No. 08-15693

**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*,

UNITED STATES OF AMERICA,

*Intervenor-Appellee*.

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

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# Reply Brief of Plaintiffs-Appellants

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## INTRODUCTORY STATEMENT

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. That is so, the United States insists, even if the conduct for which the government and its contractors are called to account is in no meaningful sense "secret," and even if the purported "disclosures" against which the government so gravely warns have already occurred. The law does not sanction, let alone require, such a sweeping grant of immunity.

Under clearly established circuit law, the district court's pleading-stage dismissal of this suit was premature and erroneous. The vast and growing body of public information about the CIA's rendition, secret detention, and coercive interrogation program, Jeppesen's role in that program, and the confirmed participation of other nations in the rendition, detention, and interrogation of the plaintiffs-appellants, render the government's contention that the "very subject matter" of this suit is a state secret increasingly farfetched and implausible. In the short time since the filing of plaintiffs-appellants' opening brief, there have been significant

additional public disclosures and foreign legal proceedings concerning the facts of this case, reaffirming that the subject matter of this suit is far from secret, and that it is possible to fashion procedures that accommodate *both* plaintiffs' right to a judicial forum and the government's legitimate security interests. In insisting that *any* litigation touching upon foreign intelligence operations is categorically off limits to judicial scrutiny, the United States truly stands alone.

CIA Director Michael Hayden has repeatedly characterized the Agency's detention and interrogation programs as "lawful," and the government would prefer simply to leave it at that. But in our system, it is General Hayden's role to oversee those programs, and the courts' role to evaluate their legality. By the same token, General Hayden's insistence that the subject matter of this suit is a "state secret" does not make it so; that is for this Court to determine after consideration of the abundant and reliable public information about the rendition program – much of it derived from the government, its foreign allies, and Jeppesen itself.

Rather than accede to the secrecy demands of the very officials whose agencies stand charged with illegal conduct, this Court must independently assess whether the information at issue is genuinely secret; whether disclosure of particular information will reasonably cause harm to national

security; and whether, even if state secrets are genuinely implicated, dismissal of an entire suit at the pleading stage is warranted. There can be no doubt that federal courts are well equipped to make such assessments.[1] Were it otherwise, the Constitution's careful balancing of power between coequal branches of government would have little meaning, and the responsibility and authority of the judiciary to safeguard individual rights would be impermissibly "abdicated to the caprice of executive officers." *United States v. Reynolds*, 345 U.S. 1, 9-10 (1953).

## ARGUMENT

### I. The Substantial Body of Reliable Public Information Concerning the Allegations of this Suit Continues to Grow

As plaintiffs-appellants set forth in their opening brief, 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. *See* Brief of Plaintiffs-Appellants ("Opening Br.") at 3-24. These proceedings are enormously significant: among the principal rationales advanced by the government in

[1] *See* Brief of Professors of Constitutional Law, Federal Jurisdiction, and Foreign Relations Law as *Amici Curiae* in Support of Mohamed and Urging Reversal at 14-17.

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. *See* Redacted, Unclassified Brief for Intervenor-Appellee the United States ("Govt. Br.") at 22-23. 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."[2]

At the time this suit was erroneously dismissed, several nations – including the United Kingdom, Egypt, Sweden, Yemen, and Jordan – had already provided documentation confirming their roles in the capture and/or detention of the plaintiffs in this case. That body of public evidence continues to grow. Just this month, the Swedish government agreed to pay

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[2] In that regard, one of the core assumptions underlying earlier state-secrets decisions has been turned on its head. *See, e.g.*, *Halkin v. Helms*, 690 F.2d 977, 993 n.58 (D.C. Cir. 1982) ("It bears noting in this connection that few if any national governments besides our own are inclined to establish official commissions of inquiry into the activities of their intelligence agencies, or to make public the results of such inquiries. The fact that our government has chosen to make a relatively clean breast of its foreign and domestic intelligence activities' impact on individuals hardly supports an inference that other governments are anxious to have their roles in those activities similarly submitted to the scrutiny either of their citizens or of foreign interests.").

the equivalent of $450,000 in damages to appellant Ahmed Agiza in compensation for Sweden's 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 Br. 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.

An equally dramatic development is underway in the United Kingdom, where attorneys for appellant Binyam Mohamed have been engaged in legal proceedings 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. On August 21, Britain's High Court of Justice, in a lengthy published opinion, ruled that Mr. Mohamed was entitled to receive such documents from the British government in order to establish

that statements that the United States might use against him in a Guantanamo military prosecution had been extracted through torture and are thus inherently unreliable. *See* R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs [2008] EWHC 2048 (Admin).[3]

For purposes of this appeal, the process by which the High Court reached its decision is as significant as the decision itself. The justices conducted their own independent examination of 44 documents sought by Mr. Mohamed. They heard testimony, in open and closed sessions, from anonymously identified agents of the U.K. Security Service, who faced cross examination by Mr. Mohamed's lawyers in the open sessions and by "Special Advocates" appointed to represent Mr. Mohamed's interests in the closed sessions. The court produced open and closed versions of its judgment.

Notably, the High Court reported that the United States government – which continues to insist categorically that it can neither admit nor deny Mr. Mohamed's allegations in this litigation – had, "based on a review of records and consultations," communicated to the British Foreign Secretary that Mr.

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[3] *Available at* http://www.judiciary.gov.uk/docs/judgments_guidance/mohamed_full210808.pdf.

Mohamed's allegations of mistreatment were "not credible."[4] *Id.* at ¶ 47(iv). In addition to that "denial," the decision contains numerous confirmations of Mr. Mohamed's allegations: that he was arrested in Karachi, Pakistan in April of 2002 (¶ 10); that he was interrogated by U.S. and U.K. intelligence agents (¶¶ 15-22); that from April of 2002 until his transfer to Guantanamo in 2004 he "was held incommunicado and was denied access to a lawyer" (¶ 23). Furthermore, the British government conceded that documents in its possession might be "exculpatory" in Mr. Mohamed's military commission proceeding pursuant to "provisions of the [Military Commissions] Act which exclude evidence obtained by torture. . . ." *Id.* at ¶ 47(ii).

Following the High Court's August 21 judgment, the United States agreed for the first time to provide the 44 documents to Mr. Mohamed's counsel when and if criminal charges are referred against him in Guantanamo – a turn of events that the High Court characterized in a second published judgment as a "significant and welcome change in position by the

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[4] The High Court characterized this U.S. denial as "unreasoned" and "untenable." *Id.* at ¶ 147(x)(4). Further, the Court pondered why the U.S. government opposed disclosing the locations in which Mr. Mohamed was detained incommunicado: "It might have been thought self evident that the provision of information as to the whereabouts of a person in custody would cause no particular difficulty, given that it is a basic and long established value in any democracy that the location of those in custody is made known to the detainee's family and those representing him." *Id.* at ¶ 147(xi).

Government of the United States." R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs [2008] EWHC 2100 (Admin), at ¶ 10.[5] Because of the High Court's flexible but persistent engagement in these proceedings, an accommodation appears to have been reached that may prove acceptable to all parties – an outcome that could not have been achieved had that Court simply acceded to the secrecy demands of British and U.S. executive-branch officials.

The United States' "welcome change in position" in the course of adversarial judicial proceedings underscores what appellants have long argued: that the government's sweeping secrecy claims are not consistent and principled, but rather malleable and expedient. When the time comes to prosecute – and possibly execute – Binyam Mohamed in Guantanamo military commission proceedings, the United State will be compelled to make available to defense counsel precisely the information and evidence that it here contends must be suppressed categorically. (By then, the government hopes, the dismissal with prejudice of Mr. Mohamed's civil suit will have been upheld by this Court.) Moreover, the significant – and

[5] *Available at* http://www.judiciary.gov.uk/docs/judgments_guidance/mohamed_judgment2_290808.pdf.

growing[6] – official foreign investigations of the CIA's overseas detention operations demonstrate that the contours of any legitimate state secrets claim are at best a moving target. The proper forum for distinguishing the government's legitimate security needs from its overbroad immunity demands – and for fashioning procedures that can fairly accommodate the interests of all parties – is the district court on remand.

## II. The Government Misapprehends or Mischaracterizes the Significance of the Abundant Public Information about Rendition Program

The government's brief exhibits a fundamental misapprehension of both the significance of the voluminous public information concerning the rendition, secret detention, and coercive interrogation program, and the proper role of courts in evaluating state secrets claims. The government's analysis *starts* from the assumption that the CIA's rendition program is a state secret – and then proceeds immediately to the question whether the privilege has been "waived" by various statements or events. But that is putting the cart before the horse.

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[6] *See, e.g.*, Gabriela Baczynska, *Polish Prosecutors Probe Possible CIA Jail*, Reuters, Sept. 5, 2008, *available at* http://www.nytimes.com/reuters/news/news-poland-cia-prisons.html?_r=2&scp=5&sq=torture&st=nyt&oref=slogin&oref=slogin (reporting that "Polish prosecutor's office is investigating allegations that there was a CIA prison in Poland where al Qaeda suspects were questioned and guards might have used methods close to torture").

As Chief Judge Walker explained in the *Hepting* case, the threshold question for a court confronted with a claim of state secrets is whether the information as to which the privilege has been asserted "actually is 'secret.'" *Hepting v. AT&T Corp*, 439 F. Supp. 2d 974, 986 (N.D. Cal. 2006).[7] If so, the court next determines whether disclosure, verification, or substantiation of the "secret" information "possesses the potential to endanger national security." *Id.* at 990. *Both* questions must be answered in the affirmative in order for the privilege to apply; only then would the question of "waiver" even become relevant. The government cannot shift focus away from its inability to *establish* secrecy by loudly insisting it has not *waived* it.

A. The CIA's Rendition, Detention, and Interrogation Program is Not Secret

Simply put, the core allegations of this lawsuit – that the CIA seizes foreign nationals and transports them to foreign or U.S.-run detention facilities; that other nations cooperate in these activities; that corporations, including Jeppesen, play an integral role in the CIA's rendition program – are matters of public knowledge, not "state secrets." As set forth in detail plaintiffs-appellants' opening brief, the United States itself is responsible for

[7] Notably, the government fails even to acknowledge *Hepting*, let alone to distinguish it, even though that case, like this one, involved a suit against a government contractor for its role in a "secret" government intelligence program.

making public much of that information. Appellants do not contend that this Court must take into account every unconfirmed public report of the CIA's conduct in evaluating whether the allegations in this suit comprise legitimate state secrets. However, where the source's relationship to the underlying facts "possesses substantial indicia of reliability," *Hepting*, 439 F. Supp. 2d at 990, published information can no longer reasonably be deemed secret.

Thus, in *Hepting*, Chief Judge Walker appropriately gave weight not only to the public statements of the government itself, but to those of the defendant telecommunications companies that were direct participants in the alleged wrongdoing. *Hepting*, 439 F. Supp. 2d at 990; *see also Terkel v. AT&T*, 441 F. Supp. 2d 899, 913 (N.D. Ill. 2006) `(accepting as bearing "persuasive indication of reliability" both government reports *and* "admissions or denials by private entities claimed to have participated in a purportedly secret activity"). Similarly, in evaluating the government's sweeping secrecy claims here, this Court must consider not only the relevant government statements, but also the statements of other direct participants – namely, foreign governments and Jeppesen itself. Once again, the significance of this information is not that it somehow "waives" a privilege that belongs solely to the government, but that it calls into question any

legitimate invocation of the privilege in the first place as to the information at issue.

The government hardly addresses the mass of information provided by appellants concerning the disclosures and investigations of other nations, instead mischaracterizing that abundant evidence as "[s]peculation by . . . foreign officials. . . ." Govt. Br. at 23. But it should go without saying that when governments, like Sweden's, openly admit their complicity in a CIA rendition – and thereafter fashion procedures for redress to the victims – they are not "speculating" about anything, and their actions and words cannot be so cavalierly dismissed. Similarly, when a British parliamentary committee reports that the British Security Service "was informed by the U.S. authorities that they intended to conduct . . . a 'Rendition to Detention' operation, to transfer [appellant Bisher Al-Rawi] from The Gambia to Bagram Air Base," Opening Br. at 17, the committee is not "speculating," but rather confirming a key allegation of plaintiffs' complaint.[8]

[8] For the same reason, the government entirely ignores the highly relevant declaration of former Jeppesen employee Sean Belcher, who reports that a senior Jeppesen official openly discussed Jeppesen's participation in the CIA's rendition program. Opening Br. at 23-24. Once again, such evidence cannot be dismissed as "speculation," as it derives from a direct participant in the challenged conduct, and renders all the more dubious the government's insistence that Jeppesen's involvement with the program is a secret – let alone a state secret.

In short, this Court must first independently assess whether the information as to which the privilege has been invoked is genuinely secret, or whether it has been made public by a reliable source. To be sure, that is an extremely difficult task at a stage of the litigation before any specific evidence has been requested, and before any evidentiary disputes have arisen. For that reason, pleading-stage dismissal is appropriate only when the entire litigation directly involves a "truly secret or 'black-box' program." *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1193 (9th Cir. 2007).[9] As plaintiffs-appellants have amply demonstrated, that is surely not the case here.

B. Judicial Confirmation of What the Public Already Knows Cannot Cause Harm to National Security

Not only must the government establish that, despite the abundant and reliable public information about the core allegations of this suit, its subject

[9] The government repeatedly asserts that *Al-Haramain* supports pleading-stage dismissals even where the subject matter of the litigation is not a state secret. That is highly misleading. Unique among pleading-stage state secrets cases, *Al-Haramain* involved a dispute over a *discrete piece of evidence* – precisely the procedure advocated by appellants in this case. Moreover, "[a]t oral argument, counsel for Al-Haramain essentially conceded that Al-Haramain [could] not establish standing without reference to the Sealed Document." *Al-Haramain*, 507 F.3d at 1205. In contrast, appellants 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.

matter is secret as a matter of law, but it also bears the burden of demonstrating that disclosure or confirmation of the information at issue would cause harm to the United States. *Reynolds*, 345 U.S. at 10. Thus, the Court must "be satisfied that under the particular circumstances of the case," a reasonable danger to national security exists, *Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998), and that "the harm that might reasonably be seen to flow from disclosure is adequate . . . to trigger the absolute right to withhold the information sought . . . ." *Halkin*, 690 F.2d at 990. That is a burden that the government cannot meet.

The significant disclosures emanating from foreign investigations, public inquiries, and civil proceedings are highly relevant to this inquiry: it should be readily apparent that if the putative harm claimed by the United States includes the damage to foreign relations that would flow from the "disclosure" of CIA cooperation with foreign governments, that concern is demolished when the foreign governments themselves publicly confirm such cooperation. To be clear, appellants have never suggested that statements by Egyptian, Jordanian, Yemeni, Swedish, or British officials – or by Jeppesen employees, for that matter – have somehow waived the government's right

to assert the state secrets privilege.[10] But the government cannot reasonably rely on the purported secrecy concerns of countries or entities that have willingly disclosed their own roles as a basis for extinguishing appellants' right of redress in this action.

The growing body of evidence produced by direct participants in the CIA's rendition program – together with flight records, eyewitness accounts, other documentary evidence, and voluminous and detailed media coverage of these events and activities – place an insurmountable burden on the government to explain how confirming or denying the information contained in plaintiffs' complaint would cause harm to the nation. The government's "waiver" argument – a red herring at best – cannot distract from this central truth.

## III. This is Not a *Totten* Case

Jeppesen asserts that this Court should affirm the dismissal of plaintiffs' complaint on a ground not considered by the district court and not raised by the government on appeal: the narrow nonjusticiability rule articulated by the Supreme Court in *Totten v. U.S.*, 92 U.S. 105 (1875). In effect, Jeppesen finds itself in the odd posture of demanding immunity from

[10] The same cannot be said about the government's own public statements about the CIA's rendition and detention program, which plainly *would* waive even a valid assertion of the privilege with respect to the information disclosed. *See* Opening Br. at 40-48.

the consequences of its own alleged misdeeds in order to protect the *government's* secrecy interests – despite its own employees' open discussion of the company's participation in the CIA's "torture flights." But even if Jeppesen were a more credible proponent of this argument, its misreading of *Totten* would transform an obscure doctrine pertaining to enforceability of espionage contracts into an expansive immunity regime shielding *any* CIA contractor from liability in all circumstances. That is not the law.

*Totten* was an action against the government by the administrator of the estate of a former Civil War spy, seeking to enforce his secret espionage contract. The Supreme Court held that the suit could not be maintained, because the contract contained an implicit promise never to reveal its existence:

> Both employer and agent must have understood that the lips of the other were to be forever sealed respecting the relation of either to the matter. This condition of the engagement was implied from the nature of the employment, and is implied in all secret employments of the government in time of war. . . . The secrecy which such contracts impose precludes any action for their enforcement.

*Totten*, 92 U.S. at 106-07.

The Court reaffirmed *Totten* in a factually indistinguishable decision well over a century later, holding that the plaintiffs, who allegedly performed espionage for the CIA pursuant to a promise of lifelong financial support, could not enforce such an agreement in federal court. *Tenet v. Doe*,

544 U.S. 1 (2005).[11] In *Tenet,* the Court repeatedly characterized *Totten* in terms of the estoppel that prevents suits against the government by its former spies: "*Totten's* core concern . . . [is] preventing the existence of the *plaintiff's* relationship with the Government from being revealed," *id.* at 10 (emphasis added); "*Totten's* . . . holding [is] that lawsuits premised on alleged espionage agreements are altogether forbidden," *id.* at 9; "the longstanding rule, announced more than a century ago in *Totten*, prohibiting suits against the Government based on covert espionage agreements," *id.* at 3; "the very essence of the alleged contract [in *Totten*] . . . was that it was secret, and had to remain so: [¶] . . . [¶] Thus, we thought it entirely incompatible with the nature of such a contract that a former spy could bring suit to enforce it," *id.* at 7-8; "[n]o 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.*" *Id.* at 8 (emphasis added). In sum, Chief Justice Rehnquist left no doubt in *Tenet* that "only" in a case

[11] *Amicus* Foundation for the Defense of Democracies valiantly characterizes these cases as representing "over 130 years of Supreme Court precedent," but it is at least equally accurate to describe them as *two* Supreme Court cases, over 130 years apart. Brief of *Amicus Curiae* the Foundation for the Defense of Democracies in Support of Appellees Supporting Affirmance, at 2.

"filed by an alleged former spy" is "*Totten's* core concern implicated: preventing the existence of the plaintiff's relationship with the Government from being revealed." *Id.* at 10.[12] The decision rests on the premise that a categorical prohibition on litigation over the substance of a secret employment relationship is an implied condition of the contract.

That tailored understanding of *Totten* has governed several recent decisions in which courts have declined to apply the *Totten* rule to bar suits brought by parties not in privity with the government.[13] In *Hepting,* for

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[12] The Court's decision in *Weinberger v. Catholic Action of Haw./Peace Educ. Project*, 454 U.S. 139 (1981), is not to the contrary. *Weinberger* was decided on the basis of an exemption under FOIA, *not* the *Totten/Tenet* bar. The Court held that because FOIA governs the public disclosure requirements of the National Environmental Policy Act ("NEPA"), and because FOIA Exemption 1 bars disclosure of classified materials, the Navy was excused from disclosures relating to a classified nuclear weapons facility. *Id.* at 145. *Weinberger* mentions *Totten* only once, in the decision's penultimate paragraph, simply as another example of a case in which national security concerns defeated the plaintiff's claims: "*In other circumstances,* we have held that 'public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated.'" *Id.* at 146-47 (quoting *Totten*, 92 U.S. at 107) (emphasis added).

[13] 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.

example, Chief Judge Walker rejected the government's *Totten* argument, holding that *Totten* was based on principles of equitable estoppel: one who agrees to spy for the government gives up the right to sue to enforce that agreement because it embodies an implicit promise not to reveal its existence. *Hepting*, 439 F. Supp. 2d at 991. The court in *Terkel*, another case in which third-party plaintiffs sought damages from government contractors for their alleged involvement in secret intelligence activities, held likewise, 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." *Terkel*, 441 F. Supp. 2d at 907.[14]

Thus, while it is remotely conceivable that the *government* could assert a plausible *Totten* argument if it were sued *by Jeppesen* for enforcement of their rendition-related contracts, *Totten* has no bearing on this case, where third-party plaintiffs are suing *Jeppesen*. Even in that

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[14] *See also 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).

hypothetical, however, it is unlikely that *Totten* would apply. Simply put, there has been no allegation that Jeppesen is involved in espionage for the government; rather, Jeppesen is charged with providing publicly documented assistance to a publicly acknowledged program. Jeppesen's provision of flight and logistical support services to CIA aircraft and crew is no more an agreement to perform espionage than would be a contract to supply blindfolds, or shackles, or paper shredders, to the CIA in connection with the rendition program. Even the government, by declining to invoke *Totten* as an independent basis for dismissal, recognizes that a determination of the applicability of the state secrets privilege is the appropriate manner to resolve the secrecy concerns implicated by this suit.

## CONCLUSION

The government acknowledges that dismissal of a suit pursuant to the state secrets privilege is "harsh," but it insists that in this instance appellants' interest in a judicial forum for the vindication of their rights must be subordinated in the name of the "greater public good . . . ." Govt. Br. at 10 (quoting *Kasza*, 133 F.3d at 1167). But the "greater public good" is not advanced by the seizure without process and interrogation without restraint of individuals who might well be innocent of any wrongdoing. Conversely, the greater public good *is* served by the preservation of a meaningful judicial

remedy that imposes necessary restraints on executive misconduct and may prevent other potential victims from suffering a like fate.

As *amici* Former United States Diplomats eloquently observe, the CIA's rendition program has already "harmed the United States' standing in the world and undermined its capacity to secure cooperation from foreign governments, including our oldest and closest allies." Brief *Amicus Curiae* of Former United States Diplomats Supporting Plaintiffs-Appellants and Reversal, at 5. The United States' insistence that the courts must be closed to the victims of those unlawful practices only compounds that harm:

> By immunizing unlawful conduct from judicial scrutiny at the behest of the executive branch, [denial of a judicial forum] would send a message that the courts of the United States cannot 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. To our friends and allies, it would signal that the United States does not respect the rule of law in relation to such operations, and reinforce the concerns that already impede international cooperation.

*Id.* at 6. In short, "[h]olding plaintiffs' claims inherently 'non-justiciable' would not only affect their private interests; it would 'jeopardize national security and foreign relations,' thereby damaging the very interests that the privilege is intended to protect." *Id.* at 7 (quoting district court order of dismissal).

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

Respectfully submitted,

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- o This brief is being filed in a capital case pursuant to the type-volume limitations set forth at Circuit Rule 32-4 **and is**

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9/25/2008
Date

Ben Wizner

CERTIFICATE OF SERVICE

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