No. 06-1667

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

KHALED EL-MASRI,

Plaintiff-Appellant

v.

UNITED STATES OF AMERICA

Intervenor-Appellee,

GEORGE TENET, et al.

Defendants.

On Appeal from the United States District Court
for the Eastern District of Virginia
The Honorable T.S. Ellis, III

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INTRODUCTORY STATEMENT

This case arrives in the court of appeals with a markedly altered factual and legal landscape. Since the district court's premature dismissal of this case, an eyewitness to Mr. El-Masri's detention in Afghanistan has emerged; an intergovernmental body representing forty-six European member states has issued a detailed public report concluding that Mr. El-Masri and others were abducted and detained by the CIA; and, most recently, the President of the United States has confirmed the widely known fact that the CIA has operated detention and interrogation facilities in other nations, as well as the identities of specific individuals who have been held. Of equal significance, three separate Article III courts have rejected sweeping assertions of the state secrets privilege nearly identical to the assertion at issue here, and have embraced a common-sense approach to accommodating the twin goals of security and accountability that is wholly at odds with the radical theory of executive power advanced by the United States here. Quite remarkably, the United States does not even cite – let alone attempt to distinguish – any of those cases.

The government's silence speaks volumes. Simply put, there is no way to reconcile the government's view that the executive branch is effectively the sole arbiter of the scope of its own immunity from suit, *see*

Brief of the Appellee ("Govt. Br.") at 18-20, with the recent cases in which federal courts have assessed, with sensitivity and care, the government's claim that suits challenging various aspects of the National Security Agency's warrantless wiretapping of American citizens must be dismissed immediately on state secrets grounds. *See Al-Haramain Islamic Foundation, Inc. v. Bush*, --- F. Supp. 2d ----, 2006 WL 2583425 (D.Or., Sept. 7, 2006) (Slip Copy); *American Civil Liberties Union v. National Sec. Agency*, 438 F. Supp. 2d 754 (E.D.Mich., Aug. 17, 2006); *Hepting v. AT & T Corporation*, 439 F. Supp. 2d 974 (N.D.Cal., July 20 2006). As these cases and others cited in Mr. El-Masri's Opening Brief make clear, courts faced with state secrets claims must independently assess whether the information at issue is genuinely secret; whether disclosure of particular information will reasonably cause harm to national security; and whether, even if state secrets are legitimately implicated, dismissal of an entire suit at the pleading stage is warranted. There can be no doubt that federal courts are well equipped to do so. Were it otherwise, the Constitution's careful balancing of power between coequal branches of government would have little meaning, and the responsibility and authority of the judiciary to safeguard individual rights would be impermissibly "abdicated to the caprice of executive officers." *United States v. Reynolds,* 345 U.S. 1, 9-10 (1953).

ARGUMENT

1. Three recent district court decisions have rejected the government's argument that the state secrets privilege justifies dismissal of a case at the outset.

In three recent cases, Article III courts have reaffirmed that the government's legitimate security concerns may be accommodated without eliminating altogether the role of the judiciary in adjudicating claims of executive misconduct. In *Al-Haramain*, 2006 WL 2583425, the court declined to dismiss on state secrets grounds a challenge to the NSA's warrantless wiretapping program and its surveillance of plaintiffs – who alleged that they had seen evidence that they were monitored under that program – and permitted the suit to proceed through limited discovery and presentation of evidence *in camera*. Similarly, in *Hepting v. AT&T Corp.*, 439 F. Supp. 2d, the court denied the government's motion to dismiss a suit challenging AT&T's alleged participation in the NSA's warrantless wiretapping program, rejecting the government's contention that the very subject matter of the suit was a state secret and that AT&T's role in the program could be neither confirmed nor denied without harm to national security. Finally, in *ACLU v. NSA*, 438 F. Supp. 2d, the court declined to dismiss a challenge to the legality of the NSA's warrantless wiretapping

program and determined, on the basis of non-privileged evidence, that the program violated the law and the Constitution. *Id.* at 771-82.[1]

Collectively, these cases offer critical guidance about the proper role of courts in evaluating state secrets claims at the outset of litigation. In each case, for example, the court began its analysis by seeking to determine which allegedly privileged information actually "qualifie[d] as a secret." *Al-Haramain*, 2006 WL 2583425 at *5; *see also Hepting*, 439 F. Supp. 2d at 988; *ACLU v. NSA,* 438 F. Supp. 2d at 764. In *Hepting,* the court evaluated official public statements concerning the challenged program, as well as other "publicly reported information that possesse[d] substantial indicia of reliability," and concluded, after "assessing the value of the information" to actual terrorists, that not every detail of the program was a secret. *Hepting,* 439 F. Supp. 2d at 990. And in *Al-Haramain,* because government officials had confirmed the existence of the NSA's warrantless wiretapping program,

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[1] While each of these courts purported to distinguish *El-Masri*, this was a foregone conclusion given the erroneous determination by the district court, *see infra* Section II, that dismissal was warranted because litigation would require disclosures about secret "details" or "means and methods" of the rendition program. *Al-Haramain,* 2006 WL 2583425 at *9; *ACLU v. NSA,* 438 F. Supp. 2d at 763, n 5; *Hepting*, 439 F.Supp.2d at 985, 994. Unlike the other courts that cited the decision below, this Court, uniquely, has the capacity -- and the obligation -- not to assume the conclusion at issue, but to assess whether it was justified.

publicly discussed the scope and operation of the program, and engaged in a vigorous public defense of the legality and efficacy of the program, the court concluded that "the existence of the Surveillance Program is not a secret, the subjects of the program are not a secret, and the general method of the program . . . is not a secret." *Al-Haramain*, 2006 WL 2583425 at *6; *see also ACLU v. NSA*, 438 F. Supp. 2d at 764-65.

The courts also embraced a common-sense approach to the question whether disclosure of allegedly privileged information would reasonably cause harm to national security. For example, in *Al-Haramain,* the court concluded that "no harm to the national security would occur if plaintiffs are able to prove the general point that they were subject to surveillance . . . without publicly disclosing any other information," because, to the extent that there was any risk that disclosure might lead a target to change his behavior or disclose "sources and methods," that harm had already occurred. *Al-Haramain,* 2006 WL 2583425 at *7-8. Similarly, in *Hepting,* the court rejected the government's contention that harm to national security would necessarily result from confirmation or denial of whether AT&T received a certification from the government that its participation in the program was legal. Because "the government [had] already opened the door for judicial inquiry by publicly confirming and denying information about its monitoring

of communication content," confirmation of the existence of a certification would "not reveal any new information that would assist a terrorist and adversely affect national security." *Hepting,* 439 F. Supp. 2d at 996. Rather, the court believed it possible that AT&T could later confirm or deny the existence of the certification in a general manner, and respond to relevant interrogatories *in camera,* if necessary. *Id.* at 996-97; *see also* Opening Brief of Plaintiff-Appellant ("Opening Br.") at 40-45.

Each court emphatically rejected the notion that simply because the case involved foreign intelligence gathering or because some aspects of the program remained secret, the case must be dismissed on the ground that the *very subject matter* was a state secret or that the suit was barred under the *Totten* doctrine. Thus, in *Hepting,* after considering that "AT&T and the government [had] for all practical purposes already disclosed that AT&T assists the government in monitoring communication content," the impossibility of conducting such a program without AT&T's cooperation, and "AT&T's history of cooperating with the government" in national security surveillance, the court held that "AT&T's assistance in national security surveillance [was] hardly the kind of 'secret' that the *Totten* bar and the state secrets privilege were intended to protect or that a potential terrorist would fail to anticipate." *Hepting,* 439 F. Supp. 2d at 992-93; *see also Al-*

Haramain, 2006 WL 2583425 at *9 (refusing to find the very subject matter of the action a state secret where the government had already "lifted the veil of secrecy on the existence of the Surveillance Program and plaintiffs only [sought] to establish whether interception of their communications – an interception they purport to know about – was unlawful"); *ACLU v. NSA*, 438 F. Supp. 2d at 763-65; *see also* Opening Br. at 29-40.[2]

Finally, each court declined to adopt the government's unilateral pleading-stage assertion that the facts necessary to decide the legal issues were too sensitive to be revealed even to an Article III court. In *Al-Haramain*, for example, the court was simply "not yet convinced that [allegedly privileged] information [was] relevant to the case and [would]

[2] Another challenge to the legality of a telecommunication company's alleged participation in the NSA surveillance program was dismissed without prejudice pursuant to state secrets. *Terkel v. AT&T Corp.*, --- F. Supp. 2d ----, 2006 WL 2088202 (D. Ill. Jul. 25, 2006). However, even in that case, the court rejected the government's argument that dismissal was warranted because the very subject matter of the suit was a state secret. The court noted that "[d]isclosing the mere fact that a telecommunications provider is providing its customer records to the government . . . is not a state secret without some explanation about why disclosures regarding such a relationship would harm national security," where "the Court [could] hypothesize numerous situations" in which confirmation or denial of such facts would pose no harm to national security. *Id.* at *8. Rather, the court concluded that dismissal was warranted because plaintiffs could not ultimately establish harm sufficient to warrant prospective injunctive relief without state secrets, and because the case, unlike *Hepting*, involved only a challenge to an aspect of the program that had never been publicly acknowledged. *Id.* at *16-17, 20-21. Nonetheless, the court granted plaintiffs leave to amend their complaint.

need to be revealed." *Al-Haramain*, 2006 WL 2583425 at *10. While the court acknowledged that after further discovery and *in camera* presentation of evidence it might well conclude that plaintiffs' claims must be dismissed, it was "not prepared to dismiss this case without first examining all available options and allowing plaintiffs their constitutional right to seek relief in this Court." *Id.* at *11. The *Hepting* court likewise concluded that it was "premature" to decide which facts were relevant and necessary to claims and defenses "at the present time," and held that plaintiffs were "entitled to at least some discovery," after which the privilege could be assessed "in light of the facts." *Hepting*, 439 F. Supp. 2d at 994; *see also* Opening Br. at 46-57. In *ACLU v. NSA,* because the government had already announced the facts necessary to decide the legality of the program, the court was capable of adjudicating the merits of a summary judgment motion notwithstanding the government's privilege claim. Even after reviewing the classified, *ex parte* evidence submitted by the government, the court held that plaintiffs were "able to establish a *prima facie* case based solely on Defendants' public admissions regarding the [warrantless wiretapping program]," *ACLU v. NSA*, 438 F. Supp. 2d at 765, and that privileged information was "not necessary to any viable defense" of the surveillance program. *Id.* at 766. Because the government had "repeatedly told the general public that there is

a valid basis in law" for warrantless wiretapping, and the government had supported its legal arguments without recourse to classified information, the court found defendants' contention that it could not defend the legality of its actions without state secrets "disingenuous and without merit." *Id.* at 765-66.

The approach adopted in these cases demonstrates the careful manner in which Article III courts can assess responsibly even the most sweeping state secrets assertions. Rather than accept the government's claim that the need for secrecy must automatically and prematurely extinguish any possibility for relief, these courts were able to accommodate the government's legitimate secrecy concerns without eliminating the plaintiffs' right of access to a forum for judicial redress. The district court below, in deferring entirely to the government's secrecy claims, erred in several respects: it failed to evaluate whether information necessary to proving or defending against Mr. El-Masri's claims could plausibly be characterized as "secret"; it failed to consider the actual rather than speculative impact of disclosure of information already known throughout the world in assessing whether such disclosure would reasonably cause harm to national security; it failed adequately to assess whether it was even possible at the pleading stage to determine the relevance of alleged secrets to the litigation; and it failed to

use the requisite creativity and care to fashion appropriate and secure procedures that would permit the case to go forward.

In evaluating the government's assertion of the privilege in this case, this Court should be mindful of the broader context in which the government has sought to avoid accountability for alleged illegality and misconduct on grounds of secrecy. These cases concern more than the efforts of individual plaintiffs to obtain justice for alleged wrongdoing. Unless the government's premature and overbroad claims of secrecy are subjected to meaningful judicial scrutiny, the government will routinely deploy a common-law evidentiary privilege to shield even its most egregious conduct from accountability. As the *Hepting* court recognized, "even the state secrets privilege has its limits." *Hepting*, 439 F. Supp. 2d at 995.

2. This case can be litigated without disclosure of means, methods, and operational details of the CIA's clandestine activities.

The United States contends here, as it did below, that Mr. El-Masri's suit must be terminated at its outset because further litigation would expose means, methods, and operational details of the CIA's overseas operations. Indeed, the district court conclusorily accepted that argument, without explanation as to why or how exposure of means and methods unknown to the public would inevitably occur were Mr. El-Masri's case to proceed beyond the pleading stage. Joint Appendix ("JA") at 220. Mr. El-Masri

does not dispute that the state secrets privilege may be legitimately invoked to block publication of details of clandestine operations, where such disclosures would educate enemy intelligence agencies as to the United States' efforts to defeat them. But the government's insistence that any judicial involvement, however cautious, will necessarily reveal such details need not – indeed, cannot – be accepted without scrutiny. Had this Court deferred to the government's similar claims in the *Moussaoui* litigation, there would have been no accommodation permitting Mr. Moussaoui's counsel to submit written questions to witnesses with potentially exculpatory evidence. *See* Brief of Petitioner-Appellant at *27, *United States v. Moussaoui*, 382 F.3d 453 (4th Cir. 2004) (No. 03-4792), *available at* 2003 WL 22519704 (insisting that permitting any access to Al-Qaeda detainees "would irretrievably cripple painstaking efforts for securing the flow of information," and that "the courts [were] in no position to second guess such Executive Branch judgments"). There has been no discernable harm to the nation resulting from this Court's exercise of Article III independence, and Mr. Moussaoui was convicted by a jury without resort to the manifestly unfair process demanded by the government.

In this case, it is difficult to conceive how requiring the government to answer Mr. El-Masri's complaint would alert our terrorist enemies to

anything that they do not already know. In fact, just as the President's confirmation that fourteen suspected terrorists had been detained and interrogated by the CIA did not reveal classified "means and methods" that were unknown to the public, it is highly likely that Mr. El-Masri would be able to establish defendants' liability without such revelations. Moreover, the manner in which the CIA operates its rendition program is by now widely known and has been publicly aired not only in the media, *see* Opening Br. at 35-37, but in the official reports of foreign governments.

For example, the Council of Europe, in a section of its report on rendition and secret detention entitled "CIA methodology – how a detainee is treated during a rendition," distills the testimony of several rendition victims, as well as other eyewitnesses, regarding the CIA's "method" of subduing and transporting rendition targets, and concludes that "[c]ollectively[,] the cases in the report testify as to the existence of an established *modus operandi* of rendition . . . ." Dick Marty, Committee on Legal Affairs and Human Rights, Council of Europe, *Alleged Secret Detentions and Unlawful Inter-State Transfers Involving Council of Europe Member States* § 2.7.1, ¶85 (draft report 2006), *available at* http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/07_06_06_renditions_draft.pdf. The report proceeds to describe that *modus operandi*, in part, as follows:

i. it generally takes place in a small room (a locker room, a police reception area) at the airport, or at a transit facility nearby.

ii. the man is sometimes already blindfolded when the operation begins, or will be blindfolded quickly and remain so through most of the operation.

iii. four to six CIA agents perform the operation in a highly-disciplined, consistent fashion – they are dressed in black (either civilian clothes or special 'uniforms'), wearing black gloves, with their full faces covered. Testimonies speak, variously, of "*big people in black balaclavas,*" people "*dressed in black like ninjas,*" or people wearing "*ordinary clothese, but hooded.*"

iv. the CIA agents "*don't utter a word when they communicate with one another,*" using only hand signals or simply knowing their roles implicitly.

v. some men speak of being punched or shoved by the agents at the beginning of the operation in a rough and brutal fashion; others talked about being gripped firmly from several sides.

vi. the man's hands and feet are shackled.

vii. the man has all his clothes (including his underwear) cut from his body using knives or scissors in a careful, methodical fashion; an eyewitness described how "*someone was taking these clothes and feeling every part, you know, as if there was something inside the clothes, and then putting them in a bag.*"

viii. the man is subjected to a full-body cavity search, which also entails a close examination of his hair, ears, mouth and lips.

ix. the man is photographed with a flash camera, including when he is nearly or totally naked; in some instances, the man's blindfold may be removed for the purpose of a photograph in which his face is also identifiable.

x. some accounts speak of a foreign object being forcibly inserted into the man's anus; some accounts speak more specifically of a tranquiliser or a suppository being administered *per rectum* . . . .

xi. the man is then dressed in a nappy or incontinence pad and a loose-fitting "*jump-suit*" or set of overalls; *"they put diapers on him and then there is some handling with these handcuffs and foot chains, because first they put them on and then they are supposed to put him in overalls, so then they have to alternately unlock and relock them."*

xii. the man has his ears muffled, sometimes being made to wear a pair of "*headphones*."

xiii. finally a cloth bag is placed over the man's head, with no holes through which to breathe or detect light; they "*put a blindfold on him and after that a hood that apparently reaches far down on his body."*

xiv. the man is typically forced aboard a waiting aeroplane, where he may be "*placed on a stretcher, shackled,"* or strapped to a mattress or seat, or "*laid down on the floor of the plane and they bind him up in a very uncomfortable position that makes him hurt from moving."*

xv. in some cases the man is drugged and experiences little or nothing of the actual rendition flight; in other cases, factors such as the pain of the shackles or the refusal to drink water or use the toilet make the flight unbearable: *"this was the hardest moment in my life."*

xvi. in most cases, the man has no notion of where he is going, nor the fate that awaits him upon arrival.

Id. at § 2.7.1, ¶85 (citations omitted) (emphasis in original). These facts are well known. Foreign terrorists surely are on notice that, should they be captured by or turned over to the CIA, these or similar methods will be

employed against them. Confirming or denying that Mr. El-Masri was a victim of these practices will no more educate our enemies about clandestine anti-terror tactics than did President Bush's confirmation that fourteen specific individuals had been held in CIA custody.

Similarly, there is no danger whatsoever that litigation of this matter will disclose classified interrogation methods. Mr. El-Masri's complaint does not allege any such methods: he contends that he was repeatedly beaten, imprisoned incommunicado in a foul dungeon, and summoned for nighttime questioning, but makes no mention of so-called "alternative interrogation procedures," such as waterboarding, that have been reported by the media but not confirmed by the government. None of these allegations can plausibly be said to describe a state secret. As in *Al-Haramain,* "the existence of the . . . Program is not a secret, the subjects of the program are not a secret, and the general method of the program . . . is not a secret." *Al-Haramain,* 2006 WL 2583425 at *6.

That is not to say that there might not be specific details – such as, for example, the identities of covert operatives – that may be legitimately withheld on state secrets grounds. But it is precisely the role of the district court to ensure that such "sensitive information . . . [is] disentangled from nonsensitive information to allow for the release of the latter." *Ellsberg v.*

Mitchell, 709 F.2d 51, 57 (D.C. Cir. 1983). The question is not whether the CIA Director has identified any classified facts in his affidavits; rather, the question is whether it can be determined with certainty at this stage of the litigation that those facts are absolutely *essential* either for Mr. El-Masri to prove his claims or for the government validly to defend against them. As explained here and in Mr. El-Masri's Opening Brief, such a determination would be premature.

3. The United States misapprehends the significance of the widespread dissemination of information about Mr. El-Masri's case and the rendition program, and entirely ignores substantial corroborating evidence of Mr. El-Masri's allegations.

In disparaging the significance of the enormous publicity that Mr. El-Masri's abduction, detention, and torture have received, the United States does battle with a straw man. Contrary to the government's suggestions, Mr. El-Masri has never contended that the voluminous media reports about his case, many reliant on government sources, somehow amount to a waiver of the privilege, or that the government is now estopped from asserting the privilege over legitimately sensitive information. Nor does Mr. El-Masri contend that press reports have the equivalent evidentiary dignity of official government pronouncements. Rather, Mr. El-Masri maintains that the sheer number, breadth, scope, detail, consistency, and worldwide dissemination of published reports about his case place an additional burden on the

government to explain how confirming or denying the information contained therein would cause harm to the nation. Mr. El-Masri does not suggest that these articles and reports are dispositive to the state secrets inquiry, only that they are highly relevant to determining whether there is a "reasonable danger" that further litigation of publicly reported facts would harm national security. *Reynolds,* 345 U.S. at 10; *see also In re United States*, 872 F.2d 472, 478 (D.C. Cir. 1989); *Ellsberg*, 709 F.2d at 61; *Spock v. United States*, 464 F. Supp. 510, 519 (S.D.N.Y. 1978). In fact, it is the government's position -- that the many hundreds of detailed news articles about Mr. El-Masri's ordeal have absolutely no relevance to this inquiry -- that is the extreme one.

Although the government devotes substantial attention to mischaracterizing Mr. El-Masri's arguments with respect to the media, it is silent as to the significance of the Council of Europe report and the ongoing foreign investigations. It is not difficult to appreciate why. The government's argument in support of dismissal is predicated in part on an abstract and generalized concern about the effect of this litigation on relations with foreign governments. Govt. Br. at 25-27. The inconvenient fact that those other governments have investigated, and continue to investigate, the roles of their own and United States officials in Mr. El-

Masri's abduction, detention, and torture demonstrates why courts must consider actual, rather than hypothetical, harms in evaluating state secrets claims.[3] For example, the Council of Europe has concluded that both Germany and Macedonia are responsible for violations of Mr. El-Masri's rights as a result of their involvement in his ordeal. *Alleged Secret Detentions and Unlawful Inter-State Transfers Involving Council of Europe Member States* § 11, ¶ 288. And the German government continues to pursue criminal and parliamentary investigations of Mr. El-Masri's abduction and detention.[4] These reports and investigations form part of a substantial and growing body of corroborating evidence – including the

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[3] *Compare Halkin v. Helms,* 690 F.2d 977, 993 n.58 (D.C. Cir. 1982) ("*Halkin II*") ("It bears noting in this connection that few if any national governments besides our own are inclined to establish official commissions of inquiry into the activities of their intelligence agencies, or to make public the results of such inquiries. The fact that our government has chosen to make a relatively clean breast of its foreign and domestic intelligence activities' impact on individuals hardly supports an inference that other governments are anxious to have their roles in those activities similarly submitted to the scrutiny either of their citizens or of foreign interests.").

[4] Several other investigations are ongoing as well, as set forth in Mr. El-Masri's Opening Brief. *See* Opening Br. at 37. Most recently, the Canadian government, in concluding that its citizen Maher Arar was likewise an innocent victim of a U.S. rendition, described in detail the CIA's liaison work with Canadian and Syrian intelligence services. Comm'n of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar - Factual Background*, 35, 566-67 (2006), available at http://www.ararcommission.ca/eng/Vol_I_English.pdf and http://www.ararcommission.ca/eng/Vol_II_English.pdf

evidence detailed in Mr. El-Masri's Opening Brief and ignored by the government, *see* 48-52 – that renders the United States' rote-like insistence that it can neither confirm nor deny any aspect of this case increasingly peculiar and implausible.[5]

Contrary to the government's contention, *see* Govt. Br. at 30-32, this case is quite unlike the *Halkin* cases, in which the D.C. Circuit sustained NSA and CIA claims of privilege notwithstanding the extensive hearings that had been conducted regarding the surveillance activities of those agencies. *See Halkin v. Helms,* 598 F.2d 1 (D.C. Cir. 1978) ("*Halkin I*"); *Halkin v. Helms,* 690 F.2d 977 (D.C. Cir. 1982) ("*Halkin II*"). In both cases, the court held that despite general public knowledge of NSA and CIA surveillance activities, the identities of specific surveillance targets remained secret, and disclosing to plaintiffs in discovery whether they themselves had been surveilled could reasonably harm national security: "Obviously the individual himself and any foreign organizations with which he has

[5] As the *Amici* persuasively argue, it is government's behavior, not this litigation, that has harmed relations with foreign governments and endangered the international cooperation critical to combating terrorism. *See* Brief Amicus Curiae of Former United States Diplomats Supporting Plaintiff-Appellant and Reversal ("Amicus Br."). Although the United States sought and obtained an extension of time in order "to prepare a clear and precise response to the arguments of the Appellant and *Amici,*" the government does not respond to the arguments offered by *Amici,* or even mention them.

communicated would know what circuits were used. Further, any foreign government or organization that has dealt with a plaintiff whose communications are known to have been acquired would at the very least be alerted that its communications might have been compromised or that it might itself be a target." *Halkin I,* 598 F.2d at 8; *see also Halkin II,* 690 F.2d at 993 n.57 ("[I]t is clear that armed with this information and the mass of facts to be culled from the public record of [CIA] activities, it might well be possible for appellants and others to deduce such identities [of covert CIA operatives] based upon their personal knowledge of their own contacts, activities and whereabouts."). Here, Khaled El-Masri knows he was a victim of rendition, will so testify, and has eyewitness testimony as well as substantial evidentiary corroboration of key aspects of his account. The government's refusal to confirm or deny what Mr. El-Masri already knows accordingly serves no rational purpose.

Finally, the President's recent confirmation that the CIA has operated detention and interrogation centers overseas further demonstrates why the "very subject matter" of this litigation – the abduction, detention, and coercive interrogation of Khaled El-Masri by the CIA – is not a state secret. That the President additionally named the specific individuals who had been held by the CIA undermines the government's insistence that there is a

material distinction in this case between its previous confirmation of the existence of a rendition program and any response to the allegation that Mr. El-Masri was a victim of that program. Any conceivable harm that might flow from that disclosure has already occurred.

If, in the end, all that remains of the government's argument is that formal confirmation of what the entire world already knows will harm the nation not by disclosing previously unknown clandestine methods but by jeopardizing the CIA's credibility as a reliable partner, *see* Govt. Br. at 25-26, there is no reason whatsoever why this litigation cannot proceed without such confirmations or denials. As in *Moussaoui* – where the parties were able to litigate the defendant's access to terrorist suspects without any formal confirmation that those suspects were in United States custody – this case can be litigated without confirmation or discussion of, for example, any possible relationship between the United States and the government of Macedonia. Certainly Mr. El-Masri's claims against the defendants do not depend on establishing such a relationship; nor is there any aspect of such a relationship that would provide the defendants with a valid defense to Mr. El-Masri's allegations of prolonged arbitrary detention and torture. A federal court is eminently capable of devising a procedure that would permit

adjudication of Mr. El-Masri's claims without requiring confirmation or denial of facts not relevant to liability.

CONCLUSION

The arguments raised by the government in this case are not new ones. Indeed, more than three decades ago, in seeking to prevent the disclosure of information about its activities and misconduct during wartime, the government used similar language in insisting that courts were in no position to second guess the determination by executive officials that release of information would harm the nation:

> In the present cases high government officials have explained the reasons for their concern; that judgment is enough to support the Executive Branch's conclusion, reflected in the top secret classification of the documents and in the in camera evidence, that disclosure would pose the threat of serious injury to the national security.

That case was *New York Times v. United States,* and the documents at issue were the Pentagon Papers. *See* Brief for the United States at *18, *New York Times, Co. v. United States,* 403 U.S. 713 (1971), *available at* 1971 WL 167581. Some twenty years after the release of the papers, former Solicitor General Erwin Griswold, who had argued the case on behalf of the United States, conceded: "I have never seen any trace of a threat to the national security from the publication. Indeed, I have never seen it even suggested that there was such a threat." Erwin N. Griswold, *Secrets Not Worth*

Keeping: The Courts and Classified Information, Wash. Post, Feb. 15, 1989 at A25.

The stakes in this case are substantial. As *Amici* Former United States Diplomats make clear: "[D]enial of a judicial forum to Mr. El-Masri will affect not only his private interests but will damage vital public interests: our Nation's standing in the world community and our ability to obtain cooperation from foreign governments needed to combat international terrorism." Amicus Br. at 5. In these circumstances, it is all the more critical that this Court "not merely unthinkingly ratify the executive's assertion of absolute privilege, lest it inappropriately abandon its important judicial role." *In re United States*, 872 F.2d at 475.

For the foregoing reasons and for the reasons set forth in Mr. El-Masri's Opening Brief, this Court should reverse the judgment of the district court and remand for further proceedings.

Respectfully submitted,

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Dated: September 25, 2006
New York, NY

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 06-1667 **Caption:** El-Masri v. Tenet

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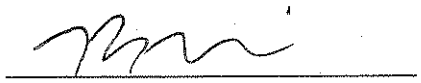

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