CA No. 08-15693

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BINYAM MOHAMED, *et al.*,
Plaintiffs/Appellants,
v.

JEPPESEN DATAPLAN, INC.,
Defendant/Appellee,
and

UNITED STATES OF AMERICA,
Intervenor/Appellee.

On Appeal from the United States District Court
for the Northern District of California
(No. 07-CV-2798-JW, Honorable James Ware)

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF APPELLEES, URGING AFFIRMANCE

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Avenue, NW
Washington, DC 20036
(202) 588-0302

September 8, 2008

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the Washington Legal Foundation and the Allied Educational Foundation state that they are corporations organized under § 501(c)(3) of the Internal Revenue Code. Neither has a parent corporation or any stock owned by a publicly owned company.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Page(s)

Statutes and Constitutional Provisions:

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF APPELLEES, URGING AFFIRMANCE

INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a public interest law and policy center with supporters in all 50 States. WLF devotes a substantial portion of its resources to promoting America's national security. To that end, WLF has appeared in this and numerous other federal and state courts to ensure that the United States government is not deprived of the tools necessary to protect this country from those who would seek to destroy it and/or harm its citizens. *See, e.g., Boumediene v. Bush*, 128 S. Ct. 2229 (2008); *Hamdan v. Runsfeld*, 548 U.S. 557 (2006). WLF has litigated against efforts to require disclosure of classified information by the federal government where disclosure would threaten harm to national security. *See, e.g., Ctr. for Nat'l Sec. Studies v. United States Dep't of Justice*, 331 F.3d 918 (D.C. Cir. 2003), *cert. denied*, 540 U.S. 1104 (2004).

WLF also devotes substantial resources to opposing efforts to create expansive private rights under the Alien Tort Statute (ATS), 29 U.S.C. § 1350, because such litigation generally seeks (inappropriately, in WLF's view) to incorporate large swaths of customary international law into the domestic law of

the United States. *See, e.g., Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); *Matar v. Dichter*, 500 F. Supp. 2d 284 (S.D.N.Y. 2007), *appeal pending*, No. 07-2579 (2d Cir.). WLF is concerned that an overly expansive interpretation of the ATS would threaten to undermine American foreign and domestic policy interests.

The Allied Educational Foundation (AEF) is a non-profit charitable foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

WLF and AEF are concerned that permitting courts to litigate Appellants' claims would pose an unacceptable risk to national security. WLF and AEF know nothing of the details of Appellants' treatment in the period during which Appellants allege that they were detained, and we do not mean to minimize the seriousness of the claims of mistreatment. Nonetheless, WLF and AEF believe it clear from the face of the amended complaint that the CIA program of which Appellants complain is a state secret which is not an appropriate subject for judicial scrutiny.

WLF and AEF have no direct interests in the outcome of this case and thus

bring to the case a perspective that is distinct from that of any of the parties. WLF and AEF are filing their brief with the consent of all parties and thus are not required to file a motion for leave to file.

STATEMENT OF THE CASE

Plaintiffs-Appellants are five overseas aliens who allege that they were taken into custody and tortured in connection with a clandestine CIA program designed to capture and interrogate suspected terrorists. They further allege that Defendant-Appellee Jeppesen Dataplan, Inc. assisted the CIA program by furnishing essential flight and logistical support to aircraft used by the CIA to transfer the plaintiffs between countries while they were in custody. They further allege that Jeppesen provided that assistance with knowledge that they would be subjected to forced disappearance and torture.

Appellants filed suit against Jeppesen in 2007 in U.S. District Court for the Northern District of California, asserting jurisdiction under the Alien Tort Statute (ATS), 28 U.S.C. § 1350.[1] Seeking an award of damages, Appellants assert that the assistance allegedly provided by Jeppesen to the CIA program violated their rights under customary international law.

---

[1] The ATS grants federal district courts original jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

Before Jeppesen responded to the complaint, the United States intervened in the suit for purposes of asserting the state secrets privilege. After reviewing both public and classified declarations submitted by General Michael V. Hayden, the Director of the CIA, the district court agreed with the U.S. that "the very subject matter of this case is a state secret." ER 9. Accordingly, the court granted the U.S.'s motion to dismiss the suit on state secrets grounds, without reaching the U.S.'s alternative arguments that dismissal was required because: (1) the invocation of the state secrets privilege deprived Appellants of evidence necessary to prove a *prima facie* case; and (2) the invocation of the privilege deprived Jeppesen of information necessary to raise a valid defense. ER 1-11.

In support of its conclusion that "the very subject mater of this case is a state secret," the court explained: (1) the case hinges on the existence of a relationship between the CIA and Jeppesen, and whether or not such a relationship exists is a state secret; and (2) the case also hinges on Appellants' claims that the CIA has cooperated with particular foreign governments in the conduct of its detention and interrogation program, and whether or not specific foreign governments have cooperated with the CIA is a state secret. ER 8-9. The Court rejected Appellants' assertion that public statements about the detention and interrogation program mean that the program is no longer a state

secret. The Court said that essential details of the program remain undisclosed by the government. ER 9. The Court said further that disclosures from a non-government source, no matter how reliable the plaintiffs allege it to be, cannot undercut the secretiveness of a state secret; only the government, through disclosures of its own, can waive the privilege. ER 9 n.7.

SUMMARY OF ARGUMENT

It is well-settled law that when "the very subject matter of a lawsuit is a matter of state secret," the suit must be dismissed at its inception without regard to the question of evidence. *Al-Haramain Islamic Foundation, Inc. v. Bush*, 507 F.3d 1190, 1197 (9th Cir. 2007). The doctrine applies generally to any suit in which "sensitive . . . secrets will be so central to the subject matter of the litigation that any attempt to proceed will threaten disclosure of the privileged matters." *Al-Haramain*, 507 F.3d at 1197. Cases to which the very-subject-of-the-lawsuit-is-a-state-secret doctrine applies will be referred to hereinafter as "very-subject-matter" cases.

The Supreme Court has also identified a separate category of state secrets cases to which a *per se* dismissal rule applies: lawsuits "premised on alleged espionage agreements." *See Tenet v. Doe*, 544 U.S. 1 (2005). The Supreme Court first articulated that doctrine in *Totten v. United States*, 92 U.S. 105 (1875).

Amici hereinafter will refer to cases subject to dismissal under this more particularized doctrine as "*Totten* cases."

Both categories of cases are pertinent here, and both require affirmance of the district court decision. First, the suit targets Jeppesen, whose only connection to Appellants' alleged injuries is an alleged espionage agreement between Jeppesen and the CIA whereby Jeppesen allegedly was to supply flight and logistical support to aircraft used by the CIA's program to capture and interrogate suspected terrorists. Accordingly, as Jeppesen points out in its opening brief, the suit can accurately be categorized as a *Totten* case because it is "premised on an alleged espionage agreement."

Second, this is also a very-subject-matter case. Appellants provide no credible explanation regarding how the subject matter of this suit could be deemed anything other than a non-disclosable state secret because – as the district court explained – most of the basic premises of Appellants' lawsuit are themselves state secrets. Thus, for example, whether the CIA contracts for logistical support from Jeppesen or other private contractors is a state secret, yet such a contract – whose existence Appellants will need to demonstrate at trial in order to hold Jeppesen liable – is the central subject matter of this lawsuit. Furthermore, whether the CIA has cooperated with any specific foreign

government – such that the CIA, after allegedly detaining Appellants as suspected terrorists, turned them over to the foreign government with the understanding that they would be harshly interrogated – is also a state secret, yet the existence of such agreements with the countries to which Appellants were sent is the other central subject matter of this lawsuit. The centrality of such agreements is readily apparent: Appellants premise their claims against Jeppesen on their assertion that Jeppesen's role was to facilitate the transfer of suspected terrorists to foreign governments that had entered into interrogation agreements with the United States.

Appellants make much of *Al-Haramain*'s stated disagreement with the Fourth Circuit's criteria regarding which cases may properly be categorized as very-subject-matter cases. *Al-Haramain* drew a distinction between the "subject matter" of the lawsuit and the facts necessary to litigate the case. It held that a case should not be categorized as a very-subject-matter case merely because the plaintiff cannot prove the *prima facie* elements of the claim absent privileged evidence; it strictly limited very-subject-matter cases to those in which the state secret clearly is the "subject matter" of the lawsuit. *Al-Haramain*, 507 F.3d at 1201. But that distinction is of no benefit to Appellants, because the district court did not categorize this as a very-subject-matter case based merely on an

examination of the facts that Appellants would need to prove their case. Rather, the district court correctly categorized this as a very-subject-matter case based on its subject matter: a challenge to Jeppesen's alleged involvement in a clandestine CIA program.

Appellants assert that the program should not be deemed clandestine because much has been said publicly by those outside the U.S. government about the nature of the program. But the state secrets privilege cannot be lost to the government based on the statements of third parties. The Supreme Court made clear in *Reynolds* that the privilege belongs exclusively to the federal government; it is the only entity empowered to assert or to waive the privilege. *United States v. Reynolds*, 345 U.S. 1, 7 (1953). Even when allegations have been reported in the press, there are often important national security interests served by not requiring the federal government to confirm or deny the accuracy of those allegations in a federal court proceeding.

Appellants allege personal knowledge of many of the facts they will need to prove their cases, but such knowledge does nothing to undermine the federal government's right to assert the state secrets privilege. A spy has no right to go to court to enforce an espionage agreement he entered into with the federal government despite his detailed knowledge of the terms of the agreement. For

identical reasons, Appellants' personal knowledge regarding their involvement with the detention and interrogation program is irrelevant to the issue of whether the program should be deemed a state secret.

Appellants are incorrect in asserting that the federal government itself has released detailed information about its detention and interrogation program. Federal officials have disclosed nothing except: (1) that such a program was initiated after the September 11, 2001 attack on the United States; (2) that the program still exists; (3) the approximate number of people detained; (4) the names of a handful of the detainees; and (5) denials of specific detainees' claims that their legal rights had been violated. Such limited disclosures do not constitute a waiver of the government's right to continue to maintain the secrecy of all other aspects of the program. Admitting the existence of the program is no more a waiver of its secrecy than an admission that the United States regularly employs spies would constitute waiver of the federal government's privilege to prevent a lawsuit by one asserting rights under an alleged espionage agreement.

The facts alleged in this case stand in sharp contrast to the facts alleged in *Al-Haramain*. *Al-Haramain* held that that case did not qualify as a very-subject-matter case because the government had released such detailed information about its Terrorist Surveillance Program ("TSP") that the TSP no longer

qualified as a state secret. The detailed information included a 42-page white paper that explained how the program worked and provided a lengthy legal analysis that concluded that the program complied with the law. Those disclosures were several orders of magnitude greater than any disclosures made by the government here with respect to its post-9/11 terrorist detention and interrogation program. Indeed, the federal government has never said anything to confirm or deny that it has ever contracted with Appellee Jeppesen (or any other private entity) to assist with transporting suspected terrorists captured overseas. Other federal appeals courts, when confronted with levels of government disclosure similar to the low levels present here, have not hesitated to order dismissal on the grounds that the very subject matter of the lawsuit was a state secret.

Moreover, Appellants are clearly wrong in asserting a right to discovery if the Court determines that this is neither a *Totten* case nor a very-subject-matter case. Indeed, the Court ended up ordering pre-discovery dismissal of claims in *Al-Haramain* even after determining, based on extensive government disclosure of information regarding its TSP program, that the program itself was not a state secret and thus that the case was not a very-subject-matter case. The Court concluded that the government had sustained its burden as to the state secrets

privilege, by demonstrating that the inevitable disclosure of detailed information about the TSP during the course of litigation "would undermine the government's intelligence capabilities and compromise national security." 507 F.3d at 1204. Similarly, this lawsuit is subject to immediate, pre-discovery dismissal even if the Court determines that this is neither a *Totten* case nor a very-subject-matter case. As in *Al-Haramain*, the complaint is subject to immediate dismissal if, after reviewing the confidential government submission, the Court determines either that the invocation of the state secrets privilege deprives Appellants of evidence necessary to prove a *prima facie* case, or that invocation of the privilege deprives Jeppesen of information necessary to raise a valid defense.

Finally, the Court should reject Appellants's plea that it should cut back on the scope of the state secrets privilege in cases, as here, in which a plaintiff alleges that the defendant has engaged in serious criminal misconduct. Any such rule would simply encourage all plaintiffs to heighten their rhetoric in an effort to qualify for the benefits bestowed by the rule. More importantly, *Reynolds* makes clear that once the government has properly invoked the state secrets privilege, not even a showing of "the most compelling necessity" by the plaintiff is sufficient to overcome the privilege. 345 U.S. at 11. If litigating a case would

cause serious damage to American national security interests, dismissal is required regardless whether the plaintiff alleges that the defendants are guilty of criminal misconduct.

Congress is, of course, entitled to modify the scope of the state secrets privilege by limiting its applicability in cases involving plaintiffs with particularly sympathetic claims; but in the 55 years since *Reynolds* established the contours of the privilege, Congress has not seen fit to do so. Indeed, Congress has exhibited extreme reluctance to authorize private parties to assert the very types of claims being asserted here by Appellants. It has declined to authorize suits by those alleging violation of their constitutional rights under color of federal law, and the Supreme Court has explicitly declined to "imply" such a private right of action under the circumstances that exist in this case. Indeed, it has explicitly withdrawn federal court jurisdiction over the claims of those, such as Appellant Binyam Mohamed, who seek to challenge the conditions of their confinement after being detained based on a determination that they are enemy combatants. In light of *Reynolds*'s mandate and the absence of any indication from Congress of a desire to cut back on the state secrets privilege, Appellants lack any justification for asking this Court to modify the state secrets doctrine for the purpose of avoiding dismissal of cases alleging

serious government misconduct.

ARGUMENT

I. THE STATE SECRETS PRIVILEGE BARS LITIGATION OF THIS SUIT, BOTH BECAUSE ITS VERY SUBJECT MATTER IS A STATE SECRET AND BECAUSE IT IS PREMISED ON AN ALLEGED ESPIONAGE AGREEMENT

Appellants seek an award of money damages from a private company that they allege played a role in a CIA-sponsored detention and interrogation program. They allege injury based on claims that, pursuant to the program, they were improperly taken into custody and tortured. They allege that Appellee Jeppesen assisted the program by furnishing essential flight and logistical support to aircraft used by the CIA to transport them between countries while they were in custody. Conspicuously absent from their complaint, however, is any allegation that the CIA has ever acknowledged whether it has employed Jeppesen or any other private firm to provide any sort of flight and logistical support to any aircraft used in the program, or indeed whether the CIA uses aircraft at all in connection with the program. Under those circumstances, the district court's decision is self-evidently correct: the lawsuit must be dismissed under the state secret privilege because the very subject matter of the suit is the CIA's post 9/11 detention and interrogation program and that program is a state

secret.

A. *Al-Haramain* Makes Clear That This Is a Very-Subject-Matter Case

As this Court recently explained in *Al-Haramain*, "where the very subject matter of a lawsuit is a matter of state secret, the action must be dismissed without reaching the question of evidence." 507 F.3d at 1197. "Dismissal is proper if 'sensitive . . . secrets will be so central to the subject matter of the litigation that any attempt to proceed will threaten disclosure of the privileged matters.'" *Id.* (quoting *Sterling v. Tenet*, 416 F.3d 338, 345 (4th Cir. 2005).

General Hayden's public declaration identifies four categories of information that are central to the subject matter of this case and whose disclosure would, in his view, risk serious danger to national security: (1) information that would tend to confirm or deny whether Jeppesen or any other private entity assisted the CIA with alleged clandestine intelligence activities; (2) information that would tend to confirm or deny whether foreign governments cooperated with the CIA on clandestine intelligence activities; (3) information about the scope and operation of the CIA's terrorist detention and interrogation program; and (4) other information about clandestine CIA activities that would tend to reveal intelligence activities, sources, or methods. ER 746. Appellants

do not make any serious effort to dispute that such information constitutes state secrets whose disclosure could risk danger to the national security.

Instead, Appellants argue that such information should not be deemed central to the very subject matter of this suit but rather should merely be deemed to raise questions regarding whether they can prove the *prima facie* elements of their claim absent privileged evidence. They insist that such questions should be addressed only after they have had an opportunity to engage in discovery. Appellants Br. 51-57.

Appellants' argument is not a plausible interpretation of the complaint. The information cited by General Hayden can only be understood as being central to the subject matter of this suit. In a suit that names only Jeppesen as a defendant, *the* central subject matter of the suit is whether the CIA has, in fact, contracted with Jeppesen to provide logistical support for flights allegedly conducted in connection with its terrorist detention and interrogation program. The other central subject matter of the suit is whether the CIA turned Appellants over to foreign governments with the understanding that they would be harshly interrogated, and whether Jeppesen was aware of that understanding. The centrality of such understandings is readily apparent: Appellants premise their claims against Jeppesen on their assertion that Jeppesen's role was to facilitate

the transfer of suspected terrorists to foreign governments that had entered into interrogation agreements with the United States. In light of General Hayden's demonstration that information about such agreements is a state secret, the only plausible conclusion is that this is a very-subject-matter case – dismissal is required because: (1) there are issues "so central to the subject matter of the litigation" that litigating the case requires their disclosure; and (2) those issues are, in fact, state secrets.

Appellants' base their opposing argument on *Al-Haramain*'s disagreement with the Fourth Circuit regarding the definition of a very-subject-matter case. The Fourth Circuit recently determined that very-subject-matter cases include any case in which the action cannot be "litigated without threatening the disclosure of [] state secrets." *El-Masri v. United States*, 479 F.3d 296, 311 (4th Cir.), *cert. denied*, 128 S. Ct. 373 (2007). According to the Fourth Circuit:

> The controlling inquiry is not whether the general subject matter of an action can be describe without resort to state secrets. Rather, we must ascertain whether an action can be *litigated* without threatening the disclosure of such state secrets. Thus, for purposes of the state secrets analysis, the "central facts" and "very subject matter" of an action are those facts that are essential to prosecuting the action or defending against it.

Id. (emphasis in original). *Al-Haramain* determined that *El-Masri*'s definition of a very-subject-matter case was too broad. It said, "In contrast [to *El-Masri*], we

do not necessarily view the 'subject matter' of a lawsuit as one and the same with the facts necessary to litigate the case." *Al-Haramain*, 507 F.3d at 1201. It held that a case should not be categorized as a very-subject-matter case merely because the plaintiff cannot prove the *prima facie* elements of the claim absent privileged evidence; it strictly limited very-subject-matter cases to those in which the state secret clearly is the "subject matter" of the lawsuit. *Id.*

But that distinction is of no benefit to Appellants. Here, unlike in *Al-Haramain*, there is no serious basis for challenging that the state secrets identified by General Hayden are, in fact, the "subject matter" of this suit. The district court correctly categorized this as a very-subject-matter case based on its subject matter: a challenge to Jeppesen's alleged involvement in a clandestine CIA program.[2]

---

[2] *El-Masri* involved a damages claim arising in connection with the same terrorist detention and interrogation program at issue here. But *Al-Haramain* did not disagree with the Fourth Circuit's ultimate conclusion (that *El-Masri* was a very-subject-matter case), only with its definition of what constitutes a very-subject-matter case. Indeed, this Court acknowledged that "the facts [in *El-Masri*] may have counseled for [the] approach" taken by the Fourth Circuit. *Id.* *Al-Haramain* also acknowledged that:

> [A] bright line does not always separate the subject matter of the lawsuit from the information necessary to establish a prima facie case. In some cases, there may be no dividing line. In other cases, the suit itself may not be barred because of its subject matter and yet ultimately, the state secrets privilege may nonetheless preclude the case from proceeding to the merits.

B. The Terrorist Detention and Interrogation Program Is a State Secret

Appellants' appeal is based primarily on their challenge to General Hayden's professional assessment that the terrorist detention and interrogation program – including all of it major operational components – is a state secret. Appellants invite the Court to second-guess General Hayden's assessment and to determine that the program should not be deemed a state secret because, allegedly, so much has been said publicly about the program.

The Court should decline that invitation. The Supreme Court has held repeatedly that the state secret privilege belongs exclusively to the federal government; it is the only entity empowered to assert or to waive the privilege. *Reynolds v. United States*, 345 U.S. at 7. It cannot be lost to the government based on the statements of third parties.[3]

Id. Indeed, the final scenario was the one the Court determined was present in *Al-Haramain*. The Court held that the state secrets privilege required pre-discovery dismissal of the complaint even though it determined that the case was not a very-subject-matter case. *Id.* at 1204.

[3] Of course, it is ultimately the responsibility of the courts to decide, after granting appropriate deference to Executive Branch officials, whether the state secrets privilege has been properly invoked. Successful invocation of the privilege requires the Executive Branch to "satisfy the court that disclosure of the information sought to be protected would expose matters that, in the interest of national security, ought to be protected." *El-Masri*, 479 F.3d at 312. If accurate information about a government program has been widely disseminated

Appellants also allege that they have personal knowledge of many details of the terrorist detention and interrogation program because, they allege, they were (or are) detained and interrogated pursuant to the program. But such knowledge has never been deemed sufficient to prevent the government from asserting that a government program should be deemed secret. There will always be individuals not now in the government's employ who wish to speak out about their involvement in such a program; if their desire to speak up eliminated the government's power to maintain secrecy, then few if any government secrets could remain safe. The Supreme Court has made clear that a spy has no right to go to court to enforce an espionage agreement he entered into with the federal government despite his detailed knowledge of the terms of the agreement. *Tenet v. Doe*, 544 U.S. 1 (2005). For identical reasons, Appellants'

---

by third parties, it may be more difficult for the Executive Branch to make its case that litigation of a claim regarding the program will damage national security. But no amount of third-party publicity can result in waiver of the government's right to make its damage-to-national-security case. Indeed, as the government's brief makes clear, there are many instances where government confirmation of information can cause severe damage to national security even where the information has been widely disseminated by others. *See, e.g., Afshar v. Dep't of State*, 702 F.2d 1125, 1130-31 (D.C. Cir. 1983) (whereas "[u]nofficial leaks and public surmise can often be ignored by foreign governments that might perceive themselves to be harmed by disclosure of their cooperation with the CIA," the same is not true of "official acknowledgment," which "may force a government to retaliate.").

personal knowledge regarding their involvement with the detention and interrogation program is irrelevant to the issue of whether the program should be deemed a state secret. Similarly, it is irrelevant for purposes of the state secret privilege that Appellants have located a witness who identifies himself as a former Jeppesen employee and who claims to have heard another Jeppesen employee say that Jeppesen played a role in the terrorist detention and interrogation program. Such testimony is in no way binding on the government and does nothing to lessen the national security concerns that would arise if the CIA were required to confirm or deny its alleged relationship with Jeppesen.

Appellants are incorrect in asserting that the federal government itself has released detailed information about its detention and interrogation program. Federal officials have disclosed nothing except: (1) that such a program was initiated after the September 11, 2001 attack on the United States; (2) that the program still exists; (3) the approximate number of people detained; (4) the names of a handful of the detainees; and (5) denials of specific detainees' claims that their legal rights had been violated. Such limited disclosures do not constitute a waiver of the government's right to continue to maintain the secrecy of all other aspects of the program. Admitting the existence of the program is no more a waiver of its secrecy than an admission that the United States regularly

employs spies would constitute waiver of the federal government's privilege to prevent a lawsuit by one asserting rights under an alleged espionage agreement. *See, e.g., Totten v. United States,* 92 U.S. 105 (1875).

The facts alleged in this case stand in sharp contrast to the facts alleged in *Al-Haramain*. *Al-Haramain* held that that case did not qualify as a very-subject-matter case because the government had released such detailed information about its Terrorist Surveillance Program ("TSP") that the TSP no longer qualified as a state secret. The detailed information included a 42-page white paper that explained how the program worked and provided a lengthy legal analysis that concluded that the program complied with the law. The Court also pointed to numerous public, detailed discussions of the TSP by senior Executive Branch officials, including President Bush, Attorney General Gonzales, and General Hayden himself. 507 F.3d at 1198-1200. The Court concluded:

> [B]ecause of the voluntary disclosures made by various officials since December 2005, the nature and purpose of the TSP, the "type" of persons it targeted, and even some of the procedures are not state secrets. In other words, the government's many attempts to assuage citizens' fears that *they* have not been surveilled now doom the government's assertion that the very subject matter of this litigation, the existence of a warrantless surveillance program, is barred by the state secrets privilege.

Id. at 1200. Those disclosures were several orders of magnitude greater than any disclosures made by the government here with respect to its post-9/11 terrorist

detention and interrogation program. Indeed, the federal government has never said anything to confirm or deny that it has ever contracted with Appellee Jeppesen (or any other private entity) to assist with transporting suspected terrorists captured overseas.

Other federal appeals courts, when confronted with levels of government disclosure similar to the low levels present here, have not hesitated to order dismissal on the grounds that the very subject matter of the lawsuit was a state secret. *El-Masri v. United States*, 479 F.3d at 308-09; *Fitzgerald v. Penthouse Internat'l, Ltd.*, 776 F.2d 1236 (4th Cir. 1985) (state secrets doctrine required dismissal of suit as a very-subject-matter case, even though it was widely known that the Navy maintained a marine mammal research program); *Zuckerbraun v. General Dynamics Corp*., 935 F.3d 544 (2d Cir. 1991) (state secrets doctrine required dismissal of a negligence suit against the manufacturers of the Phalanx Anti-Missile System; suit was deemed a very-subject-matter case, even though it was widely known that the system was deployed on many American ships).

C. Dismissal Is Also Appropriate Because the Case Is Premised on an Alleged Espionage Agreement

The Supreme Court has also identified a separate category of state secrets cases to which a *per se* dismissal rule applies: lawsuits "premised on alleged

espionage agreements" (referred to herein as "*Totten* cases"). *See Tenet v. Doe*, 544 U.S. 1 (2005); *Totten v. United States*, 92 U.S. 105 (1875). The district court's dismissal can be affirmed on the alternative ground that this is a classic *Totten* case.

Jeppesen has only one connection to Appellants' alleged injuries: it is alleged to have entered into an espionage contract with the CIA to supply flight and logistical support to aircraft allegedly used by the CIA in connection with its terrorist detention and interrogation program. Because liability is premised on an alleged espionage agreement, dismissal is required under the categorical *Totten* rule. While it is true that both *Totten* and *Tenet* involved breach of contract claims brought by an alleged spy while this case does not, *Tenet* makes clear that the *Totten* rule is not limited to the former situation only. Rather, the Court explained in *Tenet*, the rule applies regardless of the plaintiffs' theory of recovery, because "'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.'" *Tenet*, 544 U.S. at 1 (quoting *Totten*, 92 U.S. at 107) (emphasis supplied by *Tenet*). Thus, this is a *Totten* case subject to a *per se* dismissal rule, because the trial of this matter would inevitably lead to the disclosure of whether an espionage contract was entered into between

Jeppesen and the CIA.

D. Pre-Discovery Dismissal Is Required Even If the Court Determines that This Is Neither a Very-Subject-Matter Case Nor a *Totten* Case

Moreover, Appellants are clearly wrong in asserting a right to discovery if the Court determines that this is neither a very-subject-matter case nor a *Totten* case. Indeed, the Court ended up ordering pre-discovery dismissal of claims in *Al-Haramain* even after determining, based on extensive government disclosure of information regarding its TSP program, that the program itself was not a state secret and thus that the case was not a very-subject-matter case. The Court concluded that the government had sustained its burden as to the state secrets privilege, by demonstrating that the inevitable disclosure of detailed information about the TSP during the course of litigation "would undermine the government's intelligence capabilities and compromise national security." 507 F.3d at 1204. Similarly, this lawsuit is subject to immediate, pre-discovery dismissal even if the Court determines that this is neither a *Totten* case nor a very-subject-matter case. As in *Al-Haramain*, the complaint is subject to immediate dismissal if, after reviewing the confidential government submission, the Court determines either that the invocation of the state secrets privilege deprives Appellants of evidence necessary to prove a *prima facie* case, or that

invocation of the privilege deprives Jeppesen of information necessary to raise a valid defense.

II. APPELLANTS' ASSERTION THAT THEY WERE THE VICTIMS OF CRIMINAL MISCONDUCT DOES NOT AFFECT THE GOVERNMENT'S RIGHT TO DISMISSAL UNDER THE STATE SECRETS PRIVILEGE

Appellants also argue that dismissal of this case pursuant to the state secrets privilege is particularly unwarranted in light of its claims of "egregious executive misconduct." They assert that dismissal would "upset the system of checks and balances necessary to sustain a free society by preventing courts from reviewing executive actions that violate the law and the Constitution," and "would amount to a de facto rule of immunity for even the gravest violations of human rights." Appellants Br. 29.

Appellants have cited no case authority to support its assertion that the state secrets privilege should give way in the face of particularly serious allegations of misconduct. Any such rule would simply encourage all plaintiffs to heighten their rhetoric in an effort to qualify for the benefits bestowed by the rule. More importantly, *Reynolds* makes clear that once the government has properly invoked the state secrets privilege, not even a showing of "the most compelling necessity" by the plaintiff is sufficient to overcome the privilege.

345 U.S. at 11. If litigating a case would cause serious damage to American national security interests, dismissal is required regardless whether the plaintiff alleges that the defendants are guilty of egregious misconduct.

Congress is, of course, entitled to modify the scope of the state secrets privilege by limiting its applicability in cases involving plaintiffs with particularly sympathetic claims; but in the 55 years since *Reynolds* established the contours of the privilege, Congress has not seen fit to do so. Indeed, Congress has exhibited extreme reluctance to authorize private parties to assert the very types of claims being asserted here by Appellants.

For example, Congress has never adopted a law creating a private right of action for those whose constitutional rights are violated under color of federal law. Appellants do not assert any constitutional claims against Jeppesen, and with good reason. Under a line of cases beginning with *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), the Supreme Court has "implied" a private right of action for such violations in a limited number of circumstances, but none of those cases remotely benefits Appellants.[4]

---

[4] As the Supreme Court recently explained, the creation of "any freestanding damages remedy for a claimed constitutional violation has to represent a judgment about the best way to implement a constitutional guarantee; it is not an automatic entitlement no matter what other means there may be to vindicate a protected interest, and in most instances we have found a *Bivens*

Indeed, the Supreme Court has explicitly declined to recognize *Bivens* actions against private corporations. *Correctional Services Corp. v. Malesko,* 534 U.S. 61 (2001). Given that neither Congress nor the Supreme Court has indicated a willingness to permit assertion of *any* constitutional claims against Jeppesen by those in Appellants' position, there is certainly no basis for asserting that lower federal courts are authorized to relax the state secrets privilege to ensure judicial review of allegations of egregious Executive Branch misconduct.

Indeed, Congress has explicitly withdrawn federal court jurisdiction over claims by those, such as Appellant Binyam Mohamed, who seek to challenge the conditions of their confinement after being detained based on a determination that they are enemy combatants. Mohamed currently is being held by the United States government at Guantanamo Bay, Cuba. A Combatant Status Review Tribunal has determined that he is an enemy combatant. Pursuant to the Supreme Court's decision in *Boumediene v. Bush,* 128 S. Ct. 2229 (2008), Mohamed is permitted to file a habeas corpus petition in federal district court to challenge the fact of his continued detention – and he has filed such a petition in the District of Columbia. However, Congress has determined that he should not be permitted to file any type of action that challenges the conditions of his

---

action unjustified." *Wilkie v. Robbins*, 127 S. Ct. 2588, 2597 (2007).

confinement:

> Except as provided in [a provision of the Detainee Treatment Act of 2005 not relevant here] no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States *and its agents* relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been detained as an enemy combatant or is awaiting such determination.

28 U.S.C. § 2241(e)(2) (emphasis added).[5] At the very least, § 2241(e)(2) is an indication that Congress has no desire to cut back on the state secrets privilege for the purpose of allowing suspected terrorists such as Mohamed to file tort suits alleging mistreatment while they have been in U.S. custody. In light of *Reynolds*'s mandate and the absence of any indication from Congress of a desire to cut back on the state secrets privilege, Appellants lack any justification for asking this Court to modify the state secrets doctrine for the purpose of avoiding dismissal of cases alleging serious government misconduct.

---

[5] Section 2241(e)(2) was codified as Section 7(e)(2) of the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006). Although portions of Section 7(e) were declared unconstitutional by *Boumediene* as a violation of the Suspension Clause, Section 7(e)(2)'s withdrawal of jurisdiction over claims regarding conditions of confinement was unaffected by that decision.

CONCLUSION

The Washington Legal Foundation and the Allied Educational Foundation respectfully request that the Court affirm the district court's decision.

Respectfully submitted,

_____

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Dated: September 8, 2008

CERTIFICATE OF COMPLIANCE

I am an attorney for *amici curiae* Washington Legal Foundation, *et al.*. Pursuant to Fed.R.App.P. 29(d) and 32(a)(7)(C) and Ninth Circuit Rule 32-1, I hereby certify that the foregoing brief of *amicus curiae* is in 14-point, proportionately spaced CG Times type. According to the word processing system used to prepare this brief (WordPerfect 12.0), the brief contains less than 7,000 words (the actual word count is 6,455), not including the corporate disclosure statement, table of contents, table of authorities, certificate of service, and this certificate of compliance.

_____

Richard A. Samp

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of September, 2008, I deposited two copies of the brief of *amicus curiae* Washington Legal Foundation in the U.S. Mail, First Class postage prepaid, addressed to the following:

Michael P. Abate
Civil Division, Room 7318
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

Steven M. Watt
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004

Ann Brick
American Civil Liberties Union Foundation of Northern California
39 Drumm Street
San Francisco, CA 94111

Daniel P. Collins
Munger, Tolles & Olson LLP
355 South Grand Avenue, 35th Floor
Los Angeles, CA 90071-1560

_____
Richard A. Samp