists" captured by U.S. and allied forces, a "small number" had been "transferred to an environment where they can be

held secretly, questioned by experts." *President Discusses Creation of Military Commissions to Try Suspected Terrorists*. (Watt Decl. at ¶ 5; ER 254-55). Those individuals were "held and questioned outside the United States, in a separate program operated by the Central Intelligence Agency." The President singled out several of them by name – Abu Zubaydah, Khalid Sheikh Mohammed, and Ramzi bin al Shibh – and noted that the information those men and others provided during their interrogation "has given [the U.S. government] information that has saved innocent lives by helping . . . stop new attacks – here in the United States and across the world." *Id.* He acknowledged that an "alternative set" of interrogation procedures had been employed and that the interrogators had been "carefully chosen and…screened from a pool of experienced CIA officers." *Id.* Finally, the President suggested that the CIA program "has been, and remains, one of the most vital tools in our war against the terrorists" and that at all times it operated within a legal framework: "This program has been subject to multiple legal reviews by the Department of Justice and CIA lawyers; they've determined it complied with our laws. This program has received strict oversight by the CIA's Inspector General." Regarding the "alternative" interrogation techniques employed, the President insisted:

"These procedures were designed to be safe, to comply with our laws, our Constitution, and our treaty obligations." *Id.*

Earlier, in response to specific questions about the rendition program at press conferences in March and April of 2005, President Bush did not refuse to answer questions about the program on the ground that allegations concerning clandestine intelligence operations could be neither confirmed nor denied. To the contrary, he defended the program in strong terms, stating that in a "post-9/11 world, the United States must make sure we protect our people and our friends from attack," and "one way to do so is to arrest people and send them back to their country of origin with the promise that they won't be tortured." *President's Press Conference* (Watt Decl. at ¶ 7; ER 256). The President insisted that the rendition program complies with U.S. law: "We operate within the law and we send people to countries where they say they're not going to torture the people . . . . [W]e expect the countries where we send somebody to, not to torture, as well. But you bet, when we find somebody who might do harm to the American people, we will detain them and ask others from their country of origin to detain them . . . . [W]e've got guidelines. We've got law. But you bet . . . we're going to find people before they harm us." *Id.*

Through these public statements, senior government officials have not only confirmed the existence of the rendition program, they have also disclosed a number of crucial details about the practice, including: (1) that the U.S. government sends some individuals to their countries of origin or to other countries for detention and interrogation; (2) that the CIA operates a detention and interrogation program outside the U.S; (3) the names of specific countries that have cooperated in renditions; (4) the names of specific individuals who have been rendered, detained, and harshly interrogated by the CIA; (5) the legal framework purportedly employed for regulating these practices; (6) numbers of renditions and CIA detentions; and (7) a specific "enhanced" technique that was employed against three specific CIA prisoners. On the basis of these statements alone, there are compelling grounds to conclude that the "very subject matter" of this action cannot be a state secret.[11]

[11] Public discussion of the rendition program, however, has not been limited to the Executive Branch. On July 26, 2007, the Senate Foreign Relations Committee held a public hearing on "Rendition, Extraterritorial Detention, and Treatment of Detainees: Restoring Our Moral Credibility and Strengthening Our Diplomatic Standing." The House Subcommittee on International Organizations, Human Rights, and Oversight has held two public hearings on rendition: Extraordinary Rendition in U.S. Counterterrorism Policy: The Impact on Transatlantic Relations" (April 17, 2007) and Rendition to Torture: The Case of Maher Arar (October 18, 2007). (Watt Decl. at ¶ 31; ER 270-271). Senator Patrick Leahy, Representative Ed Markey, and Senator Joseph Biden have each introduced

As in *Al-Haramain,* that the government has "even thought it necessary to explain to the public in an unclassified form" and on repeated occasions the purported legality and necessity of the rendition program "suggests that the government both knew that details of the [rendition] program were in the public sphere and recognized that the program was already the subject of significant public discussion and interest." *Al-Haramain*, 507 F. 3d at 1200 (internal citation omitted). The government's selective release of information concerning the rendition program and its participation in the debate about its efficacy and legality "doom the government's assertion that the very subject matter" of the litigation is barred by the privilege. *Id.*

Indeed, in certain respects, the CIA's rendition program may be even less of a state secret than the "TSP" at issue in *Al-Haramain*. As this Court observed in *Al-Haramain,* although the "government has acknowledged the existence of the TSP, it has not disclosed the identities of the specific

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legislation either to abolish or regulate the rendition program. (Watt Decl. at ¶ 30; ER 270). The Congressional Research Service, at the behest of interested members of Congress, has produced a series of reports focused on the rendition program. (Watt Decl. at ¶ 32; ER 271). And, the initial findings released by the 9/11 Commission Staff included a section under the heading "Renditions," describing the practice as "an important component of U.S. counterterrorism policy throughout the period leading up to 9/11" that is "widely used today." (Watt Decl. at ¶18; ER 262).

persons or entities surveilled under the program." *Id*. at 1193**.** In contrast, the President *has* publicly disclosed the identities of at least 14 individuals subjected to CIA detention and interrogation, and Director Hayden has provided an estimate of the total number of rendition victims. Plaintiffs in this action do not require discovery in order to establish what they already know all too well: that they themselves were victims of the government's rendition program, as their sworn declarations and accompanying documentation attest. As demonstrated above, the plaintiffs can produce considerably more specific and reliable information about the concrete harm they have suffered as a result of defendant's conduct than could the plaintiffs in *Al-Haramain.*[12]

[12] In *Rahman v. Chertoff*, No. 05-cv-03761, Slip Op. (N.D. Ill. Apr. 16, 2008) (Opinion and Order of Magistrate Judge Schenkier) (attached at ER 825), the government similarly argued that it could neither confirm nor deny whether plaintiffs, who were repeatedly detained and mistreated at airports, were listed on the government's "Terrorist Screening Database." The government invoked the state secrets privilege, during discovery, to block disclosure of any "information tending to confirm or deny whether the plaintiffs are now or ever have been listed" in the database, arguing that any such disclosures might put terrorists on notice that they should take additional precautions. Slip Op. at 11-12; ER 825**.** The court rejected the government's argument, observing that plaintiffs, who had been stopped a total of 38 times while attempting to fly, surely were on notice already that they were subjects of government scrutiny, and that no harm would be caused by confirming or denying their status on a government watch list. *Id.* at 12-13.

As in *Al-Haramain*, "there are details about the program that the government has not yet disclosed . . . ." *Id.* at 1200. During the course of discovery, proper application of the privilege may very well result in the withholding and removal of otherwise relevant evidence that would support plaintiffs' claims. But the likelihood that this case, like *Al-Haramain*, "does involve privileged information," *id.* at 1201, stands separate and apart from the question whether its "very subject matter" is a state secret. "[B]ecause of the voluntary disclosures made by various officials" concerning the rendition program, "the nature and purpose of the [rendition program], the 'type' of persons it target[s], and even some of its procedures are not state secrets." *Id.* at 1200.[13]

It would defy logic to conclude that the very subject matter of a suit is a state secret when it involves an officially acknowledged program and widely corroborated allegations. As a matter of law and common sense, the government cannot legitimately keep secret what is already widely known

[13] The district court acknowledged *Al-Haramain* and plaintiffs' reliance on it, but dismissed its import with a single sentence: "*Al-Haramain* is distinguishable from the facts of this case." Order Granting the United States' Motion to Intervene and Granting the United States' Motion to Dismiss With Prejudice at 9; ER 9 The court did not offer any explanation of the relevant distinctions between the two cases.

and what has repeatedly been publicly disseminated.[14] To terminate plaintiffs' right of redress in the name of safeguarding information that is already known to the public would be to sacrifice their rights to a legal fiction. *Al-Haramain* makes plain that this Court must reject the unsupported assertion that the very nature of this case compels immediate dismissal, and instead require the government to assert the privilege on an item-by-item basis during discovery.

B. Dismissal of this Action Without Permitting Nonsensitive Discovery and Considering Nonprivileged Evidence Was Unnecessary and Improper

Where, as here, the very subject matter of a suit is a not state secret, a case may not be dismissed on state secrets grounds unless, after all possible nonsensitive discovery and presentation of nonprivileged evidence, a court determines that a plaintiff cannot present a prima facie case or a defendant cannot present a valid defense without resort to privileged evidence. As this Court has explained, "[i]f, *after further proceedings*, the plaintiff cannot prove the *prima facie* elements of her claim with nonprivileged evidence,

[14] *See, e.g., Capital Cities Media, Inc. v. Toole*, 463 U.S. 1303, 1306 (1983) (noting that Court has not "permitted restrictions on the publication of information that would have been available to any member of the public"); *Snepp v. United States*, 444 U.S. 507, 513 n.8 (1980) (suggesting that the government would have no interest in censoring information already "in the public domain").

then the court may dismiss her claim as it would with any plaintiff who cannot prove her case." *Kasza*, 133 F.3d at 1166 (emphasis added). "Alternatively, if the privilege deprives the defendant of information that would otherwise give the defendant a *valid* defense to the claim, then the court may grant summary judgment to the defendant." *Id.* (emphasis added) (internal quotation omitted).[15]

The wisdom of this traditional practice is manifest. When the government urges dismissal pursuant to the state secrets privilege before an answer has been filed, it is difficult for a court to determine which allegations are relevant, or even in dispute. Attempting to discern the "impact of the government's assertion of the state secrets privilege" before the plaintiff's claims have developed and the relevancy of privileged material has been determined "is akin to putting the cart before the horse." *Crater Corp. v. Lucent Technologies, Inc.*, 423 F.3d at 1268. That is precisely how the Fourth Circuit went astray in *El-Masri*, and why this Court expressly rejected such an approach. To reach its erroneous decision, the Fourth Circuit was compelled to posit a series of hypothetical prima facie cases and defenses; predict which facts might or might not be required to establish them; and then arrive at a decision in the absence of actual

[15] The district court did not consider this ground for dismissal, because it held, incorrectly, that the very subject matter of the suit was a state secret.

evidence or concrete arguments from the parties. Such an approach demands a kind of judicial clairvoyance that invariably leads to error.[16]

The extensive factual information set forth above – comprised of, *inter alia*, eyewitness testimony, detailed and corroborated sworn statements, intergovernmental investigatory reports, and the numerous public statements of U.S. officials – plainly illustrates why it would be wholly premature and improper to conclude at this preliminary stage of the

[16] For example, the Fourth Circuit incorrectly stated that in order to establish the liability of former CIA Director George Tenet, Mr. El-Masri would be "obliged to show in detail how the head of the CIA participates in such operations, and how information concerning their progress is relayed to him." *El-Masri*, 479 F.3d at 309. This was quite wrong. Under well-established rules of supervisory liability, Mr. El-Masri could have made out his prima facie case simply by demonstrating that Director Tenet had promulgated the policy that led foreseeably to Mr. El-Masri's injuries, or by various other bases of liability. *See Rizzo v. Goode*, 423 U.S. 362, 371 (1976) (holding that supervisors may be held liable where plaintiff demonstrates "affirmative link" between constitutional violation and defendant's actions, typically through "the adoption of any plan or policy . . . showing [] authorization or approval"); *Johnson v. Newburgh Enlarged Sch. Dist.*, 239 F.3d 246, 254 (2d Cir. 2001) (holding that supervisory liability attaches in any of the following circumstances: "(1) the [official] participated directly in the alleged constitutional violation, (2) the [official], after being informed of the violation through a report or appeal, failed to remedy the wrong, (3) the [official] created a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom, (4) the [official] was grossly negligent in supervising subordinates who committed the wrongful acts, or (5) the [official] exhibited deliberate indifference to the rights of [others] by failing to act on information indicating that unconstitutional acts were occurring.") (citations omitted).

proceedings that the plaintiffs will be unable to make out a prima facie case. It would be even more unjust and improper to credit the government's pleading-stage argument that the state secrets privilege will prevent Jeppesen from *defending* against plaintiffs' claims. As this Court has explained, dismissal on state secrets grounds is not permissible when the privilege may interfere with *possible* defenses, but only when it precludes the assertion of a *valid* defense. *Kasza*, 133 F.3d at 1166. That is, unless the state secrets privilege results in the elimination of a "meritorious and not merely plausible" defense, a case may not be dismissed on this ground. *In re Sealed Case*, 494 F. 3d at 149. Therefore, only if Director Hayden's classified affidavit were conclusively to demonstrate that Jeppesen had no involvement in the forced disappearance and torture of any of the five plaintiffs – an assertion that in any event would be directly contradicted by abundant available evidence – could this case be dismissed prior to discovery on the ground that the state secrets privilege would interfere with Jeppesen's defense. *Cf. Molerio v. FBI*, 749 F.2d at 825 (accepting valid defense raised *in camera* on the basis that classified affidavit conclusively established that plaintiff's claim was without merit).

The reason for this rule is clear. As the D.C. Circuit recently explained:

> Were the valid-defense exception expanded to mandate dismissal of a complaint for any plausible or colorable defense, then virtually every case in which the United States successfully invokes the state secrets privilege would need to be dismissed. This would mean abandoning the practice of deciding cases on the basis of evidence . . . in favor of a system of conjecture.

In re Sealed Case 494 F. 3d at 150-51.[17] It was precisely such "conjecture" that formed the basis for the Fourth Circuit's decision in *El-Masri*. The Fourth Circuit recited a series of admittedly "hypothetical defenses" with which the privilege might interfere – even as the court acknowledged that those defenses might not "represent[] the true state of affairs . . . ." *El-Masri*, 479 F. 3d at 310. Such a standard requires a court to base its determination on mere speculation, not evidence, and has been rejected by every other circuit to address this issue. *See Tenenbaum v. Simonini*, 372 F.3d 776, 777-78 (6th Cir. 2004); *Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544, 547 (2d Cir. 1991); *Bareford v. General Dynamics Corp.*, 973 F.2d 1138, 1141 (5th Cir. 1992).

[17] The court elaborated: "[A]llowing the mere prospect of a privileged defense to thwart a citizen's efforts to vindicate his or her constitutional rights would run afoul of the Supreme Court's caution against precluding review of constitutional claims [] and against broadly interpreting evidentiary privileges, for whatever their origins, … exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." *In re Sealed Case*, 494 F.3d at 151 (citations omitted).

The government's contention, offered repeatedly in its motion, that litigation of plaintiffs' claims necessarily would reveal intelligence "sources and methods" demonstrates precisely why courts must consider the privilege in light of specific evidence, not broad conjecture. The specific manner in which the CIA operates its rendition program is by now widely known and has been publicly aired not only in the media, but in the official reports of foreign governments. Indeed, it is difficult to conceive how requiring the defendant to answer plaintiffs' complaint could alert our terrorist enemies to anything that they do not already know. Just as the President's confirmation that 14 suspected terrorists had been detained and interrogated by the CIA did not reveal classified "means and methods" that were unknown to the public, it is highly likely plaintiffs would be able to establish defendant's liability without any such revelations.[18]

The question at this stage is not whether the CIA Director has identified any classified facts in his affidavits; rather, the question is whether it can be determined with certainty at this stage of the litigation that those

[18] That is not to say that there might not be specific details – such as, for example, the identities of covert operatives – that may be legitimately withheld on state secrets grounds. But it is precisely the role of the district court to ensure that such "sensitive information . . . [is] disentangled from nonsensitive information to allow for the release of the latter." *Ellsberg v. Mitchell*, 709 F.2d at 57.

facts are absolutely *essential* either for plaintiffs to prove their claims or for Jeppesen validly to defend against them. Such a determination would be premature.[19] The proper manner in which to assess the effect of the privilege on the evidence available to plaintiffs and defendant is to permit the case to proceed to discovery. There will be no shortage of opportunities for the government to protect its legitimate interests with respect to specific privileged evidence. To attempt to do so now, and to deprive plaintiffs of any judicial remedy on the basis of speculation, would be unjust, unnecessary, and improper, and would "sacrifice liberty for no apparent enhancement of security." *Hepting*, 439 F.Supp.2d at 995.

III. THE DISTRICT COURT ERRED BY NOT ADEQUTELY CONSIDERING ROBUST AND SECURE ALTERNATIVES TO DISMISSAL

Even if this Court determines that litigation of this matter is likely to touch upon privileged evidence, it may not uphold the dismissal of this action without carefully considering whether alternatives exist that would permit plaintiffs' claims to be adjudicated without exposing secrets of state.

[19] *See Hepting* at 994 (court "declines to decide at this time whether this case should be dismissed on the ground that the government's state secrets assertion will preclude evidence necessary for plaintiffs to establish a *prima facie* case or for AT&T to raise a valid defense to the claims. Plaintiffs appear to be entitled to at least some discovery. It would be premature to decide these issues at the present time.") (citations omitted).

Courts must use "creativity and care" to devise "procedures which would protect the privilege and yet allow the merits of the controversy to be decided in some form." *Fitzgerald*, 776 F.2d at 1238 n.3; *see also In re United States*, 872 F.2d at 478 (discussing measures to protect sensitive information as case proceeds); *Ellsberg*, 709 F.2d at 64 (encouraging "procedural innovation" in addressing state secrets issues). "Only when no amount of effort and care on the part of the court and the parties will safeguard privileged material is dismissal [on state secrets grounds] warranted." *Fitzgerald*, 776 F.2d at 1244.

A court must use all tools at its disposal, including item-by-item review of purportedly privileged evidence in camera, before considering the final resort of outright dismissal. *See, e.g.*, *Ellsberg*, 709 F.2d at 59 n.37 ("When a litigant must lose if the claim is upheld and the government's assertions are dubious in view of the nature of the information requested and the circumstances surrounding the case, careful in camera examination of the material is not only appropriate, but obligatory.") (internal citation omitted); *In re United States*, 872 F.2d at 478. Moreover, there are ample additional procedures that are available to courts that can protect legitimately sensitive evidence while allowing the merits of a case to be adjudicated.

For example, in *In re United States*, the D.C. Circuit discussed several alternatives to dismissal, noting that "the information remains in the Government's custody, and the parties' discovery stipulation has preserved the Government's right to assert the privilege and to support its assertions by submission of representative samples of documents for in camera review." 872 F.2d at 478. Moreover, "the parties have provided for the protection of third party privacy by agreeing to mechanisms limiting the disclosure of certain documents, including redaction of names." *Id*. Finally, the court noted that a bench trial "w[ould] reduce the threat of unauthorized disclosure of confidential material." *Id.*

Similarly, in *The Irish People, Inc*, the D.C. Circuit upheld the invocation of the privilege but refused to dismiss the case, suggesting that the district court could make representative findings of fact and provide summaries of withheld information. The court noted that "the district court may properly itself delve more deeply than it might ordinarily into marshalling the evidence on both sides for the selective prosecution claim." 684 F.2d at 955.

Most recently, the district court in *Hepting v. AT&T* proposed the appointment of an expert pursuant to FRE 706 "to assist the court in determining whether disclosing particular evidence would create a

'reasonable danger' of harming national security." *Hepting*, 439 F. Supp. 2d at 1010. The same function could be performed by the designation of a special master to examine and evaluate invocations of privilege. *See Vaughn v. Rosen*, 484 F.2d 820, 828 (D.C. Cir. 1983); *Loral Corp. v. McDonnell Douglas Corp.*, 558 F.2d 1130, 1132 (2d Cir. 1977). Other courts have utilized a number of additional tools to safeguard sensitive information in cases involving state secrets, including (1) protective orders, *United States v. Lockheed Martin Corp.*, 1998 WL 306755 (D.D.C. 1998); *In re Under Seal*, 945 F.2d at 1287 (noting protective orders issued and allowing depositions to be conducted in secure facilities); *Air-Sea Forwarders, Inc. v. United States*, 39 Fed. Cl. 434, 436-37 (Fed. Cl. 1997) (noting that CIA provided discovery under protective order); (2) seals, *In re Under Seal*, 945 F.2d at 1287; (3) bench trials, *In re United States*, 872 F. 2d. at 478; and (4) *in camera* trials, *Halpern*, 258 F.2d at 41.

Any or all of those alternatives, or others devised by this Court, could be employed to permit this case to proceed without jeopardizing national security.

CONCLUSION

For the foregoing reasons, the order of the district court should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Plaintiffs-Appellants are unaware of any related cases.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Plaintiffs-Appellants' Appeal Brief and Excerpt of Record were sent by overnight courier on June 30, 2008 to:

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