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

OPPOSITION TO PETITIONS FOR REHEARING OR REHEARING EN BANC

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INTRODUCTION

This appeal squarely raises the question whether the government may invoke a common-law evidentiary privilege in order to extinguish at the outset any possibility of redress not only for these plaintiffs, but for any victims of the government's unlawful torture policies. Indeed, the sum and substance of the United States' position in this litigation is that the government may engage in kidnapping and torture, declare those activities "state secrets," and by virtue of that designation alone avoid any judicial inquiry into conduct that even the government purports to condemn as unlawful in all circumstances. As the panel recognized, the government's "sweeping" rationale in support of dismissing this action "has no logical limit" and "would apply equally to suits by U.S. citizens, not just foreign nationals; and to secret conduct committed on U.S. soil, not just abroad." *Mohamed v. Jeppesen DataPlan, Inc.*, No. 08-15693, slip op. 4937 (9th Cir. Apr. 28, 2009). The law does not sanction, let alone require, such a categorical grant of immunity.

Contrary to the assertions of the former CIA Director, whose declaration remains the operative invocation of the state secrets privilege in this case, permitting torture victims to seek justice in our courts will not endanger the nation. Indeed, the current administration's repudiation of the policy of extraordinary rendition renders the assertions of that declaration obsolete. There *is*, however, a

significant danger in ceding to the executive official responsible for the implementation of a program involving grave human rights abuses the authority to determine what evidence is or is not relevant and necessary for litigation challenging that program to proceed.[1] As the panel in this case recognized, that is this Court's role. Its measured opinion restores the state secrets privilege to its evidentiary origins while leaving the government with ample tools to protect any legitimate secrecy interests on remand. En banc review is thus unnecessary and unwarranted.

The government nonetheless insists that the panel's decision has "significantly altered the contours" of the privilege by permitting this case to proceed "despite the conclusions of the Executive Branch. . . ." Govt. Br. at 1, 3. Without restating all of the arguments set forth in the briefing before the panel, plaintiffs will respond to the principal contentions raised by the government (and by Jeppesen) in support of en banc rehearing.

[1] *See, e.g.*, Greg Miller, *CIA Destroyed Secret Tapes of Interrogations*, L.A. TIMES, Dec. 7, 2007 (noting CIA Director Hayden's assertion 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").

ARGUMENT

1. The State Secrets Privilege Is an Evidentiary Privilege, Not an Immunity Doctrine.

The panel correctly acknowledged that the state secrets privilege is a rule of evidence, not of justiciability. Nonetheless, the government continues to conflate the justiciability doctrine articulated in *Totten v. United States*, 92 U.S. 105 (1875) with the evidentiary privilege recognized in *United States v. Reynolds*, 345 U.S. 1 (1953) – even though the Supreme Court has only recently reaffirmed that they are distinct doctrines that serve distinct purposes. *Tenet v. Doe*, 544 U.S. 1 (2005). As the Court explained, *Totten* is a "unique and categorical . . . bar – a rule designed not merely to defeat the asserted claims, but to preclude judicial inquiry." *Id*. at 6. By contrast, the "state secrets evidentiary privilege" involves careful "balancing," *id.* at 9-10, and represents a "formula of compromise. . . ." *Reynolds*, 345 U.S. at 9. The government's misreading of *Totten* would transform an obscure doctrine pertaining to enforceability of espionage contracts by dissatisfied secret agents into an expansive immunity regime shielding *any* CIA contractor from liability to third parties, regardless of the circumstances. That is not the law.

As the government observes, some courts – most notably the Fourth Circuit in *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007) – have permitted the government to invoke the evidentiary state secrets privilege to terminate litigation even before there is any evidence at issue. Those courts have in effect created a de

facto nonjusticiability rule that allows pre-discovery dismissals when the government contends that the "very subject matter" of a suit is a state secret. Nothing in the Supreme Court's decision in *Reynolds* remotely sanctions such a practice; in *Reynolds*, as in the overwhelming majority of state secrets decisions applying it, the privilege was invoked during discovery to prevent the disclosure of a discrete piece of evidence, not at the pleading stage to dismiss an entire lawsuit.[2] Indeed, just recently a different panel of this Court *also* expressly rejected the Fourth Circuit's articulation of the "very subject matter" standard. *See Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1201 (9th Cir. 2007) ("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)).

As the panel decision makes clear, the government's expansive "very subject matter" interpretation of the state secrets privilege distorts the careful separation of powers that lies at the heart of our constitutional framework. In the government's view, the "subject matter" of a suit is a state secret any time the suit "contains allegations, the truth or falsity of which has been classified as secret by a

[2] The dubious validity of dismissing suits on the so-called "very subject matter" ground 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 that basis. *See In re Sealed*

government official." Slip op. at 4937. But, as the panel recognized, "[i]f the simple fact that information is classified were enough to bring evidence containing that information within the scope of the privilege, then the entire state secrets inquiry – from determining which matters are secret to which disclosures pose a threat to national security – would fall exclusively to the Executive Branch, in plain contravention of the Supreme Court's admonition that '[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers' without 'lead[ing] to intolerable abuses.'" Slip op. at 4943, *quoting Reynolds*, 345 U.S. at 8-10. Put otherwise, the government's theory amounts to a demand that "the Judiciary should effectively cordon off all secret government actions from judicial scrutiny, immunizing the CIA and its partners from the demands and limits of the law." Slip op. at 4937. The panel rightly rejected this limitless demand for immunity.

2. The Panel's Interpretation of the "Very Subject Matter" Standard Does Not Deprive the Government of the Opportunity to Invoke the State Secrets Privilege With Respect To Particular Factual Assertions in the Complaint.

The government contends that the panel erred in holding that state secrets claims may not be adjudicated prior to discovery. In particular, the government is concerned that if Jeppesen is required to answer the complaint before the government has the opportunity to invoke the privilege, the government will be

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Case, 494 F.3d 139, 158 (D.C. Cir. 2007) (Brown, J., dissenting) ("This court has

unable to prevent matters that it considers to be state secrets from being transformed into "competent evidence of the facts stated." Govt. Br. at 14, *citing* *Huey v. Honeywell, Inc.*, 82 F.3d 327, 333 (9th Cir. 1996). The panel's decision in no way compels that outcome.

On remand, the government will be afforded the opportunity to assert the privilege with respect to particular factual allegations in the complaint. Ordinarily, a party is "obliged to answer those allegations that he can and to make a specific claim of the privilege as to the rest." 5 C. Wright & A. Miller, Federal Practice and Procedure § 1280 (2009) (describing procedure in analogous context of privilege against self-incrimination). Thereafter, "the court must treat the defendant's claim of the privilege as equivalent to a specific denial. This has the dual effect of creating an implied qualification to the language of the first sentence in Rule 8(d) [treating failure to respond as an admission] and putting the plaintiff to his proof of the matter covered by the 'denial.'" *Id.*

In this case, since Jeppesen (and not the government) will be answering the complaint, the district court may fashion a procedure, on the government's motion, that permits the government to protect its interests – for example, by reviewing Jeppesen's answer before it is filed and invoking the privilege with respect to specific paragraphs or allegations, or, alternatively, by requesting that the answer

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had no occasion to apply the 'very subject matter' ground.").

be filed under seal until the government has the chance to review it within a specified time period. The validity of the government's invocation need not and should not be adjudicated unless or until plaintiffs seek evidence or admissions during discovery with respect to that particular issue; in the meantime, the government's assertion will function as a "specific denial" by Jeppesen, "putting the plaintiff[s] to [their] proof" with respect to those matters.

The panel's refusal to dismiss this case on "very subject matter" grounds is also perfectly consistent with this Court's approach in *Al-Haramain.* Unique among pre-discovery stage state secrets cases, *Al-Haramain* involved a dispute over a *discrete piece of evidence* – a classified document that the Executive Branch had negligently disclosed to the plaintiffs – the contents of which appeared necessary to establish plaintiffs' standing. *See Al-Haramain*, 507 F.3d at 1205 ("At oral argument, counsel for Al-Haramain essentially conceded that Al-Haramain [could] not establish standing without reference to the Sealed Document."). This Court thus concluded that, absent the availability of the document through some other means, such as through procedures under the Foreign Intelligence Surveillance Act, plaintiffs' case could not proceed. In contrast, plaintiffs do not rely on government documents, secret or otherwise, to establish their standing: they are all too aware that they were the victims of the

CIA's rendition and detention program and can make their case through their own testimony and other publicly available information.

3 The Panel's Decision Will Not Permit Private Litigants to Disclose National Security Secrets.

The government worries that the panel's distinction between "secret evidence" and "classified information" will "severely weaken the protections of the privilege. . . ." Govt. Br. at 16. To illustrate its claim, the government suggests that the panel's decision would render it "powerless" to prevent "private participants on a secret government contract" from "exposing national security secrets" during litigation against one another, "so long as they did not seek discovery from the Government." Govt. Br. at 19. But that is simply incorrect.

First, the government wholly ignores a whole host of authorities it could bring to bear to prevent its contractors from disclosing "national security secrets." It is inconceivable, for example, that the government would enter into a "secret contract" involving highly sensitive matters without requiring the private contractors to sign enforceable nondisclosure agreements barring unauthorized release. Its failure to do so would certainly be a strong indication that the material is not a "national security secret." By the same token, if the disclosure of the information at issue *would* jeopardize national security, then the material presumably would be classified, further prohibiting the contractors from revealing it.

Second, the government would not lose its ability to invoke the state secrets privilege in a lawsuit between two private participants on a secret government contract. The government would be permitted to intervene in such an action, just as it did in this case, to prevent genuinely secret evidence, whether documentary or testimonial, from being disclosed in the litigation. Nothing in the panel's opinion suggests otherwise.

Finally, the government's admonitory hypothetical betrays an inexplicable lack of confidence in the time-tested ability of federal courts to guard against the disclosure of sensitive information. As plaintiffs have set forth in detail in the briefing before the panel, courts have long used "creativity and care" to devise "procedures which . . . protect the privilege and yet allow the merits of the controversy to be decided in some form," *Fitzgerald v. Penthouse Int'l, Ltd.*, 776 F.2d 1236, 1238 n.3 (4th Cir. 1985), including appointing special masters, issuing protective orders or seals, or conducting bench trials or even *in camera* trials. Federal district courts are well equipped to evaluate the government's legitimate secrecy concerns with respect to documents and testimony without risking public disclosure.

4. The Panel's Decision Results in No Prejudice to Jeppesen.

Although it is well established that the state secrets privilege belongs solely to the government and may be invoked only by the government, Jeppesen has also

petitioned this Court for rehearing en banc. Its petition is predicated on a wholly implausible reading of the panel's opinion. Jeppesen complains that the panel's decision was "profoundly unfair" because, while it reversed and remanded the dismissal of plaintiffs' suit, it somehow "left undisturbed the Government's formal invocation of privilege," thus placing Jeppesen in the "untenable position" of being unable to answer the complaint or defend itself. Jepp. Br. at 2. But this is obviously wrong. In fact, it is hard to imagine how the panel could have been any *more* explicit that it was wholly invalidating, not leaving "undisturbed," the CIA's overbroad and premature invocation of the state secrets privilege in this case.

The panel held that, contrary to the former CIA Director's insistence, "the subject matter of this lawsuit is not a state secret." Slip op. at 4926. Accordingly, the government's invocation of the privilege was categorically premature and overbroad, because no evidentiary requests had yet been made: "At this stage of the litigation, we simply cannot prospectively evaluate *hypothetica*l claims of privilege that the government *has not yet raised* and the district court *has not yet considered*." *Id.* at 4946 (emphasis added). The panel elaborated: "We simply cannot resolve whether the *Reynolds* privilege applies without (1) an actual request for discovery of specific evidence, (2) an explanation from plaintiffs of their need for the evidence, and (3) a formal invocation of the privilege by the government with respect to that evidence, explaining why it must remain confidential." *Id.* at

4947. The panel thus remanded the case to "allow the district court to apply *Reynolds in the first instance*" following the government's modified "assert[ion of] the privilege with respect to secret evidence (not classified information). . . ." *Id.* at 4947-48 (emphasis added). Those statements quite simply cannot be squared with Jeppesen's effort to persuade this Court that the panel "did not question the validity of the state secrets assertion" in this case. Jepp. Br. at 10.

Jeppesen's position is not "untenable." Its obligation on remand is straightforward: to answer the complaint truthfully. Should the *government* elect to invoke the privilege with respect to specific portions of Jeppesen's answer, it may do so. *See* section 2, *supra.* And should a valid invocation of the privilege by the government deprive Jeppesen of evidence that is "indispensable" to a "valid defense" that would be "otherwise available" to Jeppesen, slip op, at 4948, plaintiffs' suit will be dismissed. *See, e.g.*, *In re Sealed Case*, 494 F. 3d 139, 149 (D.C. Cir. 2007); *Molerio v. FBI*, 749 F.2d 815, 825 (D.C. Cir. 1984).

CONCLUSION

The government's petition for rehearing is correct in one critical respect: the panel's decision does indeed "implicate[] questions of exceptional public importance." Govt. Br. at 19. Chief among them is whether "the courts of the United States" can "be relied upon to provide even a *possibility* of redress for those who allege flagrant abuses of both domestic and international law in the course of

counter-terrorism operations." Brief *Amicus Curiae* of Former United States Diplomats Supporting Plaintiffs-Appellants and Reversal, at 6. If *these* plaintiffs are denied a day in court, it is difficult to imagine which torture victims will not be, and a common-law evidentiary privilege will have been fully transformed into a broad immunity doctrine. The petitions for rehearing and rehearing on banc should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 6, 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/EFC system.

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CERTIFICATE OF COMPLIANCE PURSUANT TO NINTH CIRCUIT RULES 35-4 AND 40-1

I certify that, pursuant to Ninth Circuit Rules 35-4 and 40-1, the attached Opposition to Petitions for Rehearing and Rehearing En Banc is proportionally spaced, in Times New Roman type, has a typeface of 14 points, and contains 2,658 words.

/s/ Ben Wizner
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