NATIONAL SECURITY PROJECT

AMERICAN CIVIL LIBERTIES UNION FOUNDATION

April 21, 2009

Molly Dwyer, Clerk of Court
Office of the Clerk
U.S. Court of Appeals for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

RE: *Mohamed et al v. Jeppesen Dataplan, Inc.*, No. 08-15693 (argued February 9, 2009)

Dear Ms. Dwyer:

AMERICAN CIVIL LIBERTIES UNION FOUNDATION
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Plaintiffs-Appellants submit this letter pursuant to Federal Rule of Appellate Procedure 28(j), to advise the Court of supplemental authority that bears directly on the issues on appeal.

On April 16, 2009, President Obama declassified four legal memoranda prepared by the Department of Justice's Office of Legal Counsel that purported to authorize the CIA's use of abusive interrogation techniques. (The four memos are available at www.aclu.org/olcmemos.) The memos confirm the CIA's use of a range of coercive techniques, including prolonged sleep deprivation, forced nudity, dietary manipulation, and stress positions, as well as specific techniques used to set the "initial conditions" for interrogation through preparation and flight to CIA facilities. These techniques were employed by U.S. personnel against some of the plaintiffs in this litigation.

The government's invocation of the state secrets privilege in this case is predicated on an October 18, 2007 declaration by former CIA Director Michael Hayden. General Hayden's declaration asserts that, "[w]hile the President [Bush] acknowledged the *existence* of the CIA terrorist detention and interrogation program, the details of the program remain highly classified." Hayden Decl. ¶ 9 n.4, ER 738. General Hayden insisted that disclosing specific interrogation techniques "would degrade the effectiveness of the United States' intelligence gathering activities by, for example, providing terrorists information about interrogation methods that would assist their interrogation resistance programs." *Id.* at ¶ 24, ER 748.

That rationale no longer exists, because the methods are now public, and because they have been expressly prohibited. As President Obama explained upon declassification of the memos:

First, the interrogation techniques described in these memos have already been widely reported. Second, the previous Administration publicly acknowledged portions of the program – and some of the practices –associated with these memos. Third, I have already ended the techniques described in the memos through an Executive Order. Therefore, withholding these memos would only serve to deny facts that have been in the public domain for some time.

Statement of President Barack Obama on Release of OLC Memos, April 16, 2009, *available at* http://www.whitehouse.gov/the_press_office/Statement-of-President-Barack-Obama-on-Release-of-OLC-Memos/. Indeed, the Executive Order issued by President Obama not only prohibited abusive interrogation techniques; it also directed that the "CIA shall close as expeditiously as possible any detention facilities that it currently operates and shall not operate any such detention facility in the future." Exec. Ord. 13,491, 74 Fed. Reg. 4893 (Jan 22, 2009). A program that does not exist cannot be "degraded" by disclosures of information that is already public.

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Respectfully submitted,

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