

1 JEFFREY S. BUCHOLTZ  
 Acting Assistant Attorney General  
 2 JOSEPH P. RUSSONIELLO  
 United States Attorney  
 3 CARL J. NICHOLS  
 Deputy Assistant Attorney General  
 4 JOSEPH H. HUNT  
 Director, Federal Programs Branch  
 5 VINCENT M. GARVEY  
 Deputy Director, Federal Programs Branch  
 6 MICHAEL P. ABATE  
 Trial Attorney  
 7 michael.abate@usdoj.gov  
 U.S. Department of Justice  
 8 Civil Division, Federal Programs Branch  
 20 Massachusetts Avenue, NW  
 9 Washington, DC 20001  
 Phone: (202) 616-8209  
 10 Fax: (202) 616-8470  
 Attorneys for the United States of America

11 UNITED STATES DISTRICT COURT  
 12 NORTHERN DISTRICT OF CALIFORNIA  
 San Jose Division

13 BINYAM MOHAMED;  
 14 ABOU ELKASSIM BRITEL;  
 AHMED AGIZA;  
 15 MOHAMED FARAG AHMAD  
 BASHMILAH;  
 16 BISHER AL-RAWI  
 17 Plaintiffs,  
 18 v.  
 19  
 20 JEPPESEN DATAPLAN, INC.  
 21  
 22 Defendant.

Case No. C-07-02798-JW  
 REPLY IN SUPPORT OF MOTION TO  
 DISMISS, OR, IN THE ALTERNATIVE,  
 FOR SUMMARY JUDGMENT BY  
 THE UNITED STATES OF AMERICA  
 Judge: Hon. James Ware  
 Hearing Date: February 5, 2008  
 Hearing Time: 1:00 PM  
 Courtroom: 8, 4th Floor

**TABLE OF CONTENTS**

**PAGE**

1

2

3 INTRODUCTION..... 1

4 ARGUMENT..... 3

5 I. The United States Properly Asserted the State Secrets Privilege ..... 3

6 II. Pleading-Stage Resolution Is Appropriate Because the Facts

7 Central to the Litigation Are Subject to the State Secrets Privilege ..... 9

8 III. The Purportedly “Robust Alternatives” Suggested By Plaintiffs

9 Are Insufficient to Safeguard the Privileged Information And Are

Impractical. .... 15

10 CONCLUSION. .... 18

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**TABLE OF AUTHORITIES**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

<b><u>CASES</u></b>	<b><u>PAGE(S)</u></b>
<u>Afshar v. Dep’t of State</u> , 702 F.2d 1125 (D.C. Cir. 1983).....	7
<u>Al-Haramain Islamic Foundation, Inc. v. Bush</u> , 507 F.3d 1190 (9th Cir. 2007).....	passim
<u>Bareford v. General Dynamics Corp.</u> , 973 F.2d 1138 (5th Cir. 1992).....	2, 10, 12, 13
<u>Black v. United States</u> , 62 F.3d 1115 (8th Cir. 1995). . . . .	2, 5, 10, 17
<u>DTM Research, LLC v. AT &amp; T Corp.</u> , 245 F.3d 327 (4th Cir.2001).....	15
<u>El-Masri v. Tenet</u> , 437 F. Supp. 2d 530 (E.D. Va. 2006). . . . .	3
<u>El-Masri v. United States</u> , 479 F.3d 296 (4th Cir. 2007).....	passim
<u>Ellsberg v. Mitchell</u> , 709 F.2d 51 (D.C. Cir. 1983).....	4
<u>Farnsworth Cannon, Inc. v. Grimes</u> , 635 F.2d 268 . . . . .	13, 15, 17
<u>Fitzgerald v. Penthouse International, Ltd.</u> , 776 F.2d 1236 (4th Cir. 1985). . . . .	17
<u>Fitzgibbon v. CIA</u> , 911 F.2d 755 (D.C. Cir. 1990). . . . .	7
<u>Frugone v. CIA</u> , 169 F.3d 772 (D.C. Cir. 1999). . . . .	8
<u>Halkin v. Helms</u> , 598 F.2d 1 (D.C. Cir. 1978).....	4
<u>Hepting v. AT&amp;T Corp.</u> , 439 F. Supp. 2d 974 (N.D. Cal. 2006). . . . .	3, 6, 11, 12
<u>Hunt v. CIA</u> , 981 F.2d 1116 (9th Cir. 1992). . . . .	16
<u>Kasza v. Browner</u> , 133 F.3d 1159 (9th Cir. 1998).....	passim
<u>Knopf v. Colby</u> , 509 F.2d 1362 (4th Cir. 1975).....	7
<u>Sterling v. Tenet</u> , 416 F.3d 338 (4th Cir. 2005).....	passim
<u>Tenenbaum v. Simonini</u> , 372 F.3d 776 (6th Cir. 2004).....	2, 10, 13
<u>Terkel v. AT&amp; T Corp.</u> , 441 F. Supp. 2d 899 (N.D. Ill. 2006). . . . .	7
<u>United States v. Reynolds</u> , 345 U.S. 1 (1953).....	passim
<u>Wolf v. CIA</u> , 473 F.3d 370 (D.C. Cir. 2007).....	7
<u>Zuckerbraun v. General Dynamics Corp.</u> , 935 F.2d 544 (2d Cir. 1991). . . . .	2, 4, 10, 17

## INTRODUCTION

1  
2 Plaintiffs' Opposition to the United States' Motion to Dismiss or, in the Alternative, for  
3 Summary Judgment, concedes that the public Declaration filed by Gen. Michael V. Hayden, USAF,  
4 Director, Central Intelligence Agency ("Director"), meets all of the procedural requirements  
5 necessary for the Government to assert the state secrets privilege in this case. With this concession,  
6 plaintiffs principally argue that the privilege assertion should not be accepted because it is premature.  
7 That argument is without merit.

8 The state secrets privilege prevents the disclosure of information in litigation when "there  
9 is a reasonable danger that compulsion of the evidence will expose military matters which, in the  
10 interest of national security, should not be divulged." *United States v. Reynolds*, 345 U.S. 1, 10  
11 (1953); *see also Kasza v. Browner*, 133 F.3d 1159, 1165 (9th Cir. 1998); *Al-Haramain Islamic*  
12 *Foundation, Inc. v. Bush*, 507 F.3d 1190, 1196 (9th Cir. 2007). Courts must perform a three-step  
13 analysis in any case where the United States asserts the privilege. First, the Court must determine  
14 whether the procedural requirements for invoking the privilege have been satisfied. *Reynolds*, 345  
15 U.S. at 7-8; *Kasza*, 133 F.3d at 1165; *Al-Haramain*, 507 F.3d at 1202. Second, and without  
16 divulging the information the privilege was asserted to protect, the Court must make an independent  
17 assessment of whether the privilege is properly asserted. *Reynolds*, 345 U.S. at 8; *Kasza*, 133 F.3d  
18 at 1155-56; *Al-Haramain*, 507 F.3d at 1202. Third, if the Court concludes that the privilege has been  
19 properly asserted, the privileged information is "completely removed from the case," and the court  
20 must then decide whether, and how, the case can proceed. *Kasza*, 133 F.3d at 1166; *see also Al-*  
21 *Haramain*, 507 F.3d at 1202-04.

22 It is well-established that if the privileged information is necessary to litigate the case to  
23 completion, the Court must resolve the case at the outset so as not to "jeopardize the security which  
24 the privilege is meant to protect." *Reynolds*, 345 U.S. at 10. *See, e.g., Al-Haramain*, 507 F.3d at  
25 1205 (plaintiff could not establish standing without privileged information); *El-Masri v. United*  
26 *States*, 479 F.3d 296, 308-11 (4th Cir.), *cert. denied*, 128 S.Ct. 373 (2007) (pleading-stage resolution  
27 appropriate because parties could not litigate the merits of their claims and defenses without  
28 privileged information); *Sterling v. Tenet*, 416 F.3d 338, 347-48 (4th Cir. 2005), *cert. denied sub*

1 *nom. Sterling v. Goss*, 546 U.S. 1093 (2006) (same); *Tenenbaum v. Simonini*, 372 F.3d 776, 777 (6th  
2 Cir. 2004) (same); *Kasza*, 133 F.3d at 1170 (same); *Black v. United States*, 62 F.3d 1115, 1119 (8th  
3 Cir. 1995) (same); *Bareford v. General Dynamics Corp.*, 973 F.2d 1138, 1142-44 (5th Cir. 1992)  
4 (same); *Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544, 547-48 (2d Cir. 1991) (same).

5 Plaintiffs, who contend that the Government's state secrets privilege assertion is premature  
6 because "the very subject matter" of this action is not a state secret, improperly conflate the second  
7 and third steps of this analysis. Before this Court considers whether the case can proceed without  
8 the privileged information, it must *first* determine whether the privilege has properly been asserted.  
9 *See, e.g., Al-Haramain*, 507 F.3d at 1203-04 (upholding Government's assertion of state secrets  
10 privilege despite concluding that the very subject matter of the case was not a state secret).  
11 Plaintiffs' strategy is to convince this Court to defer its consideration of the United States' privilege  
12 assertion so that the case can proceed into discovery, at which point they believe that the privilege  
13 must be asserted on an "item-by-item" basis. But they have not cited -- and cannot cite -- a single  
14 case in which a court has deferred consideration of a state secrets privilege claim until some  
15 unspecified, later point in time.

16 Nor have plaintiffs even attempted to argue how this case could be litigated to completion  
17 without the information over which the United States has asserted the state secrets privilege. The  
18 failure to attempt such a showing is unsurprising, because it is clear that the case cannot go forward  
19 if the privilege is accepted. The state secrets privilege will "completely remove[] from the case,"  
20 *Kasza*, 133 F.3d at 1166, all of the information described in the Director's declarations, which  
21 includes, but is not limited to: whether these plaintiffs were part of the CIA terrorist detention and  
22 interrogation program ("CIA program"); whether defendant assisted the CIA in conducting the  
23 program; whether countries named in the First Amended Complaint (specifically, Morocco and  
24 Egypt) assisted with the program; and other, classified operational details of the program (such as  
25 the locations where the CIA detained individuals and the interrogation methods used as part of the  
26 program). *See* Formal Claim of State Secrets and Statutory Privileges by General Michael V.

1 Hayden, USAF, Director, Central Intelligence Agency (“Public Hayden Decl.”) (Dkt. no 43-2) ¶ 20.<sup>1</sup>  
2 Plaintiffs’ claims, which allege that defendant assisted the United States and foreign governments  
3 in carrying out clandestine intelligence activities, cannot be litigated without this information.

4 Plaintiffs’ view of the case is simply too near-sighted. Regardless of whether the “very  
5 subject matter” of this litigation is a state secret, it is apparent *now* that the case cannot be litigated  
6 without revealing classified details about how the United States conducts clandestine intelligence  
7 activities. *See Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 994 (N.D. Cal. 2006) (noting that “the  
8 whole object of the suit” in *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 537 (E.D. Va. 2006), “was to  
9 reveal classified details regarding ‘the means and methods the foreign intelligence services of this  
10 and other countries used to carry out the [CIA] program’” at issue in this case (citation omitted)).  
11 Given the inevitable necessity to dispose of this suit, which cannot be litigated through any stage  
12 without risking harm to national security -- let alone to judgment -- the Court should resolve the suit  
13 at the outset without requiring further proceedings, which would only risk disclosing the very  
14 information that the privilege has been asserted to protect. *See, e.g., El-Masri*, 479 F.3d at 305  
15 (dismissing case because the “central facts” necessary to litigate the suit “remain state secrets”).  
16 “Courts are not required to play with fire and chance further disclosure -- inadvertent, mistaken, or  
17 even intentional -- that would defeat the very purpose for which the privilege exists.” *Sterling*, 416  
18 F.3d at 344; *see also Reynolds*, 345 U.S. at 10 (“[T]he court should not jeopardize the security which  
19 the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge  
20 alone, in chambers.”).

## 21 ARGUMENT

### 22 I. THE UNITED STATES PROPERLY ASSERTED THE STATE SECRETS PRIVILEGE

23 The first step in determining whether the privilege has been properly asserted is to ascertain  
24 that the procedural requirements for invoking the state secrets privilege have been satisfied. *Al-*  
25 *Haramain*, 507 F.3d at 1202. “There must be a formal claim of privilege, lodged by the head of the

---

26  
27 <sup>1</sup> The full extent of the information covered by the privilege is described in the *in camera*,  
28 *ex parte* Declaration of Gen. Michael V. Hayden, USAF, Director, Central Intelligence Agency  
 (“Classified Hayden Decl.”), which has been lodged for this Court’s review. *See* Notice of Lodging  
 of Classified *in camera*, *ex parte* Declaration (Dkt. no 43-3).

1 department which has control over the matter, after actual personal consideration by the officer.”  
2 *Reynolds*, 345 U.S. at 7-8 (footnotes omitted). Plaintiffs concede these requirements have been met.  
3 See Memorandum of Plaintiffs in Opposition to the United States’ Motion to Dismiss or, in the  
4 Alternative, for Summary Judgment (Dkt. no. 50) (“Pls. Opp.”) at 20 n.4.

5 Thus, this Court can proceed directly to the second step of the state secrets analysis, in which  
6 it “must determine whether the circumstances before [it] counsel that the state secrets privilege is  
7 applicable, without forcing a disclosure of the very thing that the privilege is designed to protect.”  
8 *Al-Haramain*, 507 F.3d at 1202. The Ninth Circuit has held that “[t]he asserted claim of privilege  
9 is accorded the ‘utmost deference’ and the court’s review of the claim of privilege is narrow: the  
10 court must be satisfied that under the particular circumstances of the case, ‘there is a reasonable  
11 danger that compulsion of the evidence will expose military matters which, in the interest of national  
12 security, should not be divulged.’” *Kasza*, 133 F.3d at 1166 (quoting *Reynolds*, 345 U.S. at 10); see  
13 also *Sterling*, 416 F.3d at 345 (“[W]hen a judge has satisfied himself that the dangers asserted by the  
14 government are substantial and real, he need not -- indeed, should not -- probe further.”);  
15 *Zuckerbraun*, 935 F.2d at 547 (articulating “utmost deference” standard); *Halkin v. Helms*, 598 F.2d  
16 1, 9 (D.C. Cir. 1978) (“*Halkin I*”) (same). In *Al-Haramain*, 507 F.3d at 1203, the Ninth Circuit  
17 recently reaffirmed “the need to defer to the Executive on matters of foreign policy and national  
18 security” and found that it “surely cannot legitimately find [itself] second guessing the Executive in  
19 this arena.” See also *El-Masri*, 479 F.3d at 305 (“The executive branch’s expertise in predicting the  
20 potential consequences of intelligence disclosures is particularly important given the sophisticated  
21 nature of modern intelligence analysis . . . .”); *Halkin I*, 598 F.2d at 9 (“The courts, of course, are ill-  
22 equipped to become sufficiently steeped in foreign intelligence matters to serve effectively in the  
23 review of secrecy classifications in that area.” (citation omitted)); *Ellsberg v. Mitchell*, 709 F.2d 51,  
24 57 n.31 (D.C. Cir. 1983) (“[T]he probability that a particular disclosure will have an adverse effect  
25 on national security is difficult to assess, particularly for a judge with little expertise in this area.”).<sup>2</sup>

---

26  
27 <sup>2</sup> Plaintiffs argue that the United States’ “sweeping theory” of “judicial ‘deference’” has  
28 “been rejected in several recent ‘state secrets’ decisions that the government entirely ignores.” Pls.  
Opp. at 19; see also *id.* at 22 (arguing that “the deference [the government] demands for the CIA

1 Gen. Hayden's public and *in camera*, *ex parte* declarations amply demonstrate that "there is  
2 a reasonable danger that compulsion of the evidence [subject to the privilege] will expose military  
3 matters which, in the interest of national security, should not be divulged." *Kasza*, 133 F.3d at 1166.  
4 In fact, those declarations explain in great detail how litigation concerning the operational details of  
5 alleged clandestine intelligence activities reasonably could be expected to damage national security.

6 Plaintiffs do not dispute directly Gen. Hayden's assertions about the harms that would follow  
7 from such disclosures. Instead, they attempt to obscure the question by pointing to (and lodging with  
8 this Court) a large volume of public sources speculating about the still-classified details of the CIA  
9 program, and asserting that these sources provide reason for this Court to conclude that the "very  
10 subject matter" of this suit is not a state secret. *See, e.g.*, Pls. Opp. at 36.<sup>3</sup> As noted above, this  
11 argument improperly conflates the second and third steps of the state secrets inquiry. Determining  
12 if the "very subject matter" of a case is a state secret is part of the Court's consideration of whether  
13 the case can proceed *in light of* an assertion of the privilege, and is not part of the calculus in  
14 determining whether the privilege itself was properly asserted. The distinction between these steps  
15 is crucial; as discussed below, there are many reasons why a case may be resolved at the pleading  
16 stage in response to an assertion of the state secrets privilege. A court may do so not only if "the

17 \_\_\_\_\_  
18 director's predictive judgments[] effectively render[s] the judicial role irrelevant"). This contention,  
19 which is unsupported by any citations, is mystifying; virtually every case to discuss the privilege  
20 recognizes that courts must afford the "utmost deference" to the Executive Branch's assessments of  
21 the harms that would flow from the disclosure of particular information. In repeating that controlling  
22 standard, the United States does not in any way denigrate the important function that this Court  
23 performs when deciding whether the privilege is properly invoked. On the contrary, and out of  
24 respect for this Court's function, Gen. Hayden's classified declaration provides the Court with a  
25 detailed account of the scope of information subject to the privilege and the harms that would result  
26 from its disclosure -- as is the United States' standard practice in state secrets litigation. *See, e.g.*,  
27 *Al-Haramain*, 507 F.3d at 1203 (government's privilege assertion was "exceptionally well  
28 documented"); *Kasza*, 133 F.3d at 1169 (submission of classified declarations for *in camera*, *ex*  
*parte* review is "unexceptional" in state secrets cases).

26 <sup>3</sup> Plaintiffs devote more than ten pages of their opposition to arguing that *Al-Haramain*  
27 requires this Court to reject *El-Masri* and hold that the "very subject matter" of this case -- which  
28 concerns the same CIA program -- is not a state secret. *See* Pls. Opp. at 25-36. That argument  
ignores the plain language of *Al-Haramain*, which notes that "[i]n *El-Masri*, the facts may  
have counseled for such an approach." *Al-Haramain*, 507 F.3d at 1201.



1 very subject matter” of the litigation is a state secret, but also if the parties cannot litigate their claims  
2 and defenses without the privileged information. *Al-Haramain* perfectly illustrates this point. Even  
3 though the “very subject matter” of that suit was not a state secret, the Court considered *and*  
4 *accepted* the “exceptionally well documented” state secrets privilege assertion at the outset, and as  
5 a result concluded that the plaintiffs’ inability to establish standing without the privileged  
6 information required dismissal. *Al-Haramain*, 507 F.3d at 1203, 1205.

7 Moreover, these public sources do not *declassify* the specific operational details of the CIA  
8 program that would be necessary to litigate this case, or otherwise negate Gen. Hayden’s claim that  
9 those details constitute state secrets. It is simply not true, as plaintiffs imply, that the existence of  
10 documents publicly discussing the program, and in some cases advancing specific allegations  
11 concerning these plaintiffs, is sufficient to defeat the Government’s claim that the case concerns state  
12 secrets. Remarkably, plaintiffs go so far as to suggest, relying on *Hepting*, 439 F. Supp. 2d at 990,  
13 that a matter cannot be a state secret if a public document with “substantial indicia of reliability”  
14 discusses that topic. Pls. Opp. at 25. But no case they cite -- not even *Hepting* -- supports that  
15 incorrect statement of the law. *See Hepting*, 439 F. Supp. 2d at 990 (“[S]imply because such  
16 statements have been publicly made does not mean that the truth of those statements is a matter of  
17 general public knowledge and that verification of the statement is harmless.”); *El-Masri*, 479 F.3d  
18 at 308-09 (“[A]dvancing a case in the court of public opinion, against the United States at large, is  
19 an undertaking quite different from prevailing against specific defendants in a court of law.”).<sup>4</sup>

20 On the contrary, it is well-established that information regarding classified intelligence  
21 activities remains classified unless and until that specific information is declassified by the United  
22

---

23 <sup>4</sup> Plaintiffs misread *Hepting*. That case did not say that speculation about classified activities  
24 contained in documents with “substantial indicia of reliability” -- however that phrase is defined --  
25 opens those activities for examination in a public trial. Rather, *Hepting* used that language in a  
26 limiting fashion; it stated that only documents bearing a sufficient imprimatur of *official* disclosure  
27 could render the matter no longer a secret. *See Hepting*, 439 F. Supp. 2d at 990 (“Accordingly, in  
28 determining whether a factual statement is a secret, the court considers only public admissions or  
denials by the government, AT&T and other telecommunications companies, which are the parties  
indisputably situated to disclose whether and to what extent the alleged programs exist.”). The Court  
thus *refused* to consider the declaration of a former AT&T employee who alleged first-hand  
knowledge of particular information. *Id.*

1 States. *See Knopf v. Colby*, 509 F.2d 1362, 1370 (4th Cir. 1975) (classified information is not  
2 considered to be “in the public domain *unless there had been official disclosure of it*” (emphasis  
3 added)). Official disclosure requires far more than public speculation; for an official disclosure to  
4 be found, (1) the information alleged to be in the public domain must be as specific as the  
5 information that has been officially disclosed; (2) the disputed information must exactly match the  
6 information publicly disclosed, *e.g.*, it must involve the same time period or same operation; and (3)  
7 the information must have been publicly released through “an official and documented disclosure.”  
8 *Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990) (citing *Afshar v. Dep’t of State*, 702 F.2d  
9 1125, 1133 (D.C. Cir. 1983)). “An agency’s official acknowledgment of information by prior  
10 disclosure . . . cannot be based on mere public speculation, *no matter how widespread.*” *Wolf v. CIA*,  
11 473 F.3d 370, 378 (D.C. Cir. 2007) (citing *Afshar*, 702 F.2d at 1130) (emphasis added).<sup>5</sup>

12 Plaintiffs argue that these official disclosure cases are “inapposite[.]” because they arose in  
13 the context of Freedom of Information Act (“FOIA”) litigation, or in cases involving prepublication  
14 review of manuscripts written by former intelligence officers. *See* Pls. Opp. at 26 n.12. This  
15 contention could not be more wrong; these cases precisely support the Government’s argument and  
16 are *essential* to the state secrets privilege analysis because they demonstrate that the information  
17 necessary to litigate this case has not been officially disclosed and therefore remains properly  
18 classified. Plaintiffs’ argument that the official disclosure doctrine “do[es] not empower the  
19 government to intervene in cases and remove what is already in the public domain from the court’s  
20 consideration” misses the point entirely. *Id.* The Government has not attempted to prevent plaintiffs  
21 from making the allegations in their Complaint. But, as noted below, it can -- and must -- intervene  
22 to prevent the parties from *litigating* the veracity of those allegations when such litigation would  
23 divulge state secrets. That litigation process would transform speculation into official findings of  
24

---

25  
26 <sup>5</sup> Similarly, media reports and reports of other governments cannot declassify information  
27 that belongs to the United States. *See, e.g., El-Masri*, 479 F.3d at 311 n.5 (declining to endorse  
28 plaintiff’s theory that information is ineligible for protection under the state secrets privilege simply  
14 (N.D. Ill. 2006) (rejecting contention that media reports about NSA surveillance program render  
state secrets privilege inapplicable).

1 fact, and would necessarily expose aspects of the Government's clandestine intelligence operations  
2 that should not be exposed. *See El-Masri*, 479 F.3d at 308 ("The controlling inquiry is not whether  
3 the general subject matter of an action can be described without resort to state secrets. Rather, we  
4 must ascertain whether an action can be *litigated* without threatening the disclosure of such state  
5 secrets."). Put differently, "what is in the public domain" is not the *truth* of the matter asserted, but  
6 merely the *assertions* themselves. The distinction between the two, which plaintiffs ignore, is the  
7 heart of this case.

8 Finally, in their attempt to argue that the "very subject matter" of the case is not a state secret,  
9 plaintiffs also point to statements about the CIA program made by United States officials, including  
10 the President, Gen. Hayden, Secretary of State Rice, and other former CIA officials. *See* Pls. Opp.  
11 at 29-33. Based on these statements, plaintiffs compile a list of purportedly "crucial details" about  
12 the program that, they claim, may be derived from official sources. *See* Pls. Opp. at 33.<sup>6</sup> In fact,  
13 those purportedly "crucial" details, the public discussion of which was previously addressed in Gen.  
14 Hayden's Public Declaration, *see* ¶¶ 12-19, fall far short of the still-classified details that actually  
15 are needed to litigate this case to completion. Plaintiffs' list includes only the most general facts  
16 about the program, such as its existence, the fact that the CIA sometimes cooperates with other  
17 countries in carrying out such activities, the general numbers of individuals detained as part of the  
18 program, an acknowledgment that the CIA abides by the law in conducting the program and that its  
19 interrogators are adequately trained, and the specific identities of some individuals detained in the  
20 program that the United States intends to bring to trial (none of whom are plaintiffs in this action).  
21 The list does *not* include the specific details over which Gen. Hayden has asserted the state secrets  
22 privilege -- and that, as described *infra*, are necessary to litigate this case -- namely, certain  
23 information that may tend to confirm or deny cooperation with any specific private entity or foreign

24  
25 <sup>6</sup> Plaintiffs imply that comments made by then-former CIA Director George Tenet on a  
26 televised interview, and in Congressional hearings, constitute an official disclosure of information.  
27 *See* Pls. Opp. at 31, 33 n.15. That is incorrect. *See Frugone v. CIA*, 169 F.3d 772, 774 (D.C. Cir.  
28 1999) (stating that "we do not deem 'official' a disclosure made by someone other than the agency  
from which the information is being sought," and collecting authorities for, *inter alia*, the  
propositions that "information reported in book by former CIA official" and "information . . . already  
reported in congressional committee report" has not been officially disclosed).

1 government concerning clandestine intelligence activities; specific information about the CIA's  
2 terrorist detention and interrogation program, such as the locations where detainees are held, the  
3 interrogation methods used in the program, and the identities of any individuals detained by the CIA  
4 that have not already been publicly acknowledged; and certain other information concerning CIA  
5 clandestine intelligence activities that would tend to reveal any intelligence activities, sources, or  
6 methods. *See* Public Hayden Decl. ¶ 20<sup>7</sup>; *See also El-Masri*, 479 F.3d at 311 (“[T]he public  
7 information does not include the facts that are central to litigating his action. Rather, those central  
8 facts -- the CIA means and methods that form the subject matter of El-Masri’s claim -- remain state  
9 secrets.” (footnote omitted)).

10 **II. PLEADING-STAGE RESOLUTION IS APPROPRIATE BECAUSE THE FACTS CENTRAL TO**  
11 **THE LITIGATION ARE SUBJECT TO THE STATE SECRETS PRIVILEGE**

12 If this Court accepts the United States’ assertion of the state secrets privilege, as it should,  
13 it “must next resolve how the litigation should proceed in light of the government’s successful  
14 privilege claim.” *Al-Haramain*, 507 F.3d at 1204 (citing *El-Masri*, 479 F.3d at 304). Plaintiffs  
15 erroneously contend that “*only where* ‘the very subject matter’ of a suit is a state secret . . . is  
16 dismissal at the pleading stage permissible.” Pls. Opp. at 2 (emphasis added). If “the very subject  
17 matter” of the case is not a state secret, plaintiffs argue, further proceedings are required before a  
18 state secrets privilege assertion may be considered, and the privilege may only be asserted “on an  
19 item-by-item basis during discovery.” *Id.* at 27, 36. This is not the law.

20 Courts have long recognized that pleading-stage resolution of a suit is appropriate and  
21 necessary where the state secrets privilege renders it impossible for the case to be litigated to  
22 completion. This inability to fully litigate the case may stem from the fact that the “very subject  
23 matter” of a suit is a state secret. But it also may owe to any other circumstance where the privilege  
24 prevents the parties from litigating the merits of their claims by, for example, depriving them of the  
25 ability to establish, or rebut, a *prima facie* case. The Court of Appeals recently reaffirmed this exact  
26 point:

---

27 <sup>7</sup> Gen. Hayden’s classified *in camera*, *ex parte* declaration contains additional information,  
28 which cannot be discussed on the public record, that is essential for this case to proceed. *See, e.g.*,  
Classified Hayden Decl. ¶¶ 3-9, 21-31, 51-53, 71-73.

1 To be sure, a bright line does not always separate the subject matter of the lawsuit  
2 from the information necessary to establish a prima facie case. In some cases, there  
3 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.*

4 *Al-Haramain*, 507 F.3d at 1201 (emphasis added)). See also *Tenenbaum*, 372 F.3d at 777 (affirming  
5 dismissal because “Defendants cannot defend their conduct . . . without revealing the privileged  
6 information”); *Kasza*, 133 F.3d at 1166 (“If, after further proceedings, the plaintiff cannot prove the  
7 *prima facie* elements of her claim with nonprivileged evidence, then the court may dismiss her claim  
8 . . . . Alternatively, ‘if the privilege deprives the *defendant* of information that would otherwise give  
9 the defendant a valid defense to the claim, then the court may grant summary judgment to the  
10 defendant.’” (quoting *Bareford*, 973 F.2d at 1141)); *Black*, 62 F.3d at 1118 (case properly dismissed  
11 because “[t]he protected information precludes Black from establishing a *prima facie* Bivens claim  
12 and . . . continued litigation carries with it the risk that privileged information might be disclosed”);  
13 *Zuckerbraun*, 935 F.2d at 547 (pleading-stage dismissal appropriate because the dispositive legal  
14 questions “cannot be resolved or even put in dispute without access to” information that is “in its  
15 entirety classified and subject to the claim of privilege”).

16 Plaintiffs’ contrary contention -- that dismissal at the pleading stage is appropriate only where  
17 the “very subject matter” is a state secret -- is based on a plainly untenable reading of *Kasza*.  
18 Plaintiffs contend that case’s passing use of the phrase “after further proceedings” affirmatively  
19 *forbids* a court from examining at the outset whether the information subject to the state secrets  
20 privilege would inevitably prevent the parties from proving their claims or defenses. See Pls. Opp.  
21 at 37 (emphasizing phrase). Instead, plaintiffs assert that courts must charge ahead until some future,  
22 as-yet-unidentified point at which it would become appropriate to reconsider the United States’  
23 privilege assertion. Plaintiffs have not cited -- and cannot cite -- a single case where a court has  
24 deferred consideration of a state secrets privilege in this manner.<sup>8</sup> Indeed, that approach would be  
25

26 <sup>8</sup> To be sure, plaintiffs do cite some of the many cases in which the state secrets privilege is  
27 asserted without seeking dismissal of the action. See Pls. Opp. at 23 & n.8. But, as explained in  
28 text, this is not such a case; without the information subject to the privilege, the parties cannot  
litigate the essential elements of their claims and defenses. Indeed, if anything, those cases undercut  
plaintiffs’ argument because they demonstrate that the United States does not view the state secrets

1 at odds with the Ninth Circuit’s most recent state secrets opinion. *See Al-Haramain*, 507 F.3d at  
2 1203 (accepting privilege assertion even though the “very subject matter” of the suit was not a state  
3 secret).

4 Crucially, plaintiffs do not explain how their claims could be litigated to completion without  
5 privileged information. At a minimum, plaintiffs must prove that “agents of the United States,  
6 Morocco, and Egypt” subjected them to “forced disappearance” and “torture and other cruel,  
7 inhuman, or degrading treatment.” First Amended Compl. ¶¶ 253, 260-61. Plaintiffs also must  
8 prove defendant Jeppesen’s purported connection to those activities. *See id.* ¶¶ 236-52, 254-59, 262-  
9 66. These allegations cannot be proven without probing the very issues covered by the Director’s  
10 state secrets privilege assertion, such as: whether these specific plaintiffs were detained as part of  
11 the CIA’s terrorist detention and interrogation program; whether the CIA cooperated with, *inter alia*,  
12 Morocco and Egypt in conducting that program; where the CIA detained individuals as part of this  
13 program; whether plaintiffs were subjected to specific detention practices and methods of  
14 interrogation; and whether defendant or any other private organization assisted the CIA in  
15 conducting the program. Disclosure of this information reasonably could be expected to harm  
16 national security. *See* Public Hayden Decl. ¶¶ 21-25; Classified Hayden Decl. ¶¶ 32-50, 54-70, 74.

17 Instead of explaining how the case could be litigated to completion without this privileged  
18 information, plaintiffs simply assert that it would be too “hypothetical” at this point to determine  
19 what information is necessary to litigate this lawsuit. *See* Pls. Opp. at 37-38 & n.19.<sup>9</sup> That is just  
20

---

21 privilege as an “immunity” doctrine, *contra* Pls. Opp. at 19-23, but instead carefully evaluates in  
22 each case whether the privilege requires the government to also seek dismissal of the litigation.

23 <sup>9</sup> Plaintiffs also contend, citing *Hepting*, that discovery is required before the Court can  
24 determine “the effect of the privilege” in this case. Pls. Opp. at 42 & n.23. The holding of that case  
25 is inapposite to allegations like those in the present case, as *Hepting* itself recognized. In *Hepting*,  
26 the court found that the case “focuses only on whether AT&T intercepted and disclosed  
27 communications or communication records to the government,” *Hepting*, 439 F. Supp. 2d at 994,  
28 and permitted limited discovery concerning those issues. The court specifically distinguished those  
facts from *El-Masri*, where -- as in this case -- “the whole object of the suit was to reveal classified  
details regarding ‘the means and methods the foreign intelligence services of this and other countries  
used to carry out the program.’” *Id.* (citation omitted). No comparable, limited discovery could be  
devised in such circumstances. *See id.* at 985 (quoting *El-Masri*’s holding that “special discovery

1 wrong. To be sure, plaintiffs have no knowledge of the full extent of the information covered by the  
2 privilege, and thus cannot truly know whether the United States' contentions about the suit are  
3 hypothetical. But Gen. Hayden's *public* assertion of the state secrets privilege, standing alone, shows  
4 that plaintiffs' contention is incorrect; there is no hypothesizing required to see that the information  
5 covered by the privilege goes to the heart of plaintiffs' claims. *Compare* Public Hayden Decl. ¶ 20  
6 (describing privileged information) *with* First Amended Compl. ¶¶ 253, 260-61 (setting forth  
7 plaintiffs' core allegations).<sup>10</sup>

8         The privilege, therefore, renders the parties unable to litigate this case to completion. First,  
9 and notwithstanding the large volume of documents that plaintiffs presented to this Court in  
10 opposition to the United States' dispositive motion, it is clear that plaintiffs cannot make out a *prima*  
11 *facie* case in support of their claims. This exact issue was addressed by the Fifth Circuit in *Bareford*,  
12 973 F.2d at 1141, where the plaintiffs presented some "2,500 pages of affidavits and documents, all  
13 assertedly in the public domain," including "an affidavit of the former captain of the U.S.S. Stark,  
14 two affidavits from former employees of General Dynamics, and information contained in  
15 Congressional reports and other published sources." Despite these documents, the Court properly  
16 concluded that the state secrets privilege prevented the plaintiffs from making out a *prima facie* case,  
17 which required more than "substantial evidence from which a judge or jury might find problems, or  
18 even wrongdoing, by" the defendant; instead, a *prima facie* case required "proof of what the Phalanx  
19 system was intended to do and the ways in which it fails to accomplish these goals." *Id.* at 1142.  
20 Because the facts plaintiffs needed to *prove* were removed from the case by the state secrets  
21 privilege, plaintiffs could not make out a *prima facie* case, and the litigation could not proceed. *Id.*

22         Moreover, even if plaintiffs' evidence might suffice to establish a *prima facie* claim, that  
23

---

24 procedures would have been 'plainly ineffective where . . . the entire aim of the suit [was] to prove  
25 the existence of state secrets'').

26         <sup>10</sup> *Kasza*, in fact, strongly undercuts plaintiffs' claim that dismissal at the pleading stage is  
27 necessarily hypothetical unless it can be determined that "the very subject matter" of the case is a  
28 state secret. In that case, the Ninth Circuit unequivocally held, at the outset, that the Government's  
assertion of the state secrets privilege "bar[s] [plaintiff] from establishing her *prima facie* case on  
any of her eleven claims." *Kasza*, 133 F.3d at 1170.

1 does not mean that this case can actually be *litigated* to completion. Once the privilege is properly  
2 invoked, no party to the litigation may use the information covered by that privilege assertion. It is  
3 clear now that the privilege would prevent defendant from meaningfully challenging plaintiffs'  
4 allegations. For example, defendant would be forbidden to discuss whether or not it cooperated with  
5 the CIA as alleged in the Complaint, and would be unable to identify -- let alone call -- witnesses  
6 with firsthand knowledge of the program's operations to contest or rebut plaintiffs' allegations. *See*  
7 *El-Masri*, 479 F.3d at 310 (defending against plaintiff's claims "would require the production of  
8 witnesses whose identities are confidential and evidence the very existence of which is a state  
9 secret"). This inability to mount a defense, in and of itself, is a sufficient basis for disposing of the  
10 case. *See, e.g., Tenenbaum*, 372 F.3d at 777 (affirming pleading-stage dismissal of suit because  
11 "Defendants cannot defend their conduct . . . without revealing the privileged information"); *see also*  
12 *Kasza*, 133 F.3d at 1166 ("[I]f the privilege deprives the defendant of information that would  
13 otherwise give the defendant a valid defense to the claim, then the court may grant summary  
14 judgment to the defendant." (quoting *Bareford*, 973 F.2d at 1141)).

15 At bottom -- and regardless of whether the "very subject matter" of this case can be classified  
16 as a state secret, or whether the parties can meet the threshold evidentiary standards for establishing  
17 a *prima facie* case or defense -- the relevant question is whether this case can be litigated to  
18 completion, and it is apparent *now* that it cannot. *See, e.g., Bareford*, 973 F.2d at 1143 ("Even if we  
19 found that *Bareford* had made out a *prima facie* case with unprivileged information, we conclude that  
20 the state secret doctrine would nonetheless bar the plaintiffs' action because any further attempt by  
21 the plaintiffs to establish a *prima facie* case would threaten disclosure of important state secrets."  
22 (citing *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268, 281 (4th Cir. 1980) (en banc)). In this  
23 regard, the case is identical to *El-Masri*, where the court correctly focused on the crucial distinction  
24 between offering material in support of one's claims, and actually *proving* the truth of such  
25 allegations.<sup>11</sup>

---

26  
27 <sup>11</sup> *Al-Haramain* is not to the contrary. Although that case criticized the Fourth Circuit's  
28 analysis of when "the very subject matter" of a case constitutes a state secret, it never took issue with  
*El-Masri's* holding that the parties could not litigate their claims and defenses without privileged



1 Notwithstanding El-Masri's ability to tell his version of the events surrounding his alleged  
2 detention and interrogation, the Fourth Circuit found that he could not be permitted to litigate those  
3 assertions because "advancing a case in the court of public opinion, against the United States at  
4 large, is an undertaking quite different from prevailing against specific defendants in a court of law."  
5 *El-Masri*, 479 F.3d at 308-09. To prevail, that plaintiff "would be obliged to produce admissible  
6 evidence not only that he was detained and interrogated, but that the defendants were involved in his  
7 detention and interrogation in a manner that renders them personally liable to him." *Id.* at 309. That  
8 showing, in turn, "could be made only with evidence that exposes how the CIA organizes, staffs, and  
9 supervises its most sensitive intelligence operations." *Id.* Moreover, as with defendant Jeppesen,  
10 the Court in *El-Masri* noted that "[w]ith respect to the defendant corporations and their unnamed  
11 employees, El-Masri would have to demonstrate the existence and details of CIA espionage  
12 contracts, an endeavor practically indistinguishable from that categorically barred by *Totten* and  
13 *Tenet v. Doe*." *Id.* Summing up, the Court noted that "[e]ven marshalling the evidence necessary  
14 to make the requisite showings would implicate privileged state secrets, because El-Masri would  
15 need to rely on witnesses whose identities, and evidence the very existence of which, must remain  
16 confidential in the interest of national security." *Id.*; *see also id.* at 311 (noting that in *Sterling*, 416  
17 F.3d at 341, although plaintiff's "allegations could be stated with no detrimental effect on national  
18 security," the case could not proceed "because a judicial resolution of the matter would have required  
19 disclosure of how the CIA makes sensitive personnel decisions, and would have involved the  
20 production of witnesses whose very participation in a court proceeding would risk exposing  
21 privileged information").

22 The same analysis applies in this case. For plaintiffs to succeed on their claims, they would  
23 have to *prove* that they were, in fact, part of the CIA program; that the governments of, *inter alia*,  
24 Morocco and Egypt were involved in their detention and interrogation; that they were mistreated by  
25 agents of those countries and the United States; and that defendant Jeppesen was connected to these

26 \_\_\_\_\_  
27 information. The Ninth Circuit never reached that issue because, after upholding the government's  
28 privilege assertion, it found that the plaintiff was unable to establish the threshold showing required  
for Article III standing, and thus had no reason to examine whether the parties could ultimately prove  
the elements of their claims and defenses. *See Al-Haramain*, 507 F.3d at 1205.

1 activities. Attempting to prove such allegations would inevitably expose state secrets covered by  
 2 the Director's privilege assertion. *See* Public Hayden Decl. ¶¶ 20-26; Classified Hayden Decl. ¶¶  
 3 75-87, 94; *see also Farnsworth Cannon, Inc.*, 635 F.2d at 281 (“In an attempt to make out a prima  
 4 facie case during an actual trial, the plaintiff and its lawyers would have every incentive to probe as  
 5 close to the core secrets as the trial judge would permit. Such probing in open court would inevitably  
 6 be revealing. It is evident that any attempt on the part of the plaintiff to establish a prima facie case  
 7 would so threaten disclosure of state secrets that the overriding interest of the United States and the  
 8 preservation of its state secrets precludes any further attempt to pursue this litigation.”).

9 Put simply, this Court must take the long view. Where, as here, the Court can determine at  
 10 the outset that the case cannot proceed to completion, the Court should not postpone the inevitable,  
 11 and the litigation should proceed no further. *See Sterling*, 416 F.3d at 348 (“[W]here ‘the very  
 12 question on which a case turns is itself a state secret, or the circumstances make clear that sensitive  
 13 military secrets will be so central to the subject matter of the litigation that any attempt to proceed  
 14 will threaten disclosure of the privileged matters,’ dismissal is the proper remedy.” (quoting *DTM*  
 15 *Research, LLC v. AT & T Corp.*, 245 F.3d 327, 334 (4th Cir.2001)). This Court should not  
 16 “jeopardize the security which the privilege is meant to protect,” *Reynolds*, 345 U.S. at 10, by  
 17 continuing with litigation in which plaintiffs can never prevail. “Courts are not required to play with  
 18 fire and chance further disclosure -- inadvertent, mistaken, or even intentional -- that would defeat  
 19 the very purpose for which the privilege exists.” *Sterling*, 416 F.3d at 344.<sup>12</sup>

20 **III. THE PURPORTEDLY “ROBUST ALTERNATIVES” SUGGESTED BY PLAINTIFFS ARE**  
 21 **INSUFFICIENT TO SAFEGUARD THE PRIVILEGED INFORMATION AND ARE**  
 22 **IMPRACTICAL**

23 In lieu of dismissing the suit, plaintiffs suggest that this Court “instead require the  
 24 government to assert the privilege on an item-by-item basis during discovery.” Pls. Opp. at 36. It

---

25 <sup>12</sup> Plaintiffs' arguments concerning the statutory privileges under National Security Act suffer  
 26 from the same flaws as their state secrets privilege arguments. The United States does not contend  
 27 that either privilege constitutes an “immunity” doctrine. *Contra* Pls. Opp. at 19-23, 50-51. Instead,  
 28 the United States contends that, like the state secrets privilege, this statutory privilege provides a  
 basis for removing specific information from this case. It is the effect of removing that information  
 -- *i.e.*, the parties' inability to litigate the suit -- that prevents the litigation from proceeding, and not  
 the assertion of the privilege *per se*.

1 is not clear exactly what more plaintiffs wish Gen. Hayden to do; his declarations *do* demonstrate  
2 with specificity why disclosure of the specific information over which he asserted the privilege  
3 reasonably could be expected to harm national security. In a case like this, the avowed purpose of  
4 which is to probe the details of alleged intelligence operations, nothing more is required. As the  
5 Court of Appeals recognized, once the responsible Department head “has properly invoked the claim  
6 of privilege and adequately identified categories of privileged information,” that officer “cannot  
7 reasonably be expected personally to explain why each item of information arguably responsive to  
8 a discovery request affects the national interest.” *Kasza*, 133 F.3d at 1169.

9 Plaintiffs’ proposal would turn the Director of the CIA and the Director of National  
10 Intelligence (who bear statutory responsibilities to safeguard information regarding clandestine  
11 intelligence activities, *see* Public Hayden Decl. ¶¶ 5-6) into special masters of this litigation. These  
12 individuals would have to personally review each and every pleading submitted, every discovery  
13 request propounded (along with the answers thereto), and every deposition question asked (and the  
14 responses provided) to ensure that no classified information is improperly disclosed. And every time  
15 a privilege assertion is deemed necessary -- as it often would be, given the nature of the allegations  
16 in this case -- the DCIA and/or DNI would be required to assert the state secrets privilege over each  
17 item. As this Court has seen, that process requires personal consideration of the matter by the  
18 department head, a formal assertion of the privilege, and, inevitably, briefing from the parties  
19 followed by a decision from this Court. The burden that such a regime would place upon this Court  
20 and the Executive Branch cannot be overstated, and is inconsistent with the numerous cases in which  
21 courts have accepted assertions of the state secrets privilege at the outset of the litigation. *See, e.g.*,  
22 *supra* at 1-2 (collecting cases). Moreover, this process itself could harm national security, because  
23 the mere act of asserting the state secrets privilege over some specific information sought in  
24 discovery, and not other information, could reveal information about whether and how the United  
25 States conducts intelligence-gathering activities. *Cf. Hunt v. CIA*, 981 F.2d 1116 (9th Cir. 1992)  
26 (affirming “Glomar” doctrine, under which the CIA can refuse to confirm or deny an allegation when  
27 such confirmation or denial itself would reveal privileged information).

28 Alternatively, plaintiffs suggest some sort of *in camera* proceeding or other process involving

1 a special master. *See* Pls. Opp. at 49-50. The Fourth Circuit correctly, and summarily, disposed of  
2 such a contention in *El-Masri*, noting that the argument was “expressly foreclosed by *Reynolds*, the  
3 Supreme Court decision that controls this entire field of inquiry.” *El-Masri*, 479 F.3d at 311.  
4 “*Reynolds* plainly held that when ‘the occasion for the privilege is appropriate, . . . the court should  
5 not jeopardize the security which the privilege is meant to protect by insisting upon an examination  
6 of the evidence, *even by the judge alone, in chambers.*’” *Id.* (emphasis added and citation omitted);  
7 *see also Zuckerbraun*, 935 F.2d at 548 (rejecting argument that discovery and *in camera* proceedings  
8 were required in lieu of dismissal).<sup>13</sup> *A fortiori*, then, this Court should not order that plaintiffs,  
9 defendant, or some third party be given access to the information. *Cf. Farnsworth Cannon, Inc.*, 635  
10 F.2d at 281 (noting counsel’s “incentive to probe as close to the core secrets as the trial judge would  
11 permit” in order to make out a prima facie case).

12 Finally, it must be noted that the information over which the United States has asserted the  
13 state secrets privilege -- much of which cannot be described on the public record -- permeates every  
14 aspect of this case. Any further steps in litigation, including responsive pleadings or even limited  
15 discovery, would risk disclosing that which, in the interests of national security, cannot be disclosed.  
16 *See* Public Hayden Decl. ¶ 26 (“I have determined that the highly classified information over which  
17 I am asserting these privileges is central to the allegations and issues in this case such that any further  
18 litigation of this case would pose an unacceptable risk of disclosure of information that the nation’s  
19 security requires not be disclosed.”); Classified Hayden Decl. ¶¶ 75-87, 94. Because, as the Court  
20 can plainly see from those declarations, “no amount of effort and care on the part of the court and  
21 the parties will safeguard” this material, *Fitzgerald v. Penthouse Intern., Ltd.*, 776 F.2d 1236, 1243  
22 (4th Cir. 1985), the case must be dismissed at the outset. *See also Black*, 62 F.3d at 1119 (“The  
23

24 <sup>13</sup> Similarly, plaintiffs call for this Court to exercise creativity in allowing the parties to  
25 litigate around the government’s assertion of the state secrets privilege. *See* Pls. Opp. at 48. This  
26 suggestion is inconsistent with *Al-Haramain*. There, the district court upheld an assertion of the  
27 state secrets privilege over a document that the plaintiffs had inadvertently seen, but allowed the  
28 plaintiffs to proceed by attesting to their knowledge of its contents (without requiring the document’s  
actual production). The Court of Appeals reversed, finding the approach “contrary to established  
Supreme Court precedent,” which requires the privileged information to be completely removed  
from the case. *Al-Haramain*, 507 F.3d at 1204.

1 information covered by the privilege is at the core of Black’s claims, and we are satisfied that the  
2 litigation cannot be tailored to accommodate the loss of the privileged information.”).

3 **CONCLUSION**

4 For all the foregoing reasons, the United States respectfully requests that this Court grant  
5 its Motion and dismiss this action without further proceedings.

6  
7 Dated: January 18, 2008

Respectfully submitted,  
JEFFREY S. BUCHOLTZ  
Acting Assistant Attorney General  
JOSEPH P. RUSSONIELLO  
United States Attorney  
CARL J. NICHOLS  
Deputy Assistant Attorney General  
JOSEPH H. HUNT  
Director, Federal Programs Branch  
VINCENT M. GARVEY  
Deputy Director, Federal Programs Branch  
/s/ Michael P. Abate  
MICHAEL P. ABATE  
(IL. Bar No. 6285597)  
Trial Attorney  
michael.abate@usdoj.gov  
U.S. Department of Justice  
Civil Division, Federal Programs Branch  
20 Massachusetts Avenue, NW  
Washington, DC 20001  
Phone: (202) 616-8209  
Fax: (202) 616-8470

*Attorneys for the United States of America*

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing REPLY IN SUPPORT OF MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT will be served by means of the Court's CM/ECF system, which will send notifications of such filing to the following:

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

American Civil Liberties Union  
Jameel Jaffer  
Steven R Shapiro  
Steven M. Watt  
Benjamin Elihu Wizner  
125 Broad Street  
18th Floor  
New York, NY 10004

International Human Rights Clinic  
Washington Square Legal Services, Inc  
Margaret L. Satterthwaite  
NYU School of Law  
245 Sullivan Street  
New York, NY 10012

Joseph Scott Klapach  
Attorney at Law  
355 S. Grand Ave., #3500  
Los Angeles, CA 90071-1560

Munger Tolles & Olson  
Daniel Paul Collins  
Henry Weissman  
355 So Grand Ave Ste 3500  
Los Angeles, CA 90071-1560

National Litigation Project-Allard K. Lowenstein  
International Human Rights Clinic  
Hope R Metcalf  
Yale Law School  
127 Wall Street  
New Haven, CT 06520

Reprieve  
Zachary Philip Katznelson  
Clive Stafford Smith  
PO Box 52742  
London, England, UK EC4P 4WS

/s/ Michael P. Abate