No. 08-15693

IN THE 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.

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On Appeal From the United States District Court
For the Northern District of California

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# PETITION FOR REHEARING OR REHEARING *EN BANC*

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## INTRODUCTION

Pursuant to Fed. R. App. P. 35 and 40 and Ninth Circuit Rule 35, Intervenor-Appellee United States respectfully petitions this Court for rehearing or rehearing *en banc*.

This is one of those few cases warranting review by the Court *en banc*. The panel has significantly altered the contours of the military and state secrets privilege – a constitutionally-based means by which the Executive protects critical national security information from disclosure. The panel's approach is flatly inconsistent with decisions of the Supreme Court, this Court, and this Court's sister circuits on questions of exceptional importance applying the privilege.

We emphasize that the Government's request for *en banc* review is based upon the most careful and deliberative consideration, at the highest levels, of all possible alternatives to relying upon the state secrets privilege. As the President made clear two weeks ago, while the state secrets privilege is necessary to protect national security, the United States will not invoke the privilege to prevent disclosure of "the violation of a law or embarrassment to the government."[1]

In this case, then-Director of the Central Intelligence Agency General Michael Hayden made the expert determination that continued litigation poses an

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[1] See "www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09".

unacceptable risk of disclosing state secrets. He submitted to the district court public and classified declarations analyzing in depth the allegations in the complaint. Director Hayden explained that "highly classified information" subject to the state secrets privilege "is central to the allegations and issues in this case," and that further litigation "would pose an unacceptable risk of disclosure of information that this nation's security requires not be disclosed." ER 740-750. Director Hayden unequivocally concluded that "no information can be adduced on the public record to establish or refute [plaintiffs'] claims, or any defenses thereto, without jeopardizing the national security of the United States." ER 739.

The district court also examined plaintiffs' claims, as well as Director Hayden's declarations, and found that "proceeding with this case would jeopardize national security and foreign relations and that no protective procedure can salvage this case." ER 9.

These conclusions by Director Hayden and the district court have been reinforced by an additional review – following the panel decision in this case – at the highest levels of the Department of Justice. Based on that review, it is the Government's position that permitting this suit to proceed would pose an unacceptable risk to national security, and that the reasoning employed by the panel would dramatically restructure government operations by permitting any

district judge to override the Executive Branch's judgments in this highly sensitive realm.

Rehearing *en banc* is appropriate because, despite the conclusions of the Executive Branch and the district court, the panel ordered that this litigation proceed. The panel held that the state secrets doctrine supports dismissal at the outset of litigation only in suits arising out of a plaintiff's alleged espionage relationship with the Government. No other court of appeals has so restricted the state secrets privilege, and the panel's order is directly at odds with the cardinal principle, repeatedly applied by courts of appeals, that a case must be dismissed regardless of its stage if it cannot be litigated further without risking disclosure of state secrets. *See Sterling v. Tenet*, 416 F.3d 338, 344 (4th Cir. 2005) ("Courts are not required to play with fire and chance further disclosure – inadvertent, mistaken, or even intentional – that would defeat the very purpose for which the privilege exists.").

The panel further held that, outside of the narrow context of suits alleging a plaintiff's espionage relationship, the state secrets doctrine is merely a limited evidentiary privilege covering only specific materials or documents, which cannot be used to protect categories of information or as a basis to dismiss claims in litigation threatening disclosure of state secrets. This unprecedented view of the

privilege conflicts with the construction endorsed and applied in various cases by the courts of appeals, including this Court, and will significantly hamstring the Government's ability to prevent the disclosure of highly sensitive state secrets through litigation.

The effect of the panel's ruling is to permit litigation to go forward even though, as the Executive Branch and the district court have both concluded in this case, further proceedings can reasonably be expected to cause serious or even exceptionally grave harm to our national security. The *en banc* Court should review the panel's decision before allowing it to become the law of this Circuit, and to govern this case.

## STATEMENT OF THE CASE

1. The plaintiffs are five foreign nationals claiming that they were subjected to "forced disappearance, torture, and inhumane treatment" by "agents of the United States and other governments" as part of the CIA's terrorist detention and interrogation program. ER 753. They sued Jeppesen Dataplan, Inc., a private company providing flight and logistical support services, alleging that the company "played a critical role in the successful implementation of the extraordinary rendition program." ER 756. Specifically, plaintiffs contend that Jeppesen "furnished essential flight and logistical support to aircraft used by the

CIA to transfer terror suspects to secret detention and interrogation facilities" in foreign countries. ER 756.

Plaintiffs assert that Jeppesen is liable for their alleged mistreatment by agents of the United States and foreign governments because Jeppesen "actively participated" in the "planning and implementation" of the CIA program. ER 818-819. They also allege that Jeppesen "conspired with agents of the United States in Plaintiffs' forced disappearance"; "entered into an agreement with agents of the United States to unlawfully render Plaintiffs to secret detention in Morocco, Egypt, and Afghanistan"; and "aided and abetted agents of the United States" and foreign countries in subjecting the plaintiffs to mistreatment. ER 819.

2. The United States intervened at the outset of the action and moved to dismiss the suit because of the risk of disclosure of state secrets. CIA Director Hayden formally invoked the privilege in two declarations.

Director Hayden's public declaration asserted the privilege over specific categories of information, the disclosure of which "reasonably could be expected to cause serious – and, in some instances, exceptionally grave – damage to the national security" of the United States. ER 746. Specifically, Director Hayden noted that plaintiffs' claims were based on allegations that Jeppesen assisted the CIA in conducting clandestine intelligence activities abroad, which the CIA could

neither confirm nor deny. ER 746-747. Director Hayden explained that confirmation of these allegations "would reveal the intelligence sources and methods by which the CIA conducts clandestine intelligence activities," while denial "would tend to confirm similar allegations in other cases in which the CIA could not deny such allegations." ER 747.

Director Hayden also made clear that, in order to prevail on their suit, plaintiffs would have to prove that the conduct they alleged was carried out on behalf of, and with the assistance of, the U.S. Government and various foreign governments. ER 747-748. As Director Hayden noted, foreign governments cooperating with the CIA in clandestine intelligence activities "do so under assurances * * * that the fact of their cooperation will remain secret," and "[v]iolating such assurances would damage the relations with foreign governments and severely impact the CIA's foreign activities by making other governments unwilling to cooperate with the United States in the future." ER 748. Director Hayden also explained that disclosure of operational details of the CIA's terrorist detention and interrogation program "would degrade the effectiveness of the United States' intelligence gathering activities." ER 748.

As noted earlier, Director Hayden also submitted to the district court a lengthy and highly detailed classified declaration, which was provided *ex parte*/*in*

*camera*. This document described more fully than was possible on the public record the precise nature of the information subject to his privilege assertion, and the national security harms that would flow from disclosure.

3. The district court reviewed both the public and the classified declarations, upheld the invocation of the state secrets privilege, and dismissed plaintiffs' action.

The court held that Director Hayden's public declaration "satisfies all of the procedural requirements" for invocation of the state secrets privilege, and that the privilege was invoked to prevent "[l]itigation over 'allegations' about the operations of the CIA overseas" – *i.e.*, "information which is properly the subject of state secrets privilege." ER 7.

The district court explained that "at the core of Plaintiffs' case against Defendant Jeppesen are 'allegations' of covert U.S. military or CIA operations in foreign countries against foreign nationals – clearly a subject matter which is a state secret." ER 9. Critically, the court found "that any further proceedings in this case would elicit facts which might tend to confirm or refute as of yet undisclosed state secrets." ER 9.

4. A panel of this Court reversed. The panel first held that dismissal at the outset of a case is appropriate only where a suit is "predicated on the existence

and content of a secret agreement between the plaintiff and the government." Slip op. 10 (citing and discussing *Totten v. United States*, 92 U.S. 105 (1875)); *see also* slip op. 17 ("if a lawsuit is not predicated on the existence of a secret agreement between the plaintiff and the government, * * * the subject matter of the suit is not a state secret").

Second, the panel significantly narrowed the contours and protections of the state secrets doctrine. The panel "contrast[ed]" the *Totten* bar on justiciability with the "evidentiary privilege" applied by the Supreme Court in *United States v. Reynolds*, 345 U.S. 1 (1953). The panel held that the state secrets privilege applied in *Reynolds* is merely an evidentiary privilege, which applies only where the plaintiff seeks "discovery of secret evidence" the disclosure of which "would threaten national security." Slip op. 11. The panel further held that this "evidentiary framework" is the only aspect of the state secrets doctrine implicated in a case not arising out of a plaintiff's alleged espionage relationship with the Government. Slip op. 11.

The panel ruled that, under the *Reynolds* "evidentiary framework," the state secrets privilege cannot "foreclos[e] litigation altogether at the outset." Slip op. 16. The panel criticized as premature the Government's "hypothetical claims of privilege" in this case, holding that the privilege could only be invoked "*during*

*discovery* or *at trial*." Slip op. 24-25 (emphasis in original). A district court should not consider application of the privilege, the panel further held, until there has been "(1) an actual request for discovery of specific evidence, (2) an explanation from plaintiffs of their need for the evidence, and (3) a formal invocation of the privilege by the government with respect to that evidence, explaining why it must remain confidential." Slip op. 25.

Even after those requirements are met, the panel held, a court should apply the state secrets privilege only "on an item-by-item basis," balancing "the circumstances of the case and the plaintiff's showing of necessity for the evidence against the danger that compulsion of evidence will expose matters which, in the interest of national security, should not be divulged." Slip op. 16 (quotation marks, citation omitted).

The panel also held that the state secrets privilege applies only to prevent "discovery of evidence," and not to "prevent parties from litigating the truth or falsity of allegations, or facts, or information" encompassed within the Government's claim of privilege. Slip op. 17-18.

Applying these principles, the panel vacated the district court judgment and remanded for further proceedings. Notably, the panel did not mention the fact that the district court had already held, based on its review of the relevant material, that

any further litigation in the case risks the disclosure of state secrets. Nor did the panel address the Executive Branch's determination that any further litigation threatens serious, and possibly exceptionally grave, harm to national security. Indeed, the panel nowhere noted Director Hayden's lengthy *ex parte*/*in camera* submission analyzing in detail the harms that will flow from continued proceedings in this case.

## ARGUMENT

The panel held that the state secrets doctrine supports dismissal of litigation prior to discovery only where the plaintiff alleges his own espionage relationship with the United States, even when it is clear that continued litigation will threaten to disclose military and state secrets. In addition, the panel ruled that the state secrets doctrine applies only to specific items of "evidence" sought in discovery, and not to "information." Not only are these unprecedented holdings wrong, but they also conflict with decisions of the Supreme Court, this Court, and other courts of appeals, all of which recognize that a case should be dismissed whenever continued litigation threatens the disclosure of state secrets, regardless of the stage of the proceedings or where those secrets are contained.

These holdings diverge from the rulings of other courts and will significantly undermine the ability of the Executive to prevent the release of

highly sensitive information that could damage national security. In light of the exceptional importance of the issues presented, as well as the conflicts created by the panel's decision, review is plainly appropriate.

1. The Supreme Court instructed in *Totten* that, where judicial proceedings will "inevitably lead to the disclosure of matters which the law itself regards as confidential," a suit cannot be maintained. 92 U.S. at 107. Contrary to the panel's view, that basic principle is not limited to cases in which the plaintiff seeks to enforce an espionage agreement; dismissal is appropriate whenever it becomes clear that further proceedings risk disclosure of state secrets.

The crux of plaintiffs' allegations against Jeppesen is that Jeppesen entered into a secret agreement with the CIA, pursuant to which it provided essential flight and logistical services in aid of clandestine CIA operations. The plaintiffs allege that Jeppesen "actively participated" in the "planning and implementation" of a secret CIA program; "conspired" with agents of the United States to carry out the plaintiffs' forced disappearance and wrongful rendition to foreign countries; and "aided and abetted" U.S. and foreign government agents in subjecting the plaintiffs to mistreatment. ER 818-819.

In order to answer the complaint, Jeppesen would be required either to admit or to deny the existence of a secret relationship with the CIA – information

that, as Director Hayden's declaration makes clear, is a state secret. Under these circumstances, the district court correctly concluded that the case should be dismissed. *Cf. Maxwell v. First Nat'l Bank*, 143 F.R.D. 590, 599 (D. Md. 1992) ("The state secret that must be protected is the existence of any relationship between the CIA and" private entities alleged to have conducted business with the Agency), *aff'd*, 998 F.2d 1009 (4th Cir. 1993) (mem.), *cert. denied*, 510 U.S. 1091 (1994).

In an analogous context, the Supreme Court has endorsed the rule that dismissal of a case is appropriate where further litigation would disclose secret information. In *Weinberger v. Catholic Action of Hawaii/Peace Education Project*, 454 U.S. 139 (1981), the plaintiffs sought to force the Navy to file an environmental impact statement – a legal obligation that arose only if the Navy planned to store nuclear weapons at the site in question, which the Navy could neither confirm nor deny. Invoking the principle that "'public policy forbids the maintenance of any suit'" in which litigation would "'inevitably lead to the disclosure'" of secret information, the Court ordered dismissal of the action. *Id.* at 146-147 (quoting *Totten*, 92 U.S. at 107, and citing *Reynolds*).

Other courts of appeals have also held that, once it is clear that further proceedings would pose an undue risk of disclosure of state secrets, the case

should be dismissed — even if the case is at the pleadings stage, and does not fall within the narrow *Totten* context. For example, in *El Masri v. United States*, the Fourth Circuit affirmed the pleading-stage dismissal of claims brought by an alleged subject of the CIA terrorist detention and interrogation program, holding that the case could not be litigated without revealing state secrets. 479 F.3d 296, 302, 308-311 (4th Cir. 2007), *cert. denied*, 128 S. Ct. 373 (2007); *see also Sterling*, 416 F.3d at 348 (upholding pleading-stage dismissal of Title VII action by former CIA employee, on the ground that the case could not be tried without threatening disclosure of state secrets); *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268, 281 (4th Cir. 1980) (en banc). Similarly, in *Black v. United States*, 62 F.3d 1115, 1119 (8th Cir. 1995), the Eighth Circuit upheld the pleading-stage dismissal of tort claims brought by former government contractor, based on the court's assessment that privileged information is "at the core of" the plaintiff's claims and "the litigation cannot be tailored to accommodate [its] loss."

2. The panel's decision was predicated on an erroneous attempt to cabin the state secrets privilege to the discovery phase of proceedings. That holding conflicts with multiple decisions by this Court and other courts of appeals; it is also based on an unsupportable distinction between pleadings and evidence.

In restricting the state secrets privilege to the discovery phase of litigation, the panel reasoned that the privilege was an "evidentiary privilege," which the panel held could not be invoked until "*discovery* or *at trial*." Slip op. 25. This reasoning is predicated on an erroneous distinction between "pleadings" and "evidence." Any answer that Jeppesen files in response to plaintiffs' allegations that it entered into an espionage relationship with the CIA is "competent evidence of the facts stated." *Huey v. Honeywell, Inc.*, 82 F.3d 327, 333 (9th Cir. 1996) (quotation marks, citation omitted). If Jeppesen does not deny those allegations in its answer, it will be deemed to have admitted the truth of the underlying facts. *See* Fed. R. Civ. P. 8(b)(6). And although the panel invoked in support of its ruling other privileges, such as the Fifth Amendment privilege against self-incrimination (slip op. 18-19), courts have recognized that those privileges apply at the pleading stage. *See, e.g., North River Ins. Co. v. Stefanou*, 831 F.2d 484, 486-487 (4th Cir. 1987) (privilege against self-incrimination protects an individual "from answering specific allegations in a complaint * * * where the answers might incriminate him in future criminal actions"); *National Acceptance Co. of America v. Bathalter*, 705 F.2d 924, 927 (7th Cir. 1983) (same).

The panel's refusal to consider the state secrets privilege prior to discovery is also at odds with *Al-Haramain Islamic Foundation, Inc. v. Bush*, 507 F.3d 1190

(9th Cir. 2007), where this Court considered – and upheld – a state secrets privilege claim at the outset of litigation, even though the Court concluded that the case did not fall into the narrow category of suits that cannot be litigated because their very subject matter is a state secret. *Id.* at 1201-1205. Concluding that the plaintiffs could not establish standing without the disclosure of state secrets, the Court dismissed the action at the pleading stage, subject only to a remand to consider a legal issue not presented here.

Similarly, the Second and Fifth Circuits have affirmed the dismissal prior to discovery of tort actions brought against defense contractors who manufactured military weapons systems, holding that state secrets were at the core of the suit and that further litigation posed an undue risk of disclosure. *Bareford v. General Dynamics Corp.*, 973 F.2d 1138, 1142, 1145 (5th Cir. 1992); *Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544, 545 (2d Cir. 1991).

The panel here relied on *Reynolds* in support of its narrow construction of the state secrets privilege, but nothing in that decision supports a refusal to consider the privilege prior to discovery. Furthermore, *Reynolds* invokes the seminal English case, *Duncan v. Cammel, Laird & Co.*, [1942] A.C. 624, which recognizes that the parallel British privilege "is not properly to be regarded as a branch of law of privilege connected with discovery," because it extends more

broadly than traditional discovery privileges. *Id.* at 641-642. *Duncan* also recognizes that the privilege might bar adjudication of certain matters where secrecy is in the public interest, regardless of a litigant's ability to produce evidence relating to the matter. *See id.* at 634-635.

Indeed, the panel's holding that the state secrets privilege may only be asserted prior to discovery in the narrow *Totten* context is perplexing. Under *Tenet v. Doe*, 544 U.S. 1, 6-10 (2005), the Government need not assert the privilege *at all* in that context, because a complaint alleging on its face that the plaintiff entered into a secret espionage relationship with the Government is properly dismissed at the outset as nonjusticiable.

3. *En banc* review is also warranted to consider the panel's holding that the state secrets privilege applies only to "evidence" and not to information, and may be asserted only over specific items of evidence sought in discovery. Those holdings would severely weaken the protections of the privilege, and are contrary to the decisions of this Court and other courts of appeals.

Extensive case law establishes that the state secrets privilege protects against disclosure of categories of military and state secrets, and *not* simply the disclosure of specific pieces of evidence. Thus, in *Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998), this Court recognized that the Government "may use

the state secrets privilege to withhold a broad range of information." *Kasza* specifically rejected the argument that a privilege assertion generally describing "ten categories of information" was insufficient, reasoning that the Secretary could not "reasonably be expected personally to explain why each item of information arguably responsive to a discovery request affects the national interest." *Id.* at 1169. Yet the panel's decision in this case mandates precisely that – requiring the CIA Director to supervise and, if necessary, personally oppose, individual discovery requests, despite the fact that discovery would expose the manner in which the CIA conducts clandestine intelligence operations overseas.

Other courts of appeals have similarly held that the state secrets privilege is properly asserted over "information" (or "facts"), and not just particular pieces of evidence. Notably, those courts have upheld the invocation of the privilege and subsequent dismissal of the suit even where the plaintiffs claimed to have personal knowledge of, or non-privileged evidence relating to, the information covered by the privilege assertion.

In *Sterling*, for example, the Fourth Circuit upheld on state secrets grounds the dismissal of an employment action brought by a former CIA employee alleging unlawful discrimination. 416 F.3d at 346-347. The *Sterling* court held that adjudicating the claims "would require inquiry into state secrets such as the

operational objectives and long-term missions of different agents, the relative job performance of these agents, details of how such performance is measured, and the organizational structure of CIA intelligence-gathering" – *i.e.*, *information*, not evidence, encompassed within the claim of state secrets. *Id.* at 347; *see also id.* (holding that depositions of CIA operatives could risk disclosure of "information" with "national security implications"). Similarly, in *El Masri*, the Fourth Circuit upheld dismissal on state secrets grounds, notwithstanding the plaintiff's argument that he could establish liability through his own testimony and other public information. 479 F.3d at 308-310.

In *Black*, 62 F.3d at 1117-1119, the Eighth Circuit upheld a state secrets privilege claim concerning a plaintiff's alleged contacts with government personnel, even though the plaintiff had personal knowledge of that information. And in *Bareford*, 973 F.2d at 1140-1142, the Fifth Circuit dismissed the plaintiffs' tort claims because information about the design of a weapons systems was properly secret, even though the plaintiffs adduced thousands of pages of assertedly public materials with which they claimed they could litigate their case. These decisions are flatly inconsistent with the panel's view that the privilege is limited to specific pieces of evidence.

If the panel's decision were correct, the Executive would be unable to take action to protect national security if two private participants on a secret government contract sued each other over the proper division of the profits and could litigate the case with evidence from their own knowledge and files. Under the panel's highly restrictive view of the state secrets doctrine, the Executive would be powerless to stop the parties from exposing national security secrets while litigating their claims so long as they did not seek discovery from the Government.

4. The panel's ruling implicates questions of exceptional public importance. The panel's limitation of pleading-stage dismissals to the narrow context of *Totten*, and its holding that the privilege protects only evidence and not information, would require the Government to wait to invoke the doctrine until discovery commences, hoping that no state secrets are revealed while the defendant answers the complaint and the parties litigate over motions to dismiss. Even after that point, the panel would require Executive department heads to conduct a personal review of discovery requests and to assert the privilege over each objectionable item sought. These rules would ensure that all or virtually all state secrets cases proceed to discovery even where it is clear, as it is here, that the defendant could not answer the complaint or file a dispositive motion without

risking harm to national security. *See* ER 9 ("[A]ny further proceedings in this case would elicit facts which might tend to confirm or refute as of yet undisclosed state secrets."). This has never been, and should not become, the law. *See Reynolds*, 345 U.S. at 10 ("[C]ourt[s] should not jeopardize the security which the privilege is meant to protect.").

## CONCLUSION

For the foregoing reasons, this Court should grant rehearing or rehearing *en banc*.

Respectfully submitted,

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JUNE 2009

## CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid to the following non-CM/ECF participants:

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

I certify that, pursuant to Ninth Circuit Rules 35-4 and 40-1, the attached Petition for Rehearing and Rehearing *En Banc* is proportionately spaced, in Times New Roman type, has a typeface of 14 points, and contains 4,196 words.

s/Michael P. Abate
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