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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 BISHAR AL-RAWI
17 Plaintiffs,
18 v.
19
20 JEPPESEN DATAPLAN, INC.
21
22 Defendant.

Case No. C-07-02798-JW

NOTICE OF MOTION AND MOTION TO
DISMISS, OR, IN THE ALTERNATIVE,
FOR SUMMARY JUDGMENT BY
THE UNITED STATES OF AMERICA

Judge: Hon. James Ware
Hearing Date: February 4, 2008
Hearing Time: 9:00 AM
Courtroom: 8, 4th Floor

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26
27 Notice of Motion and Motion to Dismiss or,
in the Alternative, for Summary Judgment
by the United States of America
28 Case No. C-07-02798-JW

1 PLEASE TAKE NOTICE that, on February 4, 2008, before the Honorable James Ware,
2 intervenor United States of America will move, and hereby does move, to dismiss this action
3 pursuant to Rule 12 of the Federal Rules of Civil Procedure or, in the alternative, for summary
4 judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. As explained in the United
5 States' memorandum in support of this Motion, the unclassified declaration invoking the military
6 and state secrets privilege and a statutory privilege under the National Security Act, and the classified
7 declaration submitted *in camera, ex parte*, the United States' invocation of these privileges requires
8 dismissal of this action or, in the alternative, summary judgment against plaintiffs' claims.

9 Respectfully Submitted,

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24 Dated: October 19, 2007

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37 Defendant.

Case No. C-07-02798-JW

MEMORANDUM OF THE UNITED
STATES IN SUPPORT OF MOTION TO
DISMISS OR, IN THE ALTERNATIVE,
FOR SUMMARY JUDGMENT

Hon. James Ware, District Judge

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1 **INTRODUCTION**

2 This suit, though filed against a private defendant, Jeppesen Dataplan, Inc. (“Jeppesen”),
3 attempts to probe the most sensitive details of intelligence operations allegedly conducted by the
4 Central Intelligence Agency (“CIA”). Plaintiffs allege that agents of the United States and particular
5 foreign governments, with the assistance of defendant Jeppesen, subjected plaintiffs to “forced
6 disappearance, torture, and inhumane treatment” in violation of international law, as part of the
7 CIA’s “so-called ‘extraordinary rendition’ program.” First Amended Compl. ¶¶ 1-2. Although the
8 President and other officials have acknowledged that the CIA operates a terrorist detention and
9 interrogation program (“program”), these officials have specifically refused to confirm or deny any
10 operational details concerning that program--including whether any private entities or other countries
11 assisted the CIA in conducting the program; the dates and locations of any detentions and
12 interrogations; the methods of interrogation employed in the program; and the names of any
13 individuals detained and interrogated by the CIA (other than fifteen individuals whose identities have
14 been divulged so that they can be brought to trial). This information remains properly classified as
15 sources and methods of intelligence gathering.

16 For the reasons set forth in both his public declaration and a classified declaration which has
17 been lodged for the Court’s *in camera, ex parte* review, the Director of the Central Intelligence
18 Agency (“DCIA”), Gen. Michael V. Hayden, USAF, has determined that allowing plaintiffs’ claims
19 to proceed would risk the disclosure of highly classified information concerning the alleged
20 “intelligence activities, sources, and methods” of the CIA. Formal Claim of State Secrets and
21 Statutory Privileges By Gen. Michael V. Hayden, USAF, Director, Central Intelligence Agency
22 (“Public Hayden Decl.”) ¶ 3. Because making public such information “reasonably could be
23 expected to cause serious--and, in some instances, exceptionally grave--damage to the national
24 security of the United States,” Gen. Hayden has asserted the state secrets privilege and a statutory
25 privilege under the National Security Act to protect against its disclosure. *Id.* ¶¶ 3, 11.

26 In particular, Gen. Hayden’s privilege assertions, discussed in greater detail below, cover the

1 classified operational details of the CIA terrorist detention and interrogation program, including:
2 whether the CIA cooperated with particular foreign governments or private entities (like Jeppesen)
3 in carrying out the program; the locations of detentions and interrogations conducted in that program;
4 the methods of interrogation employed by the CIA; and the identities of any individuals detained in
5 the program that have not already been acknowledged by the President or the CIA. *See* Public
6 Hayden Decl. ¶ 20. There can be no dispute that Gen. Hayden has properly invoked these privileges.
7 And, as set forth below, there should be no doubt that, affording his judgment the “utmost
8 deference,” Gen. Hayden has demonstrated that disclosure of this information reasonably could be
9 expected to cause serious--and, in some instances, exceptionally grave--damage to national security.

10 Under well-established precedent, if the Court upholds Gen. Hayden’s privilege assertions,
11 the information covered by the privileges must be “completely removed from the case.” *Kasza v.*
12 *Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998). Where, as here, that information is central to the
13 case, and where it is apparent now that plaintiffs’ claims cannot be litigated absent this information,
14 dismissal is required. *See id.* at 1166-67 (recognizing a class of cases that must be dismissed because
15 their “very subject matter” is a state secret). Proceeding with this case would require plaintiffs to
16 prove that they were detained and interrogated by the CIA; that they were subjected to the treatment
17 they allege; and that the CIA cooperated with defendant and particular foreign governments in
18 carrying out plaintiffs’ detention and interrogation. Because this is the very information over which
19 Gen. Hayden has asserted the privilege, “the very subject of this litigation is itself a state secret,” and
20 “no amount of effort and care on the part of the court and the parties will safeguard privileged
21 material.” *Fitzgerald v. Penthouse Intern., Ltd.*, 776 F.2d 1236, 1243-44 (4th Cir. 1985).
22 Additionally, because the absence of this information deprives the plaintiffs of the ability to make
23 out a *prima facie* case in support of their claims, and similarly deprives the defendant of information
24 necessary to defend against these claims, the state secrets privilege would require dismissal of this
25 suit even if its “very subject matter” were not a state secret. *See Kasza*, 133 F.3d at 1166.

26 The United States does not lightly invoke the state secrets or National Security Act privileges,

1 nor does it lightly seek dismissal of this action. To the contrary, we recognize that the result of these
2 privilege assertions is to deprive plaintiffs of the information necessary to litigate their claims, and
3 that this outcome is a “harsh sanction.” *Bareford v. General Dynamics Corp.*, 973 F.2d 1138, 1144
4 (5th Cir. 1992). However, as the Ninth Circuit has noted, “the results are harsh in either direction
5 and the state secret doctrine finds the greater public good--ultimately the less harsh remedy--to be
6 dismissal.” *Kasza*, 133 F.3d at 1167 (quoting *Bareford*, 973 F.2d at 1144); *see also Fitzgerald*, 776
7 F.2d at 1238 n.3 (“When the state secrets privilege is validly asserted, the result is unfairness to
8 individual litigants--through the loss of important evidence or dismissal of a case--in order to protect
9 a greater public value.”). That result is unavoidable in a case such as this, where “the very question
10 upon which the case turns is itself a state secret.” *Fitzgerald*, 776 F.2d at 1238.

11 **BACKGROUND**

12 **I. THE PLAINTIFFS’ CLAIMS AGAINST JEPPESEN**

13 Each of the five plaintiffs in this action alleges that he was arrested, transported, detained,
14 and interrogated as part of the CIA’s terrorist detention and interrogation program. Plaintiffs contend
15 that they were subject to “forced disappearance, torture, and inhumane treatment . . . by agents of the
16 United States and other governments.” First Amended Compl. ¶ 1. Plaintiffs further allege that
17 defendant Jeppesen “provided direct and substantial services to the United States for its so-called
18 ‘extraordinary rendition’ program, enabling the clandestine and forcible transportation of terrorism
19 suspects to secret overseas detention facilities where they were placed beyond the reach of the law
20 and subjected to torture and other forms of cruel, inhuman, or degrading treatment.” *Id.* ¶ 2.

21 The First Amended Complaint contains two discrete claims for relief. Each arises under the
22 Alien Tort Statute (“ATS”), 28 U.S.C. § 1350, which states that “[t]he district courts shall have
23 original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law
24 of nations or a treaty of the United States.”

25 The first ATS claim alleges that Jeppesen is liable for Plaintiffs’ forced disappearance.
26 Plaintiffs contend that Jeppesen is “directly liable” for this alleged violation of international law,

1 because it “actively participated in numerous aspects of the logistical planning and implementation
2 of the extraordinary renditions of Plaintiffs, with actual or constructive knowledge that its
3 involvement would result in the secret apprehension and detention of Plaintiffs.” First Amended
4 Compl. ¶ 254. In addition, or in the alternative, Plaintiffs also assert that Jeppesen is liable under
5 the ATS because it “conspired with agents of the United States in Plaintiffs’ forced disappearance,”
6 because it “aided and abetted agents of the United States, Morocco, Egypt and Jordan in subjecting
7 Plaintiffs to such treatment,” and/or because it “demonstrated reckless disregard as to whether
8 Plaintiffs would be subject to forced disappearance.” *Id.* ¶ 255-57.

9 The second ATS claim alleges that Jeppesen is liable for Plaintiffs’ alleged “torture and other
10 cruel, inhuman, or degrading treatment by agents of the United States, Morocco, and Egypt.” *Id.* ¶
11 260. Unlike the first count, this claim does not allege that Jeppesen is directly liable for the alleged
12 tort. Instead, it relies on the same indirect theories of liability that were advanced as alternative bases
13 of liability in the first claim: namely, that Jeppesen “conspired with agents of the United States in
14 Plaintiffs’ torture and other cruel, inhuman, or degrading treatment, including their rendition to
15 Morocco, Egypt, and Afghanistan,” that it “aided and abetted agents of the United States, Morocco
16 and Egypt in subjecting Plaintiffs to such treatment,” and/or that it “demonstrated a reckless
17 disregard as to whether Plaintiffs would be subjected to torture or other cruel, inhuman, or degrading
18 treatment by providing flight and logistical support to aircraft and crew it knew or reasonably should
19 have known would be used in the extraordinary rendition program.” *Id.* ¶¶ 262-64.

20 **II. THE UNITED STATES’ STATE SECRETS PRIVILEGE ASSERTION**

21 Gen. Hayden, the Director of the Central Intelligence Agency, has formally asserted the
22 military and state secrets privilege, and has also asserted a claim of privilege under the National
23 Security Act. *See* Public Hayden Decl. ¶ 11. Those privilege claims identify four categories of
24 information put at issue by Plaintiffs’ First Amended Complaint that cannot be inquired into in court
25 proceedings without risking serious--and in some instances, exceptionally grave--danger to the
26 national security:

- 1 A. Information that may tend to confirm or deny whether Jeppesen or any other private
2 entity assisted the CIA with any alleged clandestine intelligence activities, including
3 the CIA terrorist detention and interrogation program;
- 4 B. Information that may tend to confirm or deny any alleged cooperation between the
5 CIA and foreign governments regarding clandestine intelligence activities;
- 6 C. Information concerning the scope and operation of the CIA terrorist detention and
7 interrogation program, such as: the locations where detainees were held; whether or
8 not the CIA cooperated with particular foreign governments or private entities in
9 conducting this program; the interrogation methods used in the program; and the
10 identities of any individuals detained by the CIA that have not already been publicly
11 acknowledged; and
- 12 D. Any other information concerning CIA clandestine intelligence activities that would
13 tend to reveal any intelligence activities, sources, or methods.

14 *Id.* ¶ 20. Gen. Hayden’s Public Declaration makes clear that he made these privilege assertions after
15 personal consideration of the allegations in the First Amended Complaint. *See id.* ¶ 11.

16 While Gen. Hayden’s Public Declaration offers an explanation of why the information
17 covered by these privilege assertions cannot be disclosed without risking harm to the national
18 security and foreign relations of the United States, it also notes that the full extent of the information
19 protected by the privilege, and the potential harms of disclosure of that information, cannot be
20 discussed on the public record. *See* Public Hayden Decl. ¶¶ 11, 25. Thus, Gen. Hayden has also
21 submitted a classified *in Camera, ex parte* declaration (“Classified Hayden Decl.”) setting forth the
22 full basis for his assertion of the state secrets and statutory privileges.¹

23
24
25 ¹ This classified *in camera, ex parte* declaration has been lodged with the Department of
26 Justice’s Security Officer, who will make arrangements for the Court to view the document at the
27 Court’s convenience. A separate Notice of Lodging is filed along with this brief providing the Court
28 with contact information for that Security Officer.

1 **ARGUMENT**

2 **I. PLEADING-STAGE RESOLUTION IS APPROPRIATE WHERE PRIVILEGED INFORMATION IS**
3 **CENTRAL TO THE CASE AND IT IS CLEAR THAT THE CASE CANNOT BE LITIGATED**
4 **WITHOUT THAT INFORMATION**

5 **A. The State Secrets Privilege Bars Use of Privileged Information Regardless of a**
6 **Litigant’s Need**

7 Courts have long recognized the responsibility of the Executive Branch to protect military
8 or state secrets from disclosure. *See, e.g., Totten v. United States*, 92 U.S. 105 (1875); *United States*
9 *v. Burr*, 25 F. Cas. 30 (C.C.D. Va. 1807). In order to safeguard this type of sensitive material, the
10 Executive Branch may assert the “state secrets privilege,” which, when properly asserted, prevents
11 the parties from adducing information that, if disclosed, would harm the national security. *See, e.g.,*
12 *Reynolds*, 345 U.S. 1; *Kasza*, 133 F.3d 1159. Although this privilege “was developed at common
13 law, it performs a function of constitutional significance” because it is essential to the President’s
14 Article II powers to conduct foreign affairs and provide for the national defense. *El-Masri v. United*
15 *States*, 479 F.3d 296, 303 (4th Cir. 2007) (citing *United States v. Nixon*, 418 U.S. 683,710 (1974)),
16 *cert. denied*, 76 U.S.L.W. 3021 (U.S. Oct. 9, 2007).

17 The privilege protects a broad range of state secrets, including information the disclosure of
18 which would result in “impairment of the nation’s defense capabilities, disclosure of intelligence-
19 gathering methods or capabilities, and disruption of diplomatic relations with foreign Governments.”
20 *Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983), *cert. denied sub nom. Russo v. Mitchell*, 465
21 U.S. 1038 (1984) (footnotes omitted); *see also Kasza*, 133 F.3d at 1166 (“[T]he Government may
22 use the state secrets privilege to withhold a broad range of information.”). The privilege protects
23 information that, on its face, may appear innocuous but which in a larger context could reveal
24 sensitive classified information. *See Kasza*, 133 F.3d at 1166. Courts often observe that foreign
25 intelligence gathering is akin to the construction of a “mosaic,” where each discrete piece of
26 information is part of a larger picture of intelligence activities. *See, e.g., Halkin v. Helms*, 598 F.2d
27 1, 8 (D.C. Cir. 1978) (“*Halkin P*”) (“Thousands of bits and pieces of seemingly innocuous

1 information can be analyzed and fitted into place by skilled foreign agents to reveal with startling
2 clarity how the unseen whole must operate.”). “Accordingly, if seemingly innocuous information
3 is part of a classified mosaic, the state secrets privilege may be invoked to bar its disclosure and the
4 court cannot order the Government to disentangle this information from other classified
5 information.” *Kasza*, 133 F.3d at 1166.

6 As a procedural matter, “[t]he privilege belongs to the Government and must be asserted by
7 it; it can neither be claimed nor waived by a private party.” *Reynolds*, 345 U.S. at 7. “There must
8 be a formal claim of privilege, lodged by the head of the department which has control over the
9 matter, after actual personal consideration by the officer.” *Id.* at 7-8 (footnotes omitted).

10 In assessing whether to uphold a claim of the state secrets privilege, the court does not
11 balance the respective needs of the parties for the information. Rather, “[o]nce the privilege is
12 properly invoked and the court is satisfied as to the danger of divulging state secrets, the privilege
13 is absolute.” *Kasza*, 133 F.3d at 1166. Thus, even though “the claim of privilege should not be
14 lightly accepted,” where it is properly asserted to protect military and state secrets, “even the most
15 compelling necessity cannot overcome the claim of privilege.” *Reynolds*, 345 U.S. at 11; *Kasza*, 133
16 F.3d at 1166. *See also In re Under Seal*, 945 F.2d 1285, 1287 n.2 (4th Cir. 1991) (state secrets
17 privilege “renders the information unavailable regardless of the other party’s need in furtherance of
18 the action”); *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 399 (D.C. Cir. 1984) (state
19 secrets privilege “cannot be compromised by any showing of need on the part of the party seeking
20 the information”). “No competing public or private interest can be advanced to compel disclosure
21 of information found to be protected by a claim of privilege.” *Ellsberg*, 709 F.2d at 57.

22 **B. A Court Must Afford “Utmost Deference” to the Government’s Predictions of**
23 **the Harm that Would Result From Disclosure of State Secrets**

24 As the Ninth Circuit has recognized, “the court’s review of the claim of [state secrets]
25 privilege is narrow.” *Kasza*, 133 F.3d at 1166. Affording the United States’ predictive judgments
26 about the harm of disclosure the “utmost deference,” a court must uphold the privilege assertion if

1 it is satisfied that the government has demonstrated a “reasonable danger” that disclosure of the
2 information will harm the national security. *See, e.g., Reynolds*, 345 U.S. at 10; *Kasza*, 133 F.3d at
3 1166; *Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544, 547 (2d Cir. 1991). “[W]hen a judge
4 has satisfied himself that the dangers asserted by the government are substantial and real, he need
5 not--indeed, should not--probe further.” *Sterling v. Tenet*, 416 F.3d 338, 345 (4th Cir. 2005), *cert.*
6 *denied sub nom. Sterling v. Goss*, 546 U.S. 1093 (2006).

7 For both “constitutional” and “practical” reasons, this Court’s review of the privilege
8 assertion must begin with the Director’s predictive judgment about the harms that would result from
9 disclosure of state secrets. *El-Masri*, 479 F.3d at 305. Concern about courts’ institutional
10 competence to assess the harm to national security from the disclosure of classified information is
11 particularly acute in the context of intelligence-gathering activities. *See El-Masri*, 479 F.3d at 305
12 (“[T]he executive branch’s expertise in predicting the potential consequences of intelligence
13 disclosures is particularly important given the sophisticated nature of modern intelligence analysis
14” (citation omitted)); *Halkin I*, 598 F.2d at 9 (“The courts, of course, are ill-equipped to become
15 sufficiently steeped in foreign intelligence matters to serve effectively in the review of secrecy
16 classifications in that area.” (quoting *United States v. Marchetti*, 466 F.2d 1309, 1318 (4th Cir.
17 1972))); *Ellsberg*, 709 F.2d at 57 n.31 (“[T]he probability that a particular disclosure will have an
18 adverse effect on national security is difficult to assess, particularly for a judge with little expertise
19 in this area.”).

20 This “utmost deference” standard does not require a court to abdicate its judicial role. *See*
21 *El Masri*, 479 F.3d at 312. To the contrary, “[t]he court itself must determine whether the
22 circumstances are appropriate for the claim of privilege.” *Reynolds*, 345 U.S. at 8; *see also In re*
23 *Under Seal*, 945 F.2d at 1288 (“Although the privilege is absolute when properly invoked, the court
24 is the final arbiter of the propriety of its invocation.”). Out of respect for the Court’s duty to
25 determine whether the privilege was properly invoked (and whether, if so, the case can proceed),
26 Gen. Hayden has submitted a classified, *in camera*, *ex parte* declaration that describes in detail the

1 full extent of the information covered by his privilege assertions and the harm that would result from
2 that information’s disclosure, even though the law generally does not require such submissions. *See,*
3 *e.g., Reynolds*, 345 U.S. at 10 (“[W]e will not go so far as to say that the court may automatically
4 require a complete disclosure to the judge before the claim of privilege will be accepted in any
5 case.”).

6 **C. Where the State Secrets Are Central to a Case, the Case Cannot Proceed**

7 Once the court has upheld a claim of the state secrets privilege, the evidence and information
8 identified in the privilege assertion is “completely removed from the case,” *Kasza*, 133 F.3d at 1166,
9 and the court must undertake a separate inquiry to determine the consequences of this exclusion on
10 further proceedings. “The effect of a successful interposition of the state secrets privilege by the
11 United States will vary from case to case.” *El-Masri*, 479 F.3d at 306. “If a proceeding involving
12 state secrets can be fairly litigated without resort to the privileged information, it may continue.” *Id.*
13 However, if the state secrets “will be so central to the subject matter of the litigation that any attempt
14 to proceed will threaten disclosure of the privileged matters,” the case must be dismissed.
15 *Fitzgerald*, 776 F.2d at 1241-42; *see also El-Masri*, 479 F.3d at 306 (“[I]f ‘the circumstances make
16 clear that sensitive military secrets will be so central to the subject matter of the litigation that any
17 attempt to proceed will threaten disclosure of the privileged matters,’ dismissal is the proper
18 remedy.” (quoting *Sterling*, 416 F.3d at 348)). In such circumstances courts have noted that the
19 “very subject matter” of the action is a state secret, and that resolution of the action “based solely on
20 the invocation of the state secrets privilege” is appropriate. *Kasza*, 133 F.3d at 1166 (citing
21 *Reynolds*, 345 U.S. at 11 n.26).

22 Courts may dismiss a suit because its “very subject matter” is a state secret even where the
23 suit seeks to adduce information about activities that the government has (at least partially)
24 acknowledged. For example, in *Fitzgerald*, the court concluded that a libel suit arising out of
25 activities related to a classified Navy program for training marine animals could not proceed, even
26 though the government officially acknowledged the program’s existence, because classified aspects

1 of how the program operated would have been at issue in any adjudication of the alleged libel. *See*
2 *Fitzgerald*, 776 F.2d at 1242-43 (noting that the “very subject of this litigation is itself a state
3 secret.”). Similarly, in *El-Masri*, the court found that a tort suit against government officials and
4 corporate defendants arising out of an alleged “extraordinary rendition” as part of the CIA terrorist
5 detention and interrogation program--the very same program at issue in this case--could not proceed,
6 even though the government officially acknowledged the program’s existence, because such
7 litigation would necessarily probe the program’s still-classified operational details. *See El-Masri*,
8 479 F.3d at 308-09.

9 Moreover, where the “very subject matter” of a suit is a state secret, a plaintiff’s alleged
10 personal knowledge of the facts set forth in a complaint is irrelevant if those allegations cannot be
11 *litigated* without threatening the disclosure of state secrets. As the court noted in *El-Masri*:

12 El-Masri is therefore incorrect in contending that the central facts of this proceeding
13 are *his allegations* that he was detained and interrogated under abusive conditions,
14 or that the CIA conducted the rendition program that has been acknowledged by
15 United States officials. Facts such as those furnish the general terms in which
16 El-Masri has related his story to the press, but advancing a case in the court of public
17 opinion, against the United States at large, is an undertaking quite different from
18 prevailing against specific defendants *in a court of law*.

19 *Id.* (emphasis added). *See also Black v. United States*, 62 F.3d 1115, 1117-19 (8th Cir. 1995)
20 (upholding a state secrets privilege assertion even though plaintiff claimed personal knowledge of
21 alleged contacts with CIA agents); *Fitzgerald*, 776 F.2d at 1237, 1242 & n.8 (upholding state secrets
22 privilege over information about a Navy marine mammal program despite the fact that the plaintiff
23 was involved with the program and had “*personal knowledge of classified matters within the scope*
24 *of the*” privilege assertion) (emphasis added); *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 538 (E.D. Va.
25 2006) (“It is self-evident that a private party’s allegations purporting to reveal the conduct of the
26 United States’ intelligence services overseas are entirely different from the official admission or
27 denial of those allegations.”). These cases correctly recognize that the focal point of the analysis is
28 whether proving such allegations *through litigation* would cause harm, not whether private
individuals or entities have previously made, or could make, public statements or allegations.

1 Even if the “very subject matter” of an action is not a state secret, if the plaintiff cannot make
2 out a *prima facie* case absent the excluded state secrets, the case must be dismissed. *See Kasza*, 133
3 F.3d at 1166; *Halkin v. Helms*, 690 F.2d 977, 998-99 (D.C. Cir. 1982) (“*Halkin II*”); *Fitzgerald*, 776
4 F.2d at 1240-41. Similarly, if the privilege “deprives the defendant of information that would
5 otherwise give the defendant a valid defense to the claim, then the court may grant summary
6 judgment to the defendant.” *Kasza*, 133 F.3d at 1166 (quoting *Bareford*, 973 F.2d at 1141).

7 **D. This Case Should Be Resolved at the Pleading Stage**

8 Plaintiffs already have evinced a fundamental misunderstanding of the effect of asserting the
9 state secrets and statutory privileges in this litigation. In opposing Defendant’s Motion to Change
10 Time, plaintiffs stated that assertion of the state secrets privilege “before there is any evidence at
11 issue” is “premature as a matter of law.” Plaintiffs’ Opposition to United States’ Request for a Stay
12 and Defendant’s Motion to Change Time (“Pls. Opp. Change Time”) (Docket #38) at 1. That claim-
13 -which, plaintiffs concede, is directly contrary to the Fourth Circuit’s holding in *El-Masri*, *see* Pls.
14 Opp. Change Time at 1 n.1--is simply incorrect. “[D]ismissal on the pleadings” is appropriate where
15 “the very subject matter of the action was a state secret.” *El-Masri*, 479 F.3d at 306 (citing *Tenet*,
16 544 U.S. at 9, *Reynolds*, 345 U.S. 1, and *Totten*, 92 U.S. 105).

17 The Supreme Court has repeatedly upheld (or directed) the pleading-stage dismissals of suits
18 whose “very subject matter” is a state secret. For example, in *Totten v. United States*, 92 U.S. 105
19 (1875), the court refused to entertain a suit attempting to enforce an alleged espionage contract
20 between the President and a private citizen, who purportedly agreed to undertake clandestine
21 intelligence-gathering activities. The Court observed that “[i]t may be stated as a general principle,
22 that public policy forbids the maintenance of *any suit* in a court of justice, the trial of which would
23 inevitably lead to the disclosure of matters which the law itself regards as confidential.” *Id.* at 107
24 (emphasis added).

25 Applying *Totten*, the Supreme Court has upheld several subsequent pleading-stage dismissals
26 of actions in which state secrets were central to the maintenance of the suit. In *Weinberger v.*

1 *Catholic Action of Haw./Peace Ed. Project*, 454 U.S. 139 (1981), for example, the Court found that
2 a suit seeking to compel the Navy to prepare an Environmental Impact Statement about the
3 hypothetical effects of storing nuclear weapons at a particular facility could not go forward, because
4 national security concerns prevented the Navy from confirming or denying whether it stored nuclear
5 weapons at the facility. *See id.* at 146-47 (citing *Totten*, 92 U.S. at 107, and *Reynolds*, 345 U.S. 1).
6 Similarly, the Court upheld a pleading-stage dismissal in *Tenet v. Doe*, 544 U.S. 1, 8-9 (2005),
7 where, like in *Totten*, the plaintiff attempted to enforce the terms of an alleged espionage contract.
8 The Court cited *Totten*, *Reynolds*, and *Weinberger* for the proposition that cases that will inevitably
9 lead to the disclosure of state secrets should not proceed beyond the pleading stage. *Id.* at 8. Indeed,
10 even in *Reynolds*--a case where the Court upheld the assertion of the state secrets privilege but
11 nevertheless allowed the suit to proceed past the pleading stage--the Court approvingly cited *Totten*'s
12 observation that dismissal would be appropriate in instances where state secrets are central to the
13 litigation. *See* 345 U.S. at 11 n.26 (noting that in *Totten*, "where the very subject matter of the action
14 . . . was a matter of state secret," the Court properly "dismissed on the pleadings *without ever*
15 *reaching the question of evidence*, since it was so obvious that the action should never prevail over
16 the privilege" (emphasis added)).²

17 Following this Supreme Court guidance, the Ninth Circuit has resolved state secrets privilege
18 cases at the pleading stage because the facts central to the litigation were covered by the assertion
19 of the privilege. In *Kasza*, for example, the Ninth Circuit found that a valid assertion of the state
20

21
22 ² Even though *Totten* itself concerned the narrow circumstance of a contract for clandestine
23 espionage services, the "general principle" announced therein is not limited to that context. Rather,
24 it applies more generally to "*any suit . . . the trial of which would inevitably lead to the disclosure*
25 *of matters which the law itself regards as confidential.*" *Tenet*, 544 U.S. at 8 (rejecting court of
26 appeals' conclusion that "*Totten* developed merely a contract rule, prohibiting breach-of-contract
claims seeking to enforce the terms of espionage agreements"). *See also El-Masri*, 479 F.3d at 306
("In a recent decision unanimously reaffirming *Totten*'s validity, the Supreme Court approvingly
quoted *Reynolds*'s discussion of *Totten* as a matter in which dismissal on the pleadings was
appropriate because the very subject matter of the action was a state secret.").

1 secrets privilege over “the very subject matter” of the litigation prevented the case from proceeding
2 past the pleading stage:

3 Not only does the state secrets privilege bar Frost from establishing her prima facie
4 case on any of her eleven claims, but any further proceeding in this matter would
5 jeopardize national security. No protective procedure can salvage Frost’s suit.
Therefore, as the very subject matter of Frost’s action is a state secret, we agree with
the district court that her action must be dismissed.

6 *Kasza*, 133 F.3d at 1170. Similarly, in *Weston v. Lockheed Missiles & Space Co.*, 881 F.2d 814, 816
7 (9th Cir. 1989), the Ninth Circuit noted that, “[c]ontrary to [appellant’s] assertion at oral argument,
8 the state secrets privilege *alone can be the basis for dismissal of an entire case.*” (emphasis added).

9 While this Supreme Court and Ninth Circuit precedent is more than sufficient to defeat
10 Plaintiffs’ contrary contention that pleading-stage dismissals are “premature as a matter of law,”
11 these holdings are by no means outliers. Numerous other courts of appeals have followed the
12 Supreme Court’s lead in *Totten*, *Reynolds*, *Weinberger*, and *Tenet*, by resolving cases at the pleading
13 stage because the suits’ “very subject matter” was a state secret, or where it was clear at the outset
14 that the parties’ claims and defenses could not be established without recourse to such secrets. *See*,
15 *e.g.*, *Tenenbaum v. Simonini*, 372 F.3d 776, 777-78 (6th Cir. 2004); *El-Masri*, 479 F.3d at 311;
16 *Sterling*, 416 F.3d at 348 (quoting *Molerio v. FBI*, 749 F.2d 815, 821 (D.C. Cir. 1982)); *Black v.*
17 *United States*, 62 F.3d 1115, 1118-19 (8th Cir.1995); *Bareford*, 973 F.2d at 1140; *Zuckerbraun*, 935
18 F.2d at 548; *Fitzgerald*, 776 F.2d at 1243; *Halkin II*, 690 F.2d at 1001. *Cf.* *American Civil Liberties*
19 *Union v. NSA*, 493 F.3d 644, 653 (6th Cir. 2007) (dismissing Fourth Amendment claim on standing
20 grounds because “the plaintiffs do not--and because of the State Secrets Doctrine cannot--produce
21 any evidence that any of their own communications have ever been intercepted by the NSA, under
22 the TSP, or without warrants”), *petition for cert. filed* (Oct. 3, 2007) (No. 07-468); *Bowles v. United*
23 *States*, 950 F.2d 154, 156 (4th Cir. 1991) (affirming dismissal of the United States as a party before
24 discovery because “no amount of effort or care will safeguard the privileged information . . . [I]t
25 is evident that the case against the United States cannot be tried without compromising the
26 information sought to be protected”). This long, unbroken line of cases holding that pleading-stage

1 resolution of state secrets privilege cases may be both appropriate and necessary amply defeats
2 plaintiffs' contention that such dismissals are "premature as a matter of law."

3 * * *

4 In light of these principles, two issues remain for this Court's consideration. First, granting
5 the Director's judgment the "utmost deference," the Court must determine whether Gen. Hayden has
6 demonstrated that there is at least a reasonable danger that disclosure of the privileged information
7 will cause harm to the national security. Second, if the Court determines the privileges are properly
8 asserted, it must also determine whether the privileged information concerns the "very subject
9 matter" of the case or is so central to the case that the case cannot be litigated without reference to
10 privileged information. As set forth below, both questions must be answered in the affirmative;
11 therefore, this Court should dismiss the suit or, in the alternative, enter summary judgment against
12 plaintiffs.³

20 ³ This Motion is styled as a Motion to Dismiss or, in the Alternative, for Summary Judgment,
21 because some courts have suggested that "[t]he precise rule under which dismissal should occur is
22 not entirely clear." *Zuckerbraun*, 935 F.2d at 547. While courts, including the Ninth Circuit,
23 regularly speak of "dismissing" cases on state secrets privilege grounds where the "very subject
24 matter" is a state secret, *see, e.g., Kasza*, 133 F.3d at 1166, some courts have suggested that "[w]here
25 the effect of the invocation of the privilege is to prevent the plaintiff from establishing a prima facie
26 case, the dismissal is probably most appropriate under Rule 56 on the ground that plaintiff, who
27 bears the burden of proof, lacks sufficient evidence to carry that burden." *Zuckerbraun*, 935 F.2d
28 at 547. Because the "very subject matter" of this suit is a state secret, dismissal under Rule 12 is
appropriate. If, however, the Court were to conclude that Rule 56 is the applicable Rule, summary
judgment would be appropriate.

1 **II. THE DCIA HAS PROPERLY ASSERTED THE STATE SECRETS PRIVILEGE IN**
2 **THIS CASE**

3 **A. The Declarations from the Director of the CIA Meet all of the Procedural**
4 **Requirements for Invoking the State Secrets Privilege**

5 The United States has properly asserted the state secrets privilege in this case. Where the
6 state secrets privilege is asserted, there must be (1) a “formal claim of privilege”; (2) “lodged by the
7 head of the department which has control over the matter”; and (3) “after actual personal
8 consideration by that officer.” *Reynolds*, 345 U.S. at 7-8; *see also Kasza*, 133 F.3d at 1169 (“Here,
9 after actual personal consideration, the person that *Reynolds* requires to claim the privilege publicly
10 claimed it.”). There can be no dispute that all three criteria are met here.

11 *First*, the Director of the Central Intelligence Agency, Gen. Michael V. Hayden, has
12 submitted a formal claim of the state secrets and statutory privileges. *See* Public Hayden Decl. ¶ 11.
13 Moreover, in his public and classified declarations, Gen. Hayden explains how the disclosure of the
14 intelligence activities, sources, and methods covered by these privilege assertions would cause
15 serious--and, in some instances, exceptionally grave--damage to national security. *See* Public
16 Hayden Decl. ¶¶ 21-25; Classified Hayden Decl. ¶¶ 32-50, 54-70, 74.

17 *Second*, Gen. Hayden is the “head of the department which has control over the matter[s]”
18 covered by the assertion of the privilege. *Reynolds*, 345 U.S. at 8. As the Director of the CIA, Gen.
19 Hayden “lead[s] the CIA and manage[s] the Intelligence Community’s human intelligence and open
20 source collection programs on behalf of the Director of National Intelligence (DNI).” Public Hayden
21 Decl. ¶ 1. Gen. Hayden is thus statutorily charged with “collecting information through human
22 sources and by other appropriate means, correlating and evaluating intelligence related to the national
23 security and providing appropriate dissemination of such intelligence, providing overall direction
24 for coordination of the collection of national intelligence outside the United States through human
25 sources by elements of the intelligence community authorized to undertake such collection, and
26 performing such other functions and duties related to intelligence affecting the national security as
27 the President, or the Director of National Intelligence (DNI), may direct.” *Id.* ¶ 5 (citing 50 U.S.C. §

1 403-4a(d)). Additionally, the Director of National Intelligence, who serves as head of the nation's
2 intelligence community, has directed the DCIA to "protect[] CIA sources and methods from
3 unauthorized disclosure." *Id.* ¶ 6. The information covered by Gen. Hayden's assertion of the
4 privilege, which concerns allegations related to the CIA's terrorist detention and interrogation
5 program, clearly falls within these responsibilities, making Gen. Hayden the relevant "head of the
6 department which has control over the matter" at issue in this case.

7 *Third*, and finally, Gen. Hayden made this assertion of the state secrets privilege "in [his]
8 capacity as head of the CIA after personal consideration of the matter." Public Hayden Decl. ¶ 11.
9 Thus, all three of the *Reynolds* criteria for properly asserting the privilege are met.

10 **B. The Director Has Demonstrated That Disclosure of the Information Covered By**
11 **The Privilege Assertions Reasonably Could Be Expected to Cause Serious--And,**
12 **In Some Instances, Exceptionally Grave--Damage to the National Security and**
13 **Foreign Relations of the United States**

14 As noted above, "the court's review of the claim of [state secrets] privilege is narrow."
15 *Kasza*, 133 F.3d at 1166. "[T]he court must be satisfied that under the particular circumstances of
16 the case, 'there is a reasonable danger that compulsion of the evidence will expose military matters
17 which, in the interest of national security, should not be divulged.'" *Id.* (quoting *Reynolds*, 345 U.S.
18 at 10). In making that determination, the Court must give "utmost deference" to the government's
19 assessment of the damage that would flow from the disclosure of the information in question. *See*,
20 *e.g.*, *Kasza*, 133 F.3d at 1166; *Zuckerbraun*, 935 F.2d at 547; *Halkin I*, 598 F.2d at 9. "[W]hen a
21 judge has satisfied himself that the dangers asserted by the government are substantial and real, he
22 need not--indeed, should not--probe further." *Sterling*, 416 F.3d at 345.

23 Gen. Hayden's public and classified *in camera*, *ex parte* declarations fully support his
24 assessment that the risk of damage flowing from disclosure of the privileged information in this case
25 is "substantial and real." *Sterling*, 416 F.3d at 345. For example, Gen. Hayden explains that
26 disclosure of information concerning whether or not Jeppesen or other private entities assisted the
27 United States with clandestine intelligence activities reasonably could be expected to damage

1 national security because that information would reveal to adversaries the scope and capabilities of
2 the United States' clandestine intelligence programs. *See* Public Hayden Decl. ¶ 21. The CIA is not
3 free to disclose who it does or does not work with, in what capacity, and to what extent, in
4 connection with clandestine activities, because that information constitutes one of the sources and
5 methods of intelligence gathering that must be protected. *See Maxwell v. First Nat. Bank of*
6 *Maryland*, 143 F.R.D. 590, 599 (D. Md. 1992) (“The state secret that must be protected is the
7 existence of any relationship between the CIA and ATC or FNB.”), *aff’d*, 998 F.2d 1009 (4th Cir.
8 1993) (Mem.), *cert. denied*, 510 U.S. 1091 (1994). To disclose how clandestine activities are (or
9 are not) conducted would, quite obviously, disclose classified information. The United States has
10 a longstanding practice of generally refusing to confirm or deny allegations concerning clandestine
11 intelligence activities because if the United States were to deny such allegations where they are
12 incorrect, that would create an inference that such allegations must be correct when they are not
13 denied. *See* Public Hayden Decl. ¶ 9.⁴

14 Similarly, Gen. Hayden explains why information tending to confirm or deny whether the
15 United States cooperated with particular foreign governments in carrying out clandestine intelligence
16 activities, including the terrorist detention and interrogation program, cannot be disclosed without
17 damaging the national security and foreign relations of the United States. As Gen. Hayden notes,
18 “[w]hen foreign governments cooperate with the CIA in clandestine intelligence activities, they do
19 so under assurances from the CIA that the fact of their cooperation will remain secret.” Public
20

21 ⁴ The fact that the United States is not named as a defendant in the First Amended Complaint
22 does not lessen its need to avoid disclosures of information covered by the privilege assertions.
23 Courts have recognized that development of factual issues surrounding allegations of clandestine
24 intelligence activities--even if conducted by private parties--can nonetheless encroach upon state
25 secrets that the privilege is designed to protect. *See, e.g., Terkel v. AT & T Corp.*, 441 F. Supp. 2d
26 899, 917 (N.D. Ill. 2006) (“[T]he Court is persuaded that requiring AT&T to confirm or deny
27 whether it has disclosed large quantities of telephone records to the federal government could give
28 adversaries of this country valuable insight into the government’s intelligence activities. Because
requiring such disclosures would therefore adversely affect our national security, such disclosures
are barred by the state secrets privilege.”)

1 Hayden Decl. ¶ 23. If the United States were forced to respond to such allegations of cooperation
2 with other countries--or if the parties were permitted to offer proof in a United States court
3 concerning such allegations--it would violate the assurances of secrecy that the CIA gives its
4 intelligence partners. In the future, such partners would be less likely to cooperate with the United
5 States in intelligence-gathering activities. This lack of cooperation would have obvious, negative
6 consequences for the foreign relations and foreign activities of the United States. *See id.*

7 Gen. Hayden's declarations also demonstrate that disclosure of information concerning the
8 other alleged operational details of the CIA terrorist detention and interrogation program--including
9 the identities of individuals subject to the program, the dates and locations of any such detention and
10 interrogation, and the interrogation methods employed as part of that program--can reasonably be
11 expected to cause damage to the national security. This type of information constitutes the heart of
12 the CIA's sources and methods of intelligence gathering. *See Public Hayden Decl. ¶ 24.* Permitting
13 litigation over whether these plaintiffs were in CIA custody in the places and at the times alleged in
14 the First Amended Complaint, whether they were subject to the treatment they allege, and whether
15 Jeppesen was involved in or aware of such alleged treatment, would result in a full exploration of
16 the workings of the CIA's clandestine intelligence activities. Gen. Hayden notes that permitting the
17 parties to probe this information would degrade the effectiveness of the CIA's intelligence-gathering
18 capabilities by, for example, "providing terrorists information about interrogation methods that
19 would assist their interrogation resistance programs." *Id.*

20 Finally, Gen. Hayden makes clear that the full scope of the information subject to his
21 privilege assertions, and the assessment of all the harms that would follow from the disclosure of that
22 information, cannot be discussed on the public record. *See Public Hayden Decl. ¶ 25.* Therefore,
23 Gen. Hayden has submitted a classified *in camera, ex parte* declaration to fully explain his bases for
24 asserting the privileges. Affording these assessments of the harm that would flow from the
25 disclosure of the privileged information "utmost deference," there can be no doubt that there is a
26 "reasonable danger" that proceeding with this case would result in the disclosure of information

1 “which, in the interest of national security, should not be divulged,” and that the privileges have been
2 validly asserted. *Kasza*, 133 F.3d at 1166 (internal quotation marks omitted).

3 **C. The Director’s Assertion of the State Secrets and Statutory Privileges Over the**
4 **Information in Question is Proper, Notwithstanding the Executive Branch’s**
5 **Limited Acknowledgment of the Existence of the CIA Terrorist Detention and**
6 **Interrogation Program, and Public Speculation Concerning that Program**

7 Plaintiffs’ First Amended Complaint alleges that then-Director of the CIA George Tenet
8 publicly “described the rendition program as a key counterterrorism tool” in October 2002. *See* First
9 Amended Compl. ¶¶ 33. As noted in Gen. Hayden’s Public Declaration, the President and other
10 public officials, including Secretary of State Rice, former CIA Directors, and the DCIA himself, have
11 publicly acknowledged the program’s existence. *See* Public Hayden Decl. ¶¶ 12-15 & nn.7-8.
12 Importantly, however, none of these officials disclosed the operational details of this program;
13 indeed, they specifically refused to do so. *Id.*

14 Public confirmations of the mere *existence* of the program do not undermine the Director’s
15 decision to assert the privilege with respect to the program’s *operational details*. Limited
16 declassification of some information concerning a classified program--in this instance, the program’s
17 existence, and the identities of fifteen suspected terrorists who are to be brought to trial (none of
18 whom is a plaintiff in this action)--does not require full disclosure of the other, still-classified aspects
19 of that program. *See, e.g., Ellsberg*, 709 F.2d at 59-60 (government could invoke the state secrets
20 privilege over whether certain plaintiffs were subject to government surveillance, even though it
21 previously disclosed that other individuals had been the subject of such surveillance); *Halkin I*, 598
22 F.2d at 9 (government could assert state secrets privilege as to whether plaintiff in *Halkin I* had been
23 subjected to surveillance even though it acknowledged conducting surveillance of an individual in
24 another case). *See also Ctr. for Nat’l Security Studies v. U.S. Dep’t of Justice*, 331 F.3d 918, 930-31
25 (D.C. Cir. 2003) (“The disclosure of a few pieces of information in no way lessens the government’s
26 argument that complete disclosure would provide a composite picture of its investigation and have
27 negative effects on its investigation.”); *Salisbury v. United States*, 690 F.2d 966, 971 (D.C. Cir.

1 1982) (“The fact of disclosure of a similar type of information in a different case does not mean that
2 the agency must make its disclosure in every case.”); *Military Audit Project v. Casey*, 656 F.2d 724,
3 752-53 (D.C. Cir. 1981) (rejecting the suggestion that “because the government has revealed some
4 documents it previously considered too sensitive to release, it now must reveal all”). Numerous
5 other facts about the program, and the CIA’s intelligence operations in general, remain highly
6 classified despite the government’s limited declassification of the program’s existence. Forcing the
7 disclosure of such facts based on the extremely limited public description of the CIA terrorist
8 detention and interrogation program would, as Gen. Hayden explains, cause irreparable harm to the
9 national security by compromising sensitive intelligence sources and methods. *See* Public Hayden
10 Decl. ¶¶ 21-25; Classified Hayden Decl. ¶¶ 32-50, 54-70, 74.

11 Similarly, the reports by media outlets, public interest groups, and international organizations
12 cited in the First Amended Complaint, *see, e.g.*, ¶¶ 16-17, 38-39, 44-47, which purport to probe the
13 operational details of the CIA terrorist detention and interrogation program, do not undermine the
14 Director’s assertion of the state secrets and statutory privileges. The statements in these reports, even
15 if made by individuals who allege first-hand knowledge, cannot work to declassify information that
16 the Director affirms is properly classified. *See, e.g., Terkel*, 441 F. Supp. 2d at 913-14 (rejecting
17 contention that media reports about NSA surveillance program render state secrets privilege
18 inapplicable); *see also El-Masri*, 479 F.3d at 311 n.5 (declining to endorse plaintiff’s theory that
19 information is ineligible for protection under the state secrets privilege simply because it has been
20 published in the news media). Classified information is not considered to be “in the public domain
21 *unless there had been official disclosure of it.*” *Knopf v. Colby*, 509 F.2d 1362, 1370 (4th Cir. 1975)
22 (emphasis added). “Official disclosure” does not mean public discussion of the information by overt
23 sources. To the contrary, a finding that classified information has been “official disclosed” requires
24 that: (1) the information at issue must be as specific as the information that has been publicly
25 disclosed; (2) the disputed information must exactly match the information publicly disclosed, *e.g.*,
26 it must involve the same time period or same operation; and (3) the information sought to be released

1 must already have been publicly released through “an official and documented disclosure.”
2 *Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990) (citing *Afshar v. Dep’t of State*, 702 F.2d
3 1125, 1133 (D.C. Cir. 1983)). Plaintiffs have not alleged, let alone demonstrated, that the program’s
4 operational details have been officially disclosed under this rigorous standard.

5 **III. THE DCIA HAS PROPERLY ASSERTED A STATUTORY PRIVILEGE UNDER**
6 **THE NATIONAL SECURITY ACT**

7 The state secrets privilege is sufficient, on its own, to require removal of the information
8 covered by the Director’s privilege assertions from this case. As the D.C. Circuit observed, “[a]
9 ranking of the various privileges recognized in our courts would be a delicate undertaking at best,
10 but it is quite clear that the privilege to protect state secrets must head the list.” *Halkin I*, 598 F.2d
11 at 7. However, because the information subject to the Director’s privilege assertions concerns the
12 sources and methods of intelligence gathering, that information is also protected by a separate
13 statutory privilege under Section 102A(i)(1) of the National Security Act of 1947, as amended, 50
14 U.S.C. § 403-1(i)(1).⁵ See Public Hayden Decl. ¶ 11. This statute requires the Director of National
15 Intelligence (“DNI”) to protect intelligence sources and methods from unauthorized disclosure.
16 Under the DNI’s direction pursuant to Section 102(A) of the National Security Act, as amended, and
17 consistent with Section 6 of the Central Intelligence Agency Act of 1949, as amended, 50 U.S.C. §
18 403g, and Executive Order 12333 §§ 1.3(a)(5), (h), Gen. Hayden is responsible for protecting CIA
19 sources and methods from unauthorized disclosure. See Public Hayden Decl. ¶ 6.

20 This authority to protect intelligence sources and methods from disclosure is rooted in the
21 “practical necessities of modern intelligence gathering,” *Fitzgibbon*, 911 F.2d at 761, and has been
22 described by the Supreme Court as both “sweeping,” *CIA v. Sims*, 471 U.S. 159, 169 (1985), and
23 “wideranging,” *Snepp v. United States*, 444 U.S. 507, 509 (1980). Sources and methods constitute
24 “the heart of all intelligence operations,” *Sims*, 471 U.S. at 167, and “[i]t is the responsibility of the

25
26 ⁵ The National Security Act was amended in 2004 by the Intelligence Reform and
27 Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (Dec. 17, 2004).

1 [intelligence community], not that of the judiciary, to weigh the variety of complex and subtle factors
2 in determining whether disclosure of information may lead to an unacceptable risk of compromising
3 the . . . intelligence-gathering process.” *Id.* at 180. Thus, “courts are required to give ‘great
4 deference’ to the CIA’s assertion that a particular disclosure could reveal intelligence sources or
5 methods.” *Berman v. C.I.A.*, ___ F.3d ___, 2007 WL 2472858, *3 (9th Cir. 2007) (quoting *Sims*, 471
6 U.S. at 179).

7 This statutory privilege, which is asserted over the same sources and methods of intelligence
8 gathering covered by the state secrets privilege, *see* Public Hayden Decl. ¶ 11, provides an
9 additional, independent basis for dismissal of this suit. Moreover, the fact that intelligence sources
10 and methods are subject to express statutory protections illustrates that the need to protect such
11 information is recognized by Congress as well as the Executive Branch.

12 **IV. INFORMATION SUBJECT TO THE STATE SECRETS AND STATUTORY**
13 **PRIVILEGES IS CENTRAL TO THIS CASE AND, THUS, THIS ACTION CANNOT**
14 **PROCEED**

15 “Once the state secrets privilege has been properly invoked, the district court must consider
16 whether and how the case may proceed in light of the privilege.” *Fitzgerald*, 776 F.2d at 1243.
17 Where, as here, “the very subject of this litigation is itself a state secret,” the case should be
18 dismissed at the outset. *Id.*

19 Plaintiffs bring two claims under the Alien Tort Statute. The first alleges that Jeppesen is
20 both directly and vicariously liable for the tort of enforced disappearance. This count alleges that,
21 “[p]ursuant to the extraordinary rendition program, Plaintiffs were subjected to forced disappearance
22 by agents of the United States, Morocco, and Egypt,” and that “[t]he entire extraordinary rendition
23 program is premised on the secret detention of suspects without any official acknowledgment of the
24 location or fact of their detention.” First Amended Compl. ¶ 253. Plaintiffs’ second count alleges
25 that plaintiffs were “subjected to torture and other cruel, inhuman, or degrading treatment by agents
26 of the United States, Morocco, and Egypt.” First Amended Compl. ¶ 260. Unlike the forced
27 disappearance count, this count does not allege direct liability for Jeppesen; instead, it contends that

1 Defendant is vicariously liable for the actions of the United States and other governments. *See id.*
2 ¶¶ 262-64 (alleging vicarious liability ranging from conspiracy to reckless disregard).

3 Neither of these claims can be litigated without recourse to information subject to the state
4 secrets and statutory privileges. By their own terms, these claims are premised on the notion that
5 plaintiffs were part of the CIA terrorist detention and interrogation program; that the United States
6 cooperated with particular foreign governments in conducting that program; that Jeppesen culpably
7 assisted the United States and foreign governments in conducting the alleged activities; and that the
8 claimed torts actually occurred as plaintiffs allege. This information is covered by Gen. Hayden's
9 privilege assertions. *See* Public Hayden Decl. ¶ 20. As explained in Gen. Hayden's public and
10 classified *in camera, ex parte* declarations, none of this information can be adduced on the public
11 record because disclosures concerning these issues reasonably could be expected to cause serious--
12 and, in some instances, exceptionally grave--damage to the national security and foreign relations
13 of the United States.

14 Simply put, the parties cannot litigate whether plaintiffs suffered the alleged torts if they
15 cannot adduce information concerning whether these plaintiffs were part of the CIA terrorist
16 detention and interrogation program and whether the defendant assisted the United States in that
17 program. Moreover, even if--indeed, *especially if*--plaintiffs could establish that they were a part
18 of that program, the parties cannot be permitted to litigate over the details of how that program is or
19 was carried out. As in *El-Masri*, the information necessary to proceed cannot be disclosed without
20 risking serious--and, in some instances, exceptionally grave--damage to national security:

21 If *El-Masri's* civil action were to proceed, the facts central to its resolution would be
22 the roles, if any, that the defendants played in the events he alleges. To establish a
23 *prima facie* case, he would be obliged to produce admissible evidence not only that
24 he was detained and interrogated, but that the defendants were involved in his
25 detention and interrogation in a manner that renders them personally liable to him.
26 Such a showing could be made only with evidence that exposes how the CIA
organizes, staffs, and supervises its most sensitive intelligence operations. . . . With
respect to the defendant corporations and their unnamed employees, *El-Masri* would
have to demonstrate the existence and details of CIA espionage contracts, an
endeavor practically indistinguishable from that categorically barred by *Totten* and
Tenet v. Doe. Even marshalling the evidence necessary to make the requisite

1 showings would implicate privileged state secrets, because El-Masri would need to
2 rely on witnesses whose identities, and evidence the very existence of which, must
remain confidential in the interest of national security.

3 *El-Masri*, 479 F.3d at 309 (internal citations omitted). Thus, the Court--like the court in *El-Masri*
4 --should dismiss this suit without further proceedings. Because it is the Court's duty not to
5 "jeopardize the security which the privilege is meant to protect," *Reynolds*, 345 U.S. at 10, this Court
6 should not risk inadvertent disclosure of classified information by allowing the case to proceed past
7 the pleading stage. "Courts are not required to play with fire and chance further disclosure--
8 inadvertent, mistaken, or even intentional--that would defeat the very purpose for which the privilege
9 exists." *Sterling*, 416 F.3d at 344.

10 CONCLUSION

11 For all of the foregoing reasons, this court should uphold Gen. Hayden's assertion of the
12 state secrets and statutory privileges and dismiss the case or, in the alternative, enter summary
13 judgment against plaintiffs' claims.

14 Respectfully Submitted,

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Dated: October 19, 2007

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that the foregoing NOTICE OF MOTION AND MOTION TO DISMISS OR,
3 IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT BY THE UNITED STATES and
4 accompanying MEMORANDUM OF THE UNITED STATES IN SUPPORT OF MOTION TO
5 DISMISS, OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT will be served by means
6 of the Court's CM/ECF system, which will send notifications of such filing to the following:

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

10 American Civil Liberties Union
Jameel Jaffer
11 Steven R Shapiro
Steven M. Watt
12 Benjamin Elihu Wizner
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13 18th Floor
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14 International Human Rights Clinic
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27 Memorandum of the United States in Support of Motion to
Dismiss, or, in the Alternative, for Summary Judgment
28 Case No. C-07-02798-JW

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Memorandum of the United States in Support of Motion to
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Case No. C-07-02798-JW