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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

JEPPESEN DATAPLAN, INC.,
Defendant-Appellee,

UNITED STATES OF AMERICA,
Intervenor-Appellee.

Appeal from the United States District Court
for the Northern District of California

**Brief of Amici Curiae William G. Weaver and Robert M. Pallitto
In Support Of Reversal**

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INTEREST OF AMICI AND MOTION FOR LEAVE TO FILE

William G. Weaver is an Associate Professor in the Institute for Policy and Economic Development at the University of Texas at El Paso. Robert M. Pallitto is an Assistant Professor of Political Science at Seton Hall University in South Orange, New Jersey. Both Professors are experts on the state secrets privilege, and they seek leave for permission to file the attached brief. Professors Weaver and Pallitto's recently published legal scholarship includes a detailed study of the history and use of the state secrets privilege, *State Secrets and Executive Power*, 120 Pol. Sci. Quart. 85 (Spring 2005), a historical legal analysis of "extraordinary rendition," *'Extraordinary Rendition' and Presidential Fiat*, 36 Pres. Studies Quart. 102 (March 2006), and the book *Presidential Secrecy and the Law* (Johns Hopkins U.P., 2007). Both Professors Weaver and Pallitto served on a recent panel for the Constitution Project to frame reform guidelines for use and assertion of the state secrets privilege.

An amicus brief from Professors Weaver and Pallitto is desirable because Professors Weaver and Pallitto bring scholarly and expert knowledge on the history of, and jurisprudence surrounding, the state secrets privilege, the application of which is a central issue in this case.

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SUMMARY OF THE ARGUMENT

The state secrets privilege is an indispensable common law evidentiary rule adapted to United States law from the British law doctrine of Crown Privilege. But, with the Constitution to contend with it is certainly not an American expression of royal prerogative. The privilege, barely fifty years old in the United States, was created as a narrow and admittedly draconian exception to normal evidentiary procedure. The scheme for assertion and use of the principle, first announced by the U.S. Supreme Court in *U.S. v. Reynolds*, 345 U.S. 1 (hereinafter "*Reynolds*"), makes it clear that the privilege is a pragmatic tool to prevent predictable and consequential damage to the national security. *Reynolds* is also clear that the privilege is not to operate as an extra-constitutional principle, a sort of legal kudzu, spreading to and choking the life out of any case it touches. The decision of the district court below, holding that application of the privilege requires dismissal of this action on the pleadings, is contrary to the *Reynolds* ruling, and reversal of that decision is required under any reasonable analysis of *Reynolds* and its progeny.

ARGUMENT

I. ANTECEDENTS TO THE STATE SECRETS PRIVILEGE

A. English Antecedents.

Before the 17th Century there is no discussion in extant records concerning a royal prerogative to withhold information from courts, Parliament, and the public. The *Prerogativa Regis*, 17 Edw. II, Stat. 1 (1324), in its development over the centuries did not address or spawn discussion of a Crown power to refuse disclosure of information or documents. The absence of contention over this matter before the 17th Century most likely results from the fact that such a power was so a part of Crown prerogative as not to generate any controversy. But Charles I put this issue into debate after he ordered the detention of subjects who refused to loan the crown money to prosecute war.

In *Darnel's Case*, 3 How. St. Tr. 59 (1628), detainees of the crown sought relief in *habeas corpus cum causa*. The Crown asserted that courts could not acquire jurisdiction over the detainees since no cause for their detention had been identified; they were held "*per speciale mandatum Domini Regis*" (by special order of the King). The Attorney General claimed that the Crown could hold the detainees without answering to the courts because the reasons for detention were secrets of state and constituted

“*Arcana Imperii.*” Raising what has become a much-echoed concern about such a ranging power, Sir Benjamin Rudyard reportedly declaimed at the time that secrets of state “in the latitude [they] had been used . . . had eaten out, not only the laws, but all the religion of Christendom.” 7 *A Collection of State Trials and Proceedings Upon High Treason* 91 (London: C. Bathurst, 1766).

In the Petition of Right of 1628, Charles grudgingly accepted the claim that arrests and detentions without showing legal cause were beyond the Crown’s power. This put into notice the limit of the King’s power to withhold information from courts, but once the problem of disclosure of matters of state was separated from warrantless detention, English courts generally adopted a position of strong deference to Crown claims to withhold information.

In the *Trial of the Seven Bishops*, the court refused to require a witness to testify as to the events of a Privy Council meeting. 12 How. St. Tr. 183, 309-11 (1688). Similarly, in *Layer’s Case*, counsel for a defendant charged with high treason lost in his effort to have minutes of a Council meeting read into the record in open court. 16 How. St. Tr. 94, 223-224 (1722). And in *Rex v. Watson* a public official was forbidden to testify as to

the accuracy of a publicly purchased plan of the Tower of London. 32 How. St. Tr. 1, 389 (1817).

The apogee of deference to Crown withholding came in two cases. In *Beatson v. Skene*, Chief Baron Pollock, for a unanimous panel of Law Lords, found: “We are of opinion that, if the production of a State paper would be injurious to the public service, the general public interest must be considered paramount to the individual interest of a suitor in a court of justice.” 5 H. & N. 838, 853 (1860). *Beatson* also held that the determination of the public interest is solely in the hands of public ministers. *Id.* And in *Duncan v. Cammel Laird*, [1942] A.C. 624, 641 (1942), the Law Lords reiterated the holding of *Beatson* and approvingly quoted Lord Parker’s observation in *The Zamora*, [1916] 2 A.C. 77, 107 (1916), that “Those who are responsible for the national security must be the sole judges of what the national security requires.”¹ But, in the United States, before *Reynolds*, there is virtually no history with the state secrets privilege. W. Weaver and R. Pallitto, *State Secrets and Executive Power*, 120 Pol. Sci. Quart. 85 (Spring, 2005), 92-7. While there was little doubt before *Reynolds* that U.S. law would recognize

¹ Abdication of judicial power in the face of ministerial withholding of information based on the public interest was abandoned by the Law Lords in 1968, and the holdings in *Beatson* and *Duncan* on this matter have been overruled. *Conway v. Rimmer*, [1968] A.C. 910 (1968).

such a privilege, the form and reach that the privilege would take was speculative.

B. The Trial of Aaron Burr

Unlike England, the United States had no Crown Privilege or public interest exception privilege, so that when *Reynolds* arose there was virtually no American law upon which to draw. federal courts' decisions, Justice Department briefs, scholarly articles, and amicus briefs often point to the Aaron Burr trial of 1807 and the Supreme Court case of *Totten v. United States*, 92 U.S. 105 (1876) (hereinafter "*Totten*") as valid precedents for the state secrets privilege. A district court in 1977, for example, claimed that the privilege "can be traced as far back as Aaron Burr's trial in 1807." *Jabara v. Kelley*, 75 F.R.D. 475, 483 (D. Mich. 1977). In 1989, the D.C. Circuit said that although "the exact origins" of the state secrets privilege "are not certain," the privilege in the United States "has its initial roots in Aaron Burr's trial for treason." *In re U.S.*, 872 F.2d 472, 474-75 (D.C. Cir. 1989). In the *Reynolds* case, the Justice Department's brief to the Supreme Court cited Burr's trial as an apt precedent. Brief for the United States, *United States v. Reynolds*, No. 21, U.S. Supreme Court, October Term, 1952, at 10-11. See also *Edmonds v. U.S. Dept. of Justice*, 323 F. Supp. 2d 65, 70 (D.D.C. 2004); Brief of Amicus Curiae Professor Robert M. Chesney in

Support of Reversal, *Hepting v. AT&T Corp.*, Nos. 06-17132 and 06-17137 (9th Cir. March 16, 2007).

The Burr trial, however, is simply not a state secrets case, either directly or as a matter of incipience. Although the trial *threatened* to involve a question concerning state secrets, the Jefferson administration ultimately not only did not withhold documents but Jefferson himself took a personal and active interest in making sure that all pertinent documents would be made available to the court. 11 *The Writings of Thomas Jefferson* 241 (Thomas Jefferson Memorial Association of the United States, 1904). Justice John Marshall, writing in his capacity of eyre judge for the Circuit of Maryland, noted that on the matter of withholding for state secrets “it need only be said that the question does not occur at this time.” *United States v. Burr*, 25 Fed. Cas. 30, 37 (D.C.D. Va. 1807). *See also* Louis Fisher, *In the Name of National Security: Unchecked Presidential Power and the Reynolds Case* 212-20 (2006).

C. *Totten v. United States*

As for *Totten*, in *Reynolds* the Supreme Court cited several precedents for “the privilege against revealing military secrets, a privilege which is well established in the law of evidence.” *Reynolds*, 345 U.S. at 6-7. The first cite is to *Totten*. *Id.* at n.11. Other federal court decisions, Justice Department

briefs, scholarly articles, and amicus briefs also cite *Totten* as a legitimate precedent for the state secrets privilege. See, e.g., *Edmonds v. U.S. Dept. of Justice*, 323 F. Supp. 2d 65, 71; Petition for a Writ of Certiorari, *Tenet v. Doe*, No. 03-1395, U.S. Supreme Court, April 6, 2004, at 17-18.

But *Totten* is not a basis for the state secrets privilege. The case involved a discrete category of unenforceable contracts. Nothing should be extracted from the law of this narrowly defined case to justify the application of its principles to the entire field of military secrets, national security, and foreign affairs. If *Totten* had such a broad reach then it would have all but replaced the state secrets privilege, since it is a jurisdictional bar; when it applies it demands dismissal of the case on the pleadings.

In *Tenet v. Doe*, 544 U.S. 1 (2005), the United States Supreme Court, in overruling a holding of the Ninth Circuit, found that *Totten* was a separate doctrine from the state secrets privilege, noting “*Reynolds* . . . cannot plausibly be read to have replaced the categorical *Totten* bar with the balancing of the state secrets evidentiary privilege in the distinct class of cases that depend upon clandestine spy relationships.” *Id.* at 10. As the Court further found, the *Totten* bar has no application to the kind of tort claims action brought by the three widows in *Reynolds*, nor does it have any application in the present case. *Id.* at 8-9.

In analyzing state secrets cases for instances of *Totten*-based dismissals of cases where plaintiff parties are not in privity with the government, we find that there is only one case that meets this criterion. *Hudson River Sloop Clearwater, Inc. v. Navy*, 1989 U.S. Dist. LEXIS 19034 (E.D.N.Y. 1989). The trial court found that the Totten Bar “requires dismissal of the supplemental . . . claim.” *Id.* at *4. The Second Circuit Court of Appeals upheld dismissal of the case, but reversed on the grounds for dismissal. *Totten, Hudson River Sloop Clearwater, Inc. v. Navy*, 891 F.2d 414, 423 (2d Cir. 1989). The court held that although it “agree[d] with this result” (dismissal of the claim) it held that the case “need not be resolved on whether judicial proceedings would necessarily divulge classified information to the public.” *Id.* Other than this orphaned district court case there is no case law to indicate that the *Totten* bar is applicable against a plaintiff not in privity with the government.

II. THE PRAGMATISM OF THE REYNOLDS DECISION

Crown Privilege proved maladroit when introduced into United States law. First, claims in Crown Privilege were not differentiated as to their compelling natures or underlying facts. Judges approached claims concerning secrets of state the same as matters concerning confidentiality of informer identities, *Rex v Watson*, 32 How. St. Tr. 1, 389 (1817), allegedly

defamatory reports generated by government officials, *Home v. Bentinck*, 2 *Brod. & B.* 130 (1820), or any other basis for a claim of Crown Privilege.

The standard that developed in English law, which was really not much of a standard at all, was whether or not the disclosure of the requested documents would be “prejudicial to the public interest.” *See e.g. Duncan v. Cammel Laird* at 637-41.

But in *Reynolds*, in accordance with our system of divided government, the Court declared a *state secrets* privilege, and specifically refused the Justice Department’s demand for a *public interest exception* privilege to withhold information from courts. *Reynolds*, 345 U.S. at 6.

Judges in the United States have a responsibility in determining the nature of the privileged material that English judges did not bear.

Second, in English law the privilege was a *principle* of government. As Viscount Simon wrote in *Duncan*, the case represented a “question . . . of high constitutional importance,” at 629, and noted that “When the Crown . . . is a party to a suit, it cannot be required to give discovery of documents at all. No special ground of objection is needed,” at 632. Understanding of the state secrets privilege developed in *Reynolds*, by contrast, does not embrace a constitutional principle but is a pragmatic device that is only to operate when requested information, if disclosed, may reasonably be expected to cause

damage to the national security. *Reynolds*, 345 U.S. at 10. These distinctions limit the operation of the privilege, emplace the courts as the final authority as to when the privilege is correctly asserted, and transform the constitutional, principle-based privilege of English law into the pragmatic, fact-driven privilege of American law.

The state secrets privilege shares only superficial similarities and spotty history with the doctrine of Crown Privilege. But the government attempts to elide these crucial distinctions by claiming a constitutional basis for the privilege, often alluding to, and sometimes simply declaring, that it protects the sphere of Article II powers held by the President. *Reynolds* explicitly holds otherwise. As the Court noted, “We have had broad propositions pressed upon us for decision . . . [these] positions have constitutional overtones which we find it unnecessary to pass upon, there being a narrower ground for decision.” *Id.* at 6. By denying the government’s demand for a public interest exception and refusing to treat the matter as even implicating constitutional doctrine, the Court recognized the substantial differences between Crown Privilege and what shape an American privilege for withholding state secrets must take.

The entire decision is a discussion of compromise, not principle. It is about the nuts and bolts of judicial action, not the reach of Article II powers.

The Court refers repeatedly to “judicial experience,” the practice and habits of judges in factually idiosyncratic settings of discovery. It speaks of “sound formula of compromise,” *id.* at 9, weighing plaintiff’s need for the requested material when deciding on *in camera* review, and the pursuit of alternatives to allow the case to go forward in the face of a state secrets privilege claim. It is clear that the Court believed that when the privilege applied, the information affected has absolute protection, but all efforts must be made to allow the suit to go forward without such information.

The privilege is also consistently referred to in case law as a “common law doctrine,” and *Reynolds* explicitly recognized the common law origins of the privilege. *Reynolds*, 345 U.S. at 7 & n.11. *See also Al-Haramain v. Bush*, 507 F. 3d 1190, 1196 (9th Cir. 2007); *In re Sealed Case*, 494 F.3d 139, 142 (D.C. Cir. 2007). The fact that the privilege is a common law practice is important for two reasons. First, the genealogical link to Crown Privilege is thereby tacitly assumed, and second, the lack of constitutional foundation for the doctrine is acknowledged. Both of these points are frequently passed over too quickly in discussions of state secrets. On the one hand, this results in a misreading of the *Reynolds* ruling that sees it as bootstrapping a powerful doctrine into American law so that it seems as if it has always been there. But it has not always been there: it is a modern doctrine in American

law, driven by modern concerns arising mainly from the use of modern technology. In the United States, the *idea* of a state secrets privilege has long been well established in legal scholarship, but before *Reynolds*, that idea was naked of legal scaffolding.

On the other hand, the link to Crown Privilege and the Justice Department's tendency to look past the pragmatic spirit of *Reynolds* has allowed the government to propagate the erroneous position that the privilege is central to Article II powers held by the President. But it takes no studied analysis to conclude that the *Reynolds* court did not accidentally, tacitly, or directly mean to eliminate operation of constitutional rights of private citizens and corporations in national security cases. If that were the case, the executive branch could digest the Bill of Rights and avoid judicial accountability for its actions through calculated expansion of the term "national security" through over-classification of information, improper claims of privilege, and declaring all manner of matters as implicating security issues. Sidney Souers, the first director of the CIA, once defined "national security" as a "point of view rather than a distinct area of governmental responsibility," *Policy Formulation for National Security*, 43 *Am. Pol. Sci. Rev.* 534, 535 (June, 1949), but it has become only the

executive branch's "point of view" and it is one that must be held to strict limitations imposed by law and the Constitution.

One of the limitations that is crucial to preventing the state secrets privilege from outstripping established constitutional rights protections is courts' refusal to dismiss an action on the pleadings when the government asserts the state secrets privilege. In *Al-Haramain v. Bush*, the Ninth Circuit refused to consider the "subject matter" of the suit a state secret, because such a conclusion would have required dismissal of the suit on the pleadings, prior to discovery. 507 F.3d 1190, 1198 (9th Cir. 2007). Instead, the court ruled on a particular discovery dispute (barring the plaintiffs' use of a particular document in evidence), and remanded the case for the trial court to consider the relationship between statutory evidentiary procedures and the common-law state secrets privilege. 507 F.3d at 1206. The court also rejected the Fourth Circuit's construction of the "very subject matter" test (which had been announced in *El-Masri v. U.S.*, 479 F.3d 296, 300 (4th Cir. 2007)), and in fact explicitly declined to adopt the Fourth Circuit's "expansive" definition of "subject matter." *Al-Haramain*, 507 F.3d at 1201. Similarly, in another case overturning a district court's ruling that the "subject matter" of a suit was a state secret, the D.C. Circuit warned, "the court has not looked favorably upon broad assertions by the United States

that certain subject matters are off-limits for judicial review.” *In re Sealed Case*, 494 F.3d at 151.

Thus, the “very subject matter” basis for adjudicating (and dismissing) state secrets claims is a difficult standard to meet, and as construed by the Ninth Circuit it is even stricter. In fact, as the following chart shows, there have been very few cases that were dismissed on the pleadings based on the determination that their “very subject matter” was a state secret.

The chart contains four cells, beginning with the universe of reported state secrets cases in the first cell. Each succeeding cell (reading left to right) narrows the field of state secrets cases by removing those that are *unlike* the facts of this case. The end result in Cell Four shows that there have been no state secrets decisions in which the court ruled as the trial court in this case did (with the exception of *El-Masri v. U.S.*, which we discuss below).

TABLE OF EXISTING STATE SECRETS CASES

All Cases²

Cases Remaining after eliminating those that allowed discovery³

Cases remaining after eliminating those that would reveal details of weapons or warfare systems

Cases remaining after eliminating those that involved government agents or employees

Cases Heard on Appeal	Cases Remaining after eliminating those that allowed discovery³	Cases remaining after eliminating those that would reveal details of weapons or warfare systems	Cases remaining after eliminating those that involved government agents or employees
Halpern v. U.S. Hobson v. Wilson Halkin v. Helms ACLU v. Brown Clift v. US Farn. Can. v. Grimes U.S. v. The Irish	Farn. Can. v. Grimes Foster v. U.S. Guong v. U.S. – a Weston v. Lockheed – a Nejad v. U.S. Zucker v. Gen. Dyn – a Clift v. U.S. – a Bareford v. Gen Dyn. – a	Guong v. U.S. –a Black v. U.S. – a Tilden v. Tenet Trulock v. Lee -a Edmonds v. DOJ Sterling v. Tenet -a El-Masri v. U.S. - a Doe v. CIA	El-Masri v. United States - a

² Cases consolidated under *In re NSA Telecoms. Records Litig.*, 444 F.Supp 2d 1332 (J.P.M.L. 2006) are not included in the table.

³ “-a” following a case means it was heard on appeal.

<p>Salisbury v. U.S. Gandera, S.A., v. Block Ellsberg v. Mitchell Northrop v. McD. Doug. Molerio v. FBI Fitzgerald v. Penthouse Guong v. U.S. Weston v. Lockheed In re U.S. Zucker v. Gen. Dyn Hudson River v. Navy Wilkinson v. FBI In re Under Seal Bowles v. U.S Maxwell v. FNB Bareford v. Gen. Dyn. Black v. U.S. Monarch P.L.C. v. U.S. Kasza v. Browner U.S. v. Klimavicius-Vil. Crater v. Lucent DTM Research v. U.S. Doe v. Tenet Trulock v. Wen Ho Lee Darby v. U.S. Tennenbaum v. Simonini Schwartz v. Raytheon El-Masri v. Tenet Sterling v. Tenet Al-Haramain v. Bush In re Sealed Case District Court Cases China v. Nat. Union Heine v. Raus Pan Am v. Aetna Kinoy v. Mitchell Spock v. U.S. Jabara v. Kelly U.S. v. Felt Alliance v. DiLeonardi Sigler v. LeVan Zenith v. U.S. Nat'l Law. Guild v. Att. Gen. Ceramica S.A. v. U.S. Republic Steel v. U.S. AT&T v. U.S. U.S. Steel v. U.S. Star-Kist Inc. v. U.S. In re Agent Orange Foster v. U.S. Xerox v. U.S. Patterson v. U.S. Nejad v. U.S. N.S.N. v. DuPont Bareford v. Gen Dyn. – a Bentzlin v. Hughes In re Smyth McD. Douglas v. U.S. Kronisch v. U.S. Yang v. Reno Frost v. Perry Linder v. Calero Tilden v. Tenet Barlow v. U.S. Virtual Inc. v. Moldova U.S. v. TRW Horn v. Huddle (In re U.S.) Burnett v. Al-Baraka Edmonds v. DOJ Arar v. Ashcroft</p>	<p>Bentzlin v. Hughes Black v. U.S. – a Tilden v. Tenet Trulock v. Lee – a Edmonds v. DOJ Sterling v. Tenet – a El-Masri v. Tenet – a Doe v. CIA</p>		
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The preceding chart shows the uniqueness of the trial court's decision in this case. The trial court's ruling stands alone in state secrets jurisprudence except for *El Masri v. United States*, which we discuss below. Thus, the trial court's ruling is out of line with existing state secrets decisional law, and it should be reversed.

The chart lists in Cell 1 all state secrets cases that resulted in published opinions. From that universe of cases, Cell 2 eliminates all cases that proceeded to the discovery stage. Those remaining in Cell 2 – a much smaller group than the original universe of all state secrets cases – were dismissed at the pleadings stage (i.e., before discovery, as the trial court did here). But that group is further reduced in Cell 3 by removing the cases that involve details of weapons or weapon systems. Weapons and weapons systems are not involved in this case, so it is appropriate to disregard those cases as well as we look at state secrets cases on point with this one. Finally, Cell 4 shows what cases remain when those involving claims by intelligence personnel are eliminated. The plaintiffs/appellants in this case are not tied by contractual employment relationship to the United States government, and so those cases involving privity with government *qua* intelligence are inapposite.

The only case that remains once distinguishable cases are culled from the set of existing state secrets cases is *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007). That is the only case dismissed at the pleadings stage that does not involve weapons systems or intelligence agency employees. While it is well-known that *El-Masri* in fact involves extraordinary rendition, as this case does, the Ninth Circuit has specifically and explicitly rejected the Fourth Circuit's handling of the "subject matter" question in that case. In the *Al-Haramain* case, *supra*, the Ninth Circuit did not simply distinguish *El-Masri* on the facts, but rather rejected its methodology, stating,

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. 507 F. 3d at 1201.

The court stated, further, that "we do not necessarily view the 'subject matter' of a lawsuit as one and the same with the facts necessary to litigate the case," and although the matter "does involve privileged information, [] that fact alone does not render the very subject matter of the action a state secret." *Id.* Thus, the court declined to foreclose the plaintiff's right to seek redress at the pleadings stage, just as the court in *Hepting v. AT&T*, 439 F. Supp. 2d 974, 993 (N.D. Cal. 2006), declined to do.

While state secrets cases necessarily involve questions of national security, and therefore raise an important interest on the government's side, they also raise basic questions of justice for the private litigants on the other side of the case as well. In the history of state secrets jurisprudence, private litigants have been denied legal relief for a variety of harms allegedly caused by the government. In this case, plaintiffs allege severe and shocking harm for which they seek redress – horrible torture and prolonged confinement. To deny them the opportunity even to pursue evidence through discovery that could be probative of their claims is a severe blow indeed. As in *Hepting*, the government would retain the opportunity to object, later, to particular pieces of evidence on state secrets grounds if this case proceeded to discovery. On the other hand, to deny plaintiffs the ability to seek such information in the first place would end their efforts with finality, forever denying them justice.

CONCLUSION


In sum, the government is asking this court to decide this case counter to state secrets precedent and the teaching of *Reynolds*. Dismissal of this case at the pleading stage would be an extraordinary departure from accepted practices of judicial decision making, since it would be: (1) contrary to clear precedent; (2) based solely on the unverified self-serving claims of the

government; (3) in the face allegedly massive constitutional violations by the government. This Court ought not entertain such a result.

**CERTIFICATION OF COMPLIANCE PURSUANT TO
FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32-1 FOR
CASE NOS. 06-17132 AND 06-17147**

I certify, pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1, that the foregoing brief is proportionately spaced, has a typeface of 14 points, and contains 4,168 words.

Dated: *July 10, 2008*



Jean-Paul Jassy

CERTIFICATE OF FILING AND SERVICE

I hereby certify that the original and fifteen (15) copies of the foregoing **Brief of Amici Curiae of William G. Weaver and Robert M. Pallitto in Support of Reversal** were this day filed with the Clerk of the United States Court of Appeals for the Ninth Circuit by Federal Express next-day delivery service.

I also certify that two (2) copies of the foregoing **Brief of Amici Curiae of William G. Weaver and Robert M. Pallitto in Support of Reversal** were this day served by first-class United States mail upon the following:

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