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

Reply Brief of Plaintiffs-Appellants on Rehearing En Banc

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INTRODUCTORY STATEMENT

Much is at stake in this appeal. Should the government's overbroad and premature assertion of the state secrets privilege prevail, torture victims will be denied their day in court solely on the basis of an affidavit submitted by their torturers. Of equal significance, Article III courts will be altogether foreclosed from their constitutional "duty . . . to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). This outcome is both unnecessary and unwarranted: the government's legitimate secrecy interests can be amply protected without extinguishing at the outset plaintiffs' right of redress, and without eliminating courts' critical role in adjudicating allegations of grave executive lawbreaking.

According to the government's proposed framework, it is the CIA Director who decides – before the case has even begun – what evidence will be "central to the allegations and issues in th[e] case," and it is the CIA Director who determines what information is classified and thus off limits for judicial scrutiny. Government's Supplemental Brief ("Govt. Br.") at 9. Although the government pays lip service to the "essential independent Article III responsibilities" of this Court, Govt. Br. at 2, it appears that the Court's "responsibilities" begin and end with dismissing the case when the CIA Director so insists. As the panel correctly observed, "[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.'' *Mohamed v. Jeppesen Dataplan*, *Inc.,* 579 F.3d 943, 958-59 (9th Cir. 2009) (quoting *United States v. Reynolds*, 345 U.S. 1, 8-10 (1953)). Put otherwise, plaintiffs have invoked the jurisdiction of the courts to enforce rights conferred by Congress; the government seeks a judge-made rule that would allow the Executive Branch to define the contours of its own immunity. The consequences of such a holding would be dire and far-reaching.

By the government's sweeping reasoning, the identities of any contractors or countries with which the CIA cooperates are *categorically* state secrets, notwithstanding the nature or amount of non-privileged evidence plaintiffs can marshal, notwithstanding public admissions by the contractors or countries themselves, and notwithstanding the clear illegality of the conduct at issue. If that view of the privilege prevails, then the CIA may violate the law with absolute impunity so long as it does so in concert

with other nations or private corporations. By the same token, the government insists that it cannot confirm or deny any allegations concerning intelligence operations that the CIA has designated as clandestine, and that therefore litigation concerning those matters must be foreclosed. But there is no reason why this litigation cannot proceed without the government's formal public confirmation or denial of particular allegations. In any event, the government already has repeatedly confirmed *and* denied allegations concerning the CIA's detention and interrogation operations; indeed, since the commencement of this litigation, the government has confirmed and declassified volumes of information that it had previously insisted could be neither confirmed nor denied. See Part III, *infra*. In fact, the government's approach to secrecy is far more malleable than it suggests: when it wishes to hold *others* accountable for their alleged wrongdoing, it fashions proceedings that protect legitimate secrets while permitting adjudication. But when others seek to hold the government or its agents accountable for *their* alleged wrongdoing, such proceedings are deemed impossible. Thus can the government simultaneously arrange a criminal trial for Khalid Sheikh Mohammed and inveigh against a civil trial for Binyam Mohamed, even though precisely the same categories of information are certain to be at

issue. It cannot seriously be contended that the security procedures available for the former would be insufficient as a matter of law for the latter.[1]

Indeed, permitting plaintiffs to proceed with this litigation by presenting non-privileged evidence and conducting non-privileged discovery in no way risks public disclosure of genuine secrets. Plaintiffs do not possess any state secrets – that is, unless this Court were somehow to hold that information plaintiffs have freely discussed elsewhere in the world can mysteriously be transformed into a state secret when discussed in a U.S.

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[1] To be sure, plaintiffs do not have access to former CIA Director Hayden's classified declaration, but this Court should read that document with the prosecution of Khalid Sheikh Mohammed and his alleged co-conspirators in mind. Like the instant case, that trial undoubtedly will involve disputes about the treatment of detainees in overseas CIA prisons and the role of contractors and foreign intelligence services in the capture and detention of the defendants. The presiding district judge will employ numerous tools, including protective orders and in camera proceedings, in order to ensure that genuine state secrets are not disclosed. *See also* Benjamin Weiser, "Terrorism Trial May Point Way for 9/11 Cases," *New York Times*, Nov. 23, 2009, at A1 (describing security procedures for prosecution of accused embassy bomber, including protective order covering "all materials that might 'reveal the foreign countries in which'" the defendant was held; "the names and even physical descriptions of any officer responsible for his detention or interrogation"; and "information about 'enhanced interrogation techniques'" that were applied to the defendant).

Similarly, in dozens of habeas corpus cases before federal district courts in the District of Columbia, the government has been defending the detention of Guantanamo prisoners, despite previously insisting that it could not do so without harm to national security. Those courts have been able to adjudicate the cases by employing, *inter alia*, security clearances, protective orders, and closed hearings. There is absolutely no reason why the same tools could not be utilized to permit adjudication here. *See also* Opening Brief of Plaintiffs-Appellants at 57-60.

judicial proceeding. Thus, the only parties that might conceivably be in a position to disclose state secrets are the United States and Jeppesen, neither of which will produce any sensitive information except by court order, following the exercise of the court's "independent Article III responsibilities." The government nonetheless insists that litigating this matter "would require proof that plaintiffs were detained by agents of the U.S. and foreign governments, information that *cannot be disclosed* without jeopardizing national security." Govt. Br. at 14 (emphasis added). But a judicial determination that plaintiffs' detailed public allegations concerning their detention and treatment are credible would not "disclose" anything: any conceivable harm that might flow from the public airing of those allegations has already occurred. Plaintiffs have already provided detailed testimony and corroborating evidence; many of the foreign governments that cooperated with the CIA have already acknowledged and even investigated plaintiffs' allegations; and Jeppesen's involvement is a matter of public record. 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.

Seeking to magnify the purported harm that the panel's opinion will cause to the government's secrecy interests, the government grossly

mischaracterizes what the panel in fact held. In doing so, it does battle with straw men. For example, the government somehow reads the panel's opinion as prohibiting the assertion of the state secrets privilege over evidence in the hands of private parties. But nothing in the panel's opinion even remotely suggests such a holding; the government plainly retains the right to invoke the privilege to prevent third parties – including Jeppesen – from disclosing evidence that a federal court has deemed a state secret. Similarly, the government appears to believe that the panel's holding would prevent it from asserting the privilege with respect to allegations in a complaint, but once again, the panel held no such thing: as explained below, the government retains the right to invoke the privilege to prevent allegations involving state secrets from becoming evidence in a case, if doing so is necessary to prevent public disclosure of privileged matters. To the extent that there is any confusion about either of these issues, this Court can provide needed clarification, but the panel's conclusions remain fundamentally sound.

Finally, since former CIA Director Michael Hayden submitted his declarations in this case in October of 2007, numerous dramatic developments have materially undermined the bases on which the government seeks to terminate this action. On taking office in January of

this year, President Obama expressly prohibited the practices that form the basis for this litigation. In subsequent months, the government has declassified voluminous materials, including CIA documents, that have further illuminated – and officially confirmed – the CIA's most controversial detention and interrogation policies. And additional reports of the government's foreign partners undertaking judicial and legislative investigations of their own roles in the CIA's overseas detention and interrogation programs continue to come to light. These developments profoundly implicate both the government's insistence that the CIA's detention and interrogation operations remain secret, and its contention that litigation of plaintiffs' claims will cause harm to national security. Yet, in the face of these extraordinarily changed circumstances, the government has not even slightly changed its formal assertion of the privilege in this case, making abundantly clear that it is not fear of "disclosures," but fear of accountability, that is animating its actions.[2]

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[2] Although the government sought and was granted leave to file a "replacement" brief, evidently intending to consolidate its arguments into a single filing, this is a "reply" brief that chiefly responds to the government's brief of November 13. Plaintiffs-Appellants respectfully refer this Court to their briefs of June 30, 2008 and September 25, 2008, copies of which were furnished to the en banc Court, for a more complete articulation of the factual and legal bases for permitting this case to go forward. In particular, Plaintiffs-Appellants refer the Court to the "Factual Background" section at pages 3-24 of their Opening Brief.

ARGUMENT

I. The State Secrets Privilege is an Evidentiary Privilege, Not an Immunity Doctrine

In proceedings before the district court and the panel, the government argued strenuously that this suit must be dismissed at its very outset because its "very subject matter" was a state secret as a matter of law. Indeed, the district court dismissed the suit on that basis alone.[3]

In its most recent filing, the government appears to have abandoned that argument, even as it urges the en banc Court to disregard the panel's analysis in favor of the district court's cursory treatment of these issues. But the government's apparent decision not to utilize the "very subject matter" rubric should in no way be construed as a concession. That is because 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 *Reynolds* – even though the Supreme Court could not be any clearer that they are distinct doctrines that serve distinct purposes. *See Tenet*

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[3] The district court's order dismissing this action, some three pages of which discussed the issues in dispute, is hardly a model of clarity. Although that court accepted the government's argument that "the very subject matter" of the suit was a state secret, it also held that it "lack[ed] subject matter jurisdiction" over the case, a contention the government itself has never made.

v. Doe, 544 U.S. 1 (2005).[4] As the Court recently 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 (emphasis added). By contrast, the "state secrets *evidentiary privilege*" involves careful "balancing," *id.* at 9-10 (emphasis added), and represents a "formula of compromise. . . ." *Reynolds*, 345 U.S. at 9. The government's proposed expansion of *Totten* would transform a narrow doctrine pertaining to enforceability of espionage contracts by dissatisfied secret agents into a broad immunity regime shielding *any* CIA contractor from liability to third parties, regardless of the circumstances. That simply is not the law.

In the face of explicit Supreme Court precedent distinguishing the *Totten* justiciability doctrine from the *Reynolds* evidentiary framework, the government seeks to rewrite the law, unaccountably going so far as to rebuke the panel for its "erroneous conceptualization of the state secrets doctrine as an evidentiary privilege." Govt. Br. at 30. But it is the Supreme Court, and not the panel, that bears responsibility for characterizing the privilege as "evidentiary." *Tenet v. Doe*, 544 U.S. at 9 (describing "state

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[4] In so holding, the Supreme Court unanimously reversed this Court, which had held that the *Totten* rule had been subsumed within the *Reynolds* framework.

secrets evidentiary privilege"); *Reynolds*, 345 U.S. at 7-8 (privilege is "well established in the law of evidence"); *see also Kasza v. Browner*, 133 F.3d 1159, 1167 (9th Cir. 1998) (state secrets privilege is "an evidentiary privilege that allows the government to withhold sensitive information within the context of litigation"). No amount of citations to cases not involving the state secrets privilege can make it otherwise.[5] While the government's attempt to fuse the two doctrines into a more elastic justiciability rule might make for an interesting law review article, it is not appropriate as an argument to an intermediate appellate court.

Thus, this suit falls *either* under the rule of *Totten,* in which case it is categorically nonjusticiable irrespective of the evidence needed to litigate it, or under the state secrets privilege, in which case it may be dismissed only if successful invocation of the privilege deprives plaintiffs of evidence necessary to make out a prima facie case, or defendant of evidence indispensable to a valid defense. As the panel correctly held, this is not a *Totten* case. For one thing, "not all of plaintiffs' theories of liability require proof of a relationship between Jeppesen and the government." *Mohamed v.*

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[5] *See* Govt. Br. at 1, 14, 17, 18, 20, 26 (citing *Weinberger v. Catholic Action of Haw./Peace Educ. Project*, 454 U.S. 139 (1981)); 16 (citing *Dep't of Navy v. Egan*, 484 U.S. 518 (1988)); *id.* (citing *United States v. Nixon*, 428 U.S. 683 (1974)); 41 (citing *Arar v. Ashcroft*, No. 06-4216-cv, 2009 WL 3522887 (2d Cir. Nov. 2, 2009) (en banc)).

Jeppesen, 579 F.3d at 953. For example, plaintiffs' claim "that Jeppesen acted with reckless disregard for whether the passengers it helped transport would be tortured" at their destinations requires no evidence that Jeppesen "entered into a secret agreement with the government," but only that Jeppesen acted despite "actual or imputed knowledge" that plaintiffs might face torture. *Id.* at 953-54.

Even more fundamentally, the Supreme Court has consistently characterized *Totten* as an estoppel doctrine that precludes suits against the government by its former spies. *See, e.g.*, *Tenet v. Doe*, 544 U.S. at 10 ("*Totten's* core concern . . . [is] preventing the existence of the *plaintiff's* relationship with the Government from being revealed") (emphasis added); *id*. at 8 ("No matter the clothing in which alleged spies dress their claims, *Totten* precludes judicial review in cases such as respondents' where success depends upon the existence of their secret espionage relationship with the Government."). In several recent cases materially indistinguishable from the instant case, lower courts have held likewise.[6] That is not to say that the

[6] For example, in *Terkel v. AT&T Corp.*, 441 F. Supp. 2d 899 (N.D. Ill. 2006), another case in which third-party plaintiffs sought damages from government contractors for their alleged involvement in secret intelligence activities, the court rejected the government's *Totten* argument, explaining that "the plaintiffs in this case were not parties to the alleged contract nor did they agree to its terms; rather, they claim that the performance of an alleged contract entered into by others would violate their statutory rights." *Id.* at

government cannot protect its legitimate secrecy interests when a third party sues a government contractor, only that it must use the state secrets privilege, and not *Totten*, to do so. *See also* Reply Brief of Plaintiffs-Appellants at 15-20 (elaborating on *Totten/Reynolds* distinction).

Accordingly, the state secrets privilege would support dismissal only if it removed from the case evidence indispensable for either party to prevail – a determination that the panel correctly held could not be made at this stage. The government insists otherwise, arguing that it is already certain that the parties will be unable to litigate this case without privileged evidence. Citing the Fourth Circuit's decision in *El-Masri v. United States*, the government contends that state secrets are "so central" to the parties' claims and defenses that further proceedings would be futile. 479 F.3d 296

907; *see also Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 991 (N.D. Cal. 2006) (same); *ACLU v. Nat'l Sec. Agency*, 438 F. Supp. 2d 754, 763 (E.D. Mich. 2006), *vacated on other grounds*, 493 F.3d 644 (6th Cir. 2007) ("This [*Totten/Tenet*] rule should not be applied to the instant case, however, since the rule applies to actions where there is a secret espionage relationship between the Plaintiff and the Government. It is undisputed that Plaintiffs do not claim to be parties to a secret espionage relationship with Defendants. Accordingly, the court finds the *Totten/Tenet* rule is not applicable to the instant case.") (internal citations omitted). Indeed, as *amici* William G. Weaver and Robert M. Pallito observe, there is only a *single* lower-court decision in which plaintiffs not in privity with the government faced dismissal of their suit under *Totten* – and, although the appellate court upheld the dismissal, it *reversed* on the grounds for dismissal. *See* Brief of *Amici Curiae* William G. Weaver and Robert M. Pallitto In Support of Reversal, at 8.

(4th Cir. 2007). But the *El-Masri* case is an object lesson in why courts should *not* attempt 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, a practice that "is akin to putting the cart before the horse." *Crater Corp. v. Lucent Technologies, Inc.*, 423 F.3d 1260, 1267-68 (Fed. Cir. 2005). As plaintiffs-appellants explained in greater detail in their Opening Brief at pages 52-55, to reach its erroneous decision, the Fourth Circuit was compelled to posit a series of purely 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 evidence or concrete arguments from the parties. Such an approach demands a kind of judicial clairvoyance that invariably leads to error.[7]

As the panel observed, it simply cannot be determined "whether the parties will be able to establish their cases without use of privileged evidence without also knowing what *non-privileged* evidence they will

[7] 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, even though there are numerous routes to establishing supervisory liability that require no such showing. *See* Opening Brief of Plaintiffs-Appellants at 53 n.16.

marshal." *Mohamed v. Jeppesen*, 579 F.3d at 961 (emphasis in original). It would be especially unjust and improper to credit the government's argument that the state secrets privilege will prevent Jeppesen from presenting "any conceivable" *defense* against plaintiffs' claims. Govt. Br. at 20-22. State secrets doctrine analyzes *actual* defenses, not imaginary ones; 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 139, 149 (D.C. Cir. 2007). Were it otherwise, "then virtually every case in which the United States successfully invokes the state secrets privilege would need to be dismissed." *Id.* at 150-51.

Thus, the question at this stage is not whether the former CIA Director has identified any privileged facts in his affidavits; perhaps he has. Rather, the question is whether it can be determined with certainty at this stage of the litigation that those 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. As the panel recognized, 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. There will be no shortage of opportunities for the government to protect its legitimate interests with respect to specific privileged evidence.

II: The Government Distorts the Panel's Decision in Order to Exaggerate Its Purported Harms

Seeking to portray the panel's decision as rewriting rather than restating core state secrets doctrine, the government misreads the opinion in critical respects. But the parade of horribles that the government foresees is purely an invention. The panel's analysis, if ratified by the en banc Court, will not result in the disclosure of state secrets.

The government construes the panel's opinion as holding that the state secrets privilege may not be invoked in response to allegations in plaintiffs' complaint. 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 unable to prevent matters that it considers to be state secrets from being transformed into "competent evidence of the facts stated." Govt. Br. at 30, *citing Huey v. Honeywell, Inc.*, 82 F.3d 327, 333 (9th Cir. 1996). But 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[(b)(6)] [treating failure to respond as an admission] and putting the plaintiff to his proof of the matter covered by the 'denial.'" *Id.*, *see also Nat'l Acceptance Co. of America v. Bathalter*, 705 F.2f 924, 932 (7th Cir. 1983) (when defendant claims privilege in response to factual allegation in complaint, plaintiff must be "put to its proof, either by way of evidentiary support for a motion for summary judgment or at trial").

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 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 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. In other words, the privilege may be invoked, but should not be adjudicated, at the pleading stage.

The government is even more off-base in suggesting that the panel's opinion prohibits it from invoking the privilege to prevent private parties from disclosing state secrets in litigation, "so long as they [do] not seek discovery from the Government." Govt. Br. at 41. The panel held no such thing. The government is undoubtedly permitted to intervene in an action between private parties, 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.

In any event, secrecy concerns involving private contractors are not *created* by litigation; the risk that secrets will be disclosed exists at all times. For that reason, when the government enters into a "secret contract"

involving highly sensitive matters, it requires 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.

Thus, while the government considers Jeppesen's role in the CIA's rendition program a state secret, a different view evidently prevailed at Jeppesen's headquarters.[8] The evidence of Jeppesen's involvement in the transfer of plaintiffs to detention and torture did not arise as a consequence of the litigation, but rather before the litigation commenced. *See* Opening Brief of Plaintiffs-Appellants at 2-24. The state secrets privilege, however construed, cannot place that cat back in the bag.

III. New Developments Have Materially Undermined the Bases on Which the Government Seeks Dismissal of this Action

In seeking the termination of this lawsuit at its outset, the government continues to rely on declarations submitted in October of 2007 by former

[8] *See* 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; *see also* Opening Brief of Plaintiffs-Appellants at 23-24.

CIA Director Michael Hayden. But subsequent events have materially undermined many of Director Hayden's central points. Fundamental shifts in U.S. policy, extensive declassification of previously secret documents, and numerous foreign investigations of the CIA's overseas detention and interrogation activities have vastly altered the context in which the government's secrecy claims must be evaluated.

For example, General Hayden's public declaration states that the CIA's detention and interrogation program "remains one of our most vital tools in the war against the terrorists," ER 741, and that public confirmation of any details of that program would "degrade the effectiveness of the United States' intelligence gathering activities by . . . providing terrorists information about interrogation methods that would assist their interrogation resistance programs," ER 748. But on January 22, 2009, President Obama eliminated the program by Executive Order. That order – entitled "Ensuring Lawful Interrogations" – directs unequivocally that "the CIA shall close as expeditiously as possible any detention facilities that it currently operates and shall not operate any such detention facility in the future," and it prohibits the use of interrogation techniques not approved by the Army Field Manual. Exec. Ord. 13,491, 74 Fed. Reg. 4893 (Jan. 22, 2009).

Not only have many of the practices at the center of this litigation been discontinued; they have also been officially confirmed. On April 16, 2009, President Obama declassified four legal memoranda prepared by the Department of Justice's Office of Legal Counsel that purported to authorize the CIA's use of abusive interrogation techniques.[9] The memos confirm the CIA's use of a range of coercive techniques, including prolonged sleep deprivation, forced nudity, dietary manipulation, and stress positions, as well as specific techniques used to set the "initial conditions" for interrogation through preparation and flight to CIA facilities. These techniques were employed by U.S. personnel against some of the plaintiffs in this litigation.

On August 24, 2009, the government declassified large portions of a report by the CIA's Inspector General, together with other CIA and Department of Justice documents, that provide additional detail concerning the interrogation methods and conditions of confinement that form the basis for this litigation. Significantly, these are documents prepared by the CIA itself that describe how specific coercive interrogation techniques were employed against specific CIA detainees.[10] One CIA document declassified

[9] The four memos, together with others relating to the CIA's rendition, detention, and interrogation program, are available at www.aclu.org/olcmemos.

on that day is a self-styled "Background Paper" prepared by the CIA to describe the Agency's "combined use of interrogation techniques." In a section entitled "Rendition," the CIA describes the procedures by which a detainee "is flown to a Black Site":

> During the flight, the detainee is securely shackled and is deprived of sight and sound through the use of blindfolds, earmuffs, and hoods. There is no interaction with the [detainee] during this rendition movement except for periodic, discreet assessments by the on-board medical officer. . . . [T]he rendition and reception process generally creates significant apprehension in the [detainee] because of the enormity and suddenness of the change in environment, the uncertainty about what will happen next, and the potential dread [the detainee] might have of U.S. custody.[11]

This declassified CIA document accurately depicts the rendition procedures to which plaintiffs were subjected, as well as the terror they experienced during their ordeals.

The CIA's most secret and controversial detention and interrogation practices have been prohibited and brought to light. Contrary to General Hayden's now-obsolete declaration, a program that does not exist cannot be

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[10] The CIA Inspector General's report, dated May 7, 2004 and entitled "Counterterrorism Detention and Interrogation Activities," is available at http://luxmedia.vo.llnwd.net/o10/clients/aclu/IG_Report.pdf.

[11] The CIA "Background Paper" is dated December 30, 2004 and is available at http://www.aclu.org/files/torturefoia/released/082409/olcremand/2004olc97.pdf.

degraded by "disclosure" of information that has already been made public by the government itself.

The recent developments in this country are not the only changed circumstances that are relevant to the government's state secrets claim. As plaintiffs have previously observed, the proceedings in this Court are not taking place in a vacuum, but in the broader international context of numerous national and intergovernmental investigatory and judicial proceedings concerning the CIA's rendition program and the role of various governments and corporations in the abduction and detention of foreign nationals. Foreign states, acting both individually[12] (including Sweden, Germany, Italy, Lithuania, Poland, Portugal, Romania, Spain, and the United

[12] *See, e.g.,* Chief Parliamentary Ombudsman, Sweden, *A review of the enforcement by the Security Police of a Government decision to expel two Egyptian citizens* (Mar. 22, 2005) *available at* http://www.jo.se/Page.aspx?MenuId=106&MainMenuId=106&Language=en&ObjectClass=DynamX_SFS_Decision&Id=1662; Rachel Donadio, *Italy Convicts 23 Americans in C.I.A. Trials*, N.Y. Times, Nov. 5, 2009; Michael Evans, *MI6 faces torture investigation after reporting its own officer*, The Times (U.K.), Sept. 12, 2009; *Factbox – Next steps in CIA flights probes in Europe*, Reuters, Feb.14, 2007; *Poland Investigating CIA Prison Allegations*, USA Today, Aug. 25, 2008; Letter, Cristian Gaginsky, Deputy Chief of Mission, Romanian Embassy, *U.S., Romania and CIA Jails*, N.Y. Times, Aug. 22, 2009; Stephen Grey & Renwick McLean, *Spain Looks Into C.I.A.'s Handling of Detainees*, N.Y. Times, Nov. 14, 2005; *Lithuania parliament to probe CIA jail allegations*, Reuters, Nov. 5, 2009; *Portugal Probes Alleged CIA Flights*, Assoc. Press, Feb. 5, 2007.

Kingdom) and through inter-governmental organizations,[13] have launched investigations and released information concerning their own involvement with the CIA's practices. These proceedings are enormously significant: among the principal rationales advanced by the government in support of its secrecy claims is the purported harm to foreign relations that would flow if the participation of foreign governments in CIA intelligence activities were to be confirmed through these proceedings. It would be a remarkable irony if this Court were to affirm the dismissal of this suit in order to protect from disclosure the roles played by other nations – when those very nations are engaged in proceedings that continue to expose precisely the relationships and information that the United States here characterizes as "state secrets."

Foreign investigations are particularly critical because they involve not only the countries at issue in the case, but some of the actual plaintiffs. As plaintiffs have previously reported, during the pendency of this appeal, the Swedish government agreed to pay the equivalent of $450,000 in damages to plaintiff Ahmed Agiza in compensation for Sweden's

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[13] *See, e.g.,* Eur. Parl. Ass., Comm. on Legal Aff. and Hum. Rts., *Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report*, 23rd Sitting, Doc. No. 11302 (2007) available at http://assembly.coe.int/CommitteeDocs/2007/EMarty_20070608_NoEmbargo.pdf; *U.N. to scrutinize Obama on counter-terrorism*, Mar. 10, 2009, Reuters.

participation in the CIA's rendition of Agiza to Egypt, where he was tortured. *See* "Ex-Terrorism Suspect to be Compensated," Wash. Post, Sept. 20, 2008, at A14. Although the Swedish government had already made public its cooperation with the CIA in the removal of Mr. Agiza to Egypt, *see* Opening Brief at 2-7, the negotiation and payment of damages to him, following Swedish and United Nations confirmation of his torture in Egypt, demonstrates not only that the cooperation between the CIA and the Swedish and Egyptian governments in Mr. Agiza's rendition, detention, and torture is in no way secret, but that this Court can provide a fair process for consideration of Mr. Agiza's claims without harm to national security or foreign relations.

Even more dramatic, perhaps, are the ongoing judicial proceedings in the United Kingdom, where attorneys for appellant Binyam Mohamed have been engaged in legal proceedings before that country's High Court to obtain documents and information relating to Mr. Mohamed's rendition, detention, and interrogation, including documents confirming the cooperation between the U.S. and U.K. governments in those events. Plaintiffs described these proceedings in their Reply Brief of September 25, 2008, at 5-9. But the litigation has continued following Mr. Mohamed's release without charge from Guantanamo in February of 2009. The ongoing

dispute involves seven short paragraphs that the High Court redacted from its published opinion at the request of the U.K. government. The disputed paragraphs are a summary of information that the court had gleaned from 42 documents relating to Mr. Mohamed's treatment by the United States authorities when he was detained in Pakistan between April 2002 and May 2002. *See R (Binyam Mohamed) v. Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 2549 (Admin).[14]

The U.K. government has opposed the publication of the disputed paragraphs on the ground that disclosure of this information, even in summary form, "would seriously harm the existing intelligence sharing arrangements between the United Kingdom and the United States and cause considerable damage to national security." *Id.* at 10. The sole basis for the government's assertions was a letter from the Bush Administration stating that public disclosure of the documents or the information contained therein would be "likely to result in serious damage to U.S. national security and could harm existing intelligence information sharing arrangements between our two governments." *Id.* After President Obama took office, the U.K.

[14] The High Court's opinion is available at http://www.judiciary.gov.uk/docs/judgments_guidance/mohammed-revised-redacted-no5.pdf. All of the High Court's opinions in this matter are available at http://www.judiciary.gov.uk/judgment_guidance/judgments/mohamed210808.htm#bm161009.

government renewed its request that the High Court maintain the redactions, arguing once again that publication would be harmful to U.K. national security interests. *Id.* at ¶ 66. In support of its request, the government produced a letter from the CIA to British intelligence, dated April 30, 2009, which stated that disclosure of the information "reasonably could be expected to cause serious damage to the United Kingdom's national security [including] a constriction of the U.S.-U.K. relationship, as well as U.K. relationships with other countries." *Id.* at ¶ 79 (v).

The High Court considered and, in a judgment delivered last month, flatly rejected the government's argument. As a threshold matter, the court noted that the decision on publication of the seven paragraphs was for the court to make, and that it would defer to the government's opinion on damage to U.K. national security only if there was "an evidential basis" for doing so. *Id.* at ¶ 67. The court conducted a lengthy independent assessment of the evidence presented in support of and against disclosure. Noting that the seven paragraphs at issue "relate to admissions of what officials of the United States did to [Mr. Mohamed] during his detention in Pakistan," *id.* at ¶ 79 (viii), the court held that "the evidence simply does not sustain the Foreign Secretary's opinion that there is a serious risk" from disclosure. *Id.* at ¶ 95. The court deemed it significant that, upon assuming

office, President Obama had publicly renounced the use of torture and other techniques set forth in Department of Justice memoranda that had governed CIA interrogation techniques; it noted that the declassified memos describing the CIA's enhanced interrogation techniques were so detailed that no conceivable harm could result from disclosure of the seven paragraphs. *Id.* at ¶ 69 (iii) and ¶ 79 (vii). The court concluded: "It cannot be suggested that information as to how officials of the U.S. Government admitted treating [Mr. Mohamed] during his interrogation is information that can in any democratic society governed by the rule of law be characterized as 'secret' or as 'intelligence.'" *Id.* at ¶ 93 (ii).

These foreign judicial proceedings, and many others, offer more than a model of how government secrecy interests can be accommodated without foreclosing remedies for plaintiffs and without preventing adjudication of critical legal issues. The proceedings also substantially weaken the government's categorical argument that the CIA "cannot" confirm or deny its cooperation with other nations. But even if this Court were to hold that the combined weight of these significant new developments does not wholly vitiate the government's secrecy interests, the inquiry does not end there. In order for the privilege to attach, the government bears the additional burden of demonstrating that formal confirmation of what the entire world already

knows will cause harm to national security. *Reynolds*, 345 U.S. at 10. In the face of such vastly changed circumstances, that is a burden the government cannot meet.

CONCLUSION

The government's position in this litigation can remain wholly unaffected by significantly changed circumstances because, at its heart, its argument is a formal one. The government cannot seriously contend that confirming already public information about the specific role of Jeppesen, or of Sweden, or of Egypt, or of the United Kingdom in these events will cause concrete harm to national security. Rather, it must insist that the CIA *cannot*, in *any* circumstances, formally confirm its relationships with contractors or countries – not because such confirmation would "disclose" any new details (it would not), but because it might undermine the government's future ability to recruit intelligence partners.

But if the government's unwillingness to confirm or deny allegations concerning matters that are *already public* is sufficient to defeat a claim, then the government quite literally retains control over its own immunity from suit, and this Court's role is purely ministerial. By contrast, if this Court permits the government to assert the privilege with respect to genuinely secret matters, while permitting plaintiffs to marshal non-

privileged evidence in support of their claims, then the government's legitimate security interests can be accommodated without entirely compromising the rights of victims or the role of the judiciary.

For the foregoing reasons, this Court should reverse the judgment of the district court and remand this case for further proceedings.

Respectfully submitted,

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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 6506 words.

/s/ Ben Wizner
BEN WIZNER

CERTIFICATE OF SERVICE

I hereby certify that on November 27, 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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