

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT



BINYAM MOHAMED; ABOU ELKASSIM BRITEL; AHMED AGIZA;
MOHAMED FARAG AHMAD BASHMILAH; BISHER AL-RAWI,
Plaintiffs-Appellants,

—v.—

JEPPESEN DATAPLAN, INC.,
Defendant-Appellee,

UNITED STATES OF AMERICA,
Intervenor-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION
THE HONORABLE JAMES WARE

**BRIEF AMICUS CURIAE OF FORMER UNITED STATES
DIPLOMATS SUPPORTING PLAINTIFFS-APPELLANTS AND
REVERSAL (SEE INSIDE COVER FOR LIST OF AMICI CURIAE)**

BARBARA MOSES
DAVID J. STANKIEWICZ
MORVILLO, ABRAMOWITZ, GRAND,
IASON, ANELLO & BOHRER, P.C.
565 Fifth Avenue
New York, New York 10017
(212) 856-9600

AZIZ HUQ
JONATHAN HAFETZ
BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW
161 Avenue of the Americas, 12th Floor
New York, New York 10013
(212) 992-6730

Attorneys for Amici Curiae Former United States Diplomats

AMICI CURIAE FORMER UNITED STATES DIPLOMATS

Morton Abramowitz

Jack Binns

Harry C. Blaney III

Marshall Carter-Tripp

Willard Ames De Pree

Mary E. Gawronski

F. Allen "Tex" Harris

Samuel F. Hart

Gilbert D. Kulick

Alfred H. Moses

E. Michael Southwick

Paul K. Stahnke

Peter Wolcott

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	iii
INTEREST OF THE AMICI	1
INTRODUCTION AND SUMMARY OF ARGUMENT	4
ARGUMENT	7
I. THE RULE OF LAW REQUIRES THAT A JUDICIAL FORUM BE AVAILABLE FOR VIOLATIONS OF ELEMENTARY CIVIL AND HUMAN RIGHTS.....	7
II. DENIAL OF A FORUM TO APPELLANTS WOULD FURTHER UNDERMINE OUR NATION’S INTERNATIONAL STANDING AND ITS ABILITY TO OBTAIN THE FOREIGN COOPERATION ESSENTIAL TO COMBAT TERRORISM	11
A. Cooperation from Foreign Governments is Essential to Combat International Terrorism	11
B. Impunity and Failure to Respect the Rule of Law Threaten to Undermine Essential Counter-Terrorism Cooperation.....	13
1. The Conduct Alleged in this Case has Adversely Affected America’s Relationship with its Allies	15
2. The Deterioration of America’s Relationship with its Allies Threatens its National Security	25
CONCLUSION	28

TABLE OF AUTHORITIES

Page(s)

CASES

<i>Al-Haramain Islamic Foundation, Inc. v. Bush</i> , 507 F.3d 1190 (9th Cir. 2007)	4-5, 7
<i>Boumediene v. Bush</i> , 128 S. Ct. 2229 (2008).....	9, 28
<i>Chambers v. Baltimore & Ohio R. Co.</i> , 207 U.S. 142 (1907).....	6
<i>United States v. Reynolds</i> , 345 U.S. 1 (1963)	9

CONSTITUTION & STATUTES

U.S. Const. art. VI, cl. 2	10
18 U.S.C. § 113(a)(4) (2000)	8
18 U.S.C. § 1201 (2000).....	8
18 U.S.C. § 2340A (2000).....	8
18 U.S.C. § 373 (2000).....	8
Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242, 112 Stat. 2822-822 (codified as note to 8 U.S.C. § 1231 (2000)).....	8
Military Extraterritorial Jurisdiction Act of 2000, Pub. L. No. 106-523, §§ 1-2, 114 Stat. 2488 (codified at 18 U.S.C. §§ 3261-67 (2000)).....	8
USA PATRIOT Act, Pub. L. No. 107-56, § 804, 115 Stat. 377 (codified at 18 U.S.C. § 7(9)(A) (2000)).....	8

TREATIES

- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85 10
- International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, S. Exec. Doc. E. 95-2, 999 U.N.T.S. 171..... 10

REPORTS & DECISIONS OF THE U.S. & FOREIGN GOVERNMENTS & INTERNATIONAL ORGANIZATIONS

- Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar* (2006)..... 24
- Eur. Comm. for Democracy through Law, *Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners*, Op. no. 363/2005, Doc. No. CDL-AD(2006)009 (Mar. 17, 2006)..... 15-16
- Eur. Parl. Ass., Comm. on Legal Affairs & Human Rights, *Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe Member States: Second Report*, Doc. No. 11302 rev. (Jun. 11, 2007) 16-17
- German Bundestag, Mandate for the Committee of Inquiry, (July 6, 2007)..... 19-20
- Intelligence and Security Committee, Rendition, 2007, Cm. 7171 (U.K.).... 6, 22-23
- Irish Human Rights Commission, “Extraordinary Rendition”: A Review of Ireland’s Human Rights Obligations (2007)..... 24
- Ministry of Foreign Affairs, Norges svar til Europarådet vedrørende ulovlig fangetransport [Norway’s Answer to the European Parliament Concerning Illegal Rendition] (Feb. 22, 2006)..... 24
- Nat’l Comm’n on Terrorist Attacks Upon the U. S., *The 9/11 Commission Report* 379 (2004) 11-12, 14
- The National Security Strategy of the United States* (March 16, 2006)..... 12-13
- National Strategy for Combating Terrorism* (September 2006)..... 12

Report on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners, Eur. Parl. Doc. A6-0020/2007 (2007)	17
U.N. Comm. Against Torture, <i>Agiza v. Sweden</i> , U.N. Doc. CAT/C/34/D/233/2003 (May 2005).....	22
U.N. Human Rights Comm., <i>Communication No. 1416/2005</i> , U.N. Doc. CCPR/C/88/D/1416/2005 (Nov. 10, 2006).....	22

BOOKS & ARTICLES

9/11 Public Discourse Project, <i>Report on the Status of the 9/11 Commission Recommendations: Part III: Foreign Policy, Public Diplomacy, and Nonproliferation</i> (Nov. 14, 2005)	14-15
Raymond Bonner, <i>Britain Sends Information on Suspect to the U.S.</i> , N.Y. Times, June 21, 2008, at A10.....	6, 23
Balz Bruppacher, <i>Swiss Suspend CIA Abduction Probe</i> , Associated Press, Jan. 18, 2008.....	24
Éric Decouty, <i>La France enquête sur les avions de la CIA [France Investigates CIA Planes]</i> , Le Figaro (Fr.), Oct 15, 2007	24
<i>Denmark to Investigate Alleged CIA Flights</i> , L.A. Times, Feb. 1, 2008, at 10.....	24
<i>Germany Drops Pursuit of CIA Kidnappers</i> , Spiegel Online (F.R.G.), Sep. 24, 2007	18-19
<i>Germany Issues Arrest Warrants for 13 CIA Agents in El-Masri Case</i> , Spiegel Online (F.R.G.), Jan. 31, 2007	18
John Goetz, Marcel Rosenbach & Holger Stark, <i>CIA Arrest Warrants Strain US-German Ties</i> , Spiegel Online (F.R.G.), Jun. 25, 2007.....	18
John Goetz, Marcel Rosenbach & Andreas Wassermann, <i>Special Treatment for Uncle Sam?</i> , Spiegel Online (F.R.G.), Jul. 10, 2007.....	19

Stephen Grey & Renwick McLean, <i>Spain Looks into C.I.A. 's Handling of Detainees</i> , N.Y. Times, Nov. 14, 2005, at A8	21
Steven Grey & Elisabetta Povoledo, <i>Italy Arrests 2 in Kidnapping of Imam in '03</i> , N.Y. Times, Jul. 6, 2006, at A1.....	20
Victor Homola, <i>Spying Investigation Approved</i> , N.Y. Times, April 8, 2006, at A5	19
Michael Isikoff & Mark Hosenball, <i>Hunting the Hunters</i> , Newsweek Web Exclusive, Mar. 29, 2007, http://www.newsweek.com/id/35902	18
<i>El Juez que Investiga los Vuelos de CIA Pide los Planes de Viajes a las Bases Aereas [The Judge Investigating CIA Flights Requests Flight Plans to Air Bases]</i> , La Vanguardia (Spain), May 28, 2008	21
Paul Kelbie, <i>Call for Outlawing of "Rendition" Flights</i> , The Observer (U.K.), Oct. 28, 2007, at 4.....	24
Mark Lander, <i>German Court Challenges C.I.A. over Abduction</i> , N.Y. Times, Feb. 1, 2007, at A1	18
Georg Mascolo & Matthias Gebauer, <i>The CIA in the Dock</i> , Spiegel Online (F.R.G.), Jan. 10, 2007	19
Elizabeth Nash, <i>Madrid Begins Inquiry into CIA "Torture Flights,"</i> The Independent (U.K.), Nov. 16, 2005, at 26.....	21
<i>Norway and Sweden Investigate Alleged Secret CIA Flights</i> , Deutsche Presse-Agentur (F.R.G.), Nov. 16, 2005.....	24
<i>Portugal Probes Alleged CIA Flights</i> , Associated Press, Feb. 6, 2007	24
<i>Renditions Victim to Sue German Government</i> , Spiegel Online (F.R.G.), Jun. 9, 2008	19
Elisabeth Rosenthal, <i>Italian Trial of C.I.A. Operatives Begins with Torture Testimony</i> , N.Y. Times, May 15, 2008, at A10	20

Charles M. Sennott, <i>Italy Seethes at US Abduction of Iman</i> , Boston Globe, Jul. 3, 2005, at A9	22
Victor L. Simpson, <i>U.S. Allies Resist Secret Deportations</i> , Associated Press, June 19, 2005.....	22
<i>Spanish Government to Declassify Documents on Alleged CIA Flights</i> , Associated Press, Feb. 9, 2007	21
<i>U.S. Displeased over German Hunt for CIA Agents</i> , Spiegel Online (F.R.G.), Mar. 5, 2007	18
Jo-Anne Wemmers, <i>Victim Policy Transfer: Learning from Each Other</i> , 11(1) Eur. J. Crim. Pol. & Research 121 (2005).....	18
Craig Whitlock, <i>Computer Files Hold Key in CIA Case</i> , Wash. Post, Jun. 26, 2008, at A11	20
Craig Whitlock, <i>New Swedish Documents Illuminate CIA Action</i> , Wash. Post, May 21, 2005, at A01	22
Craig Whitlock, <i>U.S. Won't Send CIA Defendants to Italy</i> , Wash. Post, Mar. 1, 2007, at A12	25

CONGRESSIONAL HEARINGS & SPEECHES

Transcript of Legal Advisor Bellinger’s Media Roundtable in Brussels, Belgium (May 4, 2006)	25
<i>Extraordinary Rendition, Extraterritorial Detention and Treatment of Detainees: Restoring Our Moral Credibility and Strengthening Our Diplomatic Standing: Hearing before the Sen. Comm. on Foreign Relations, 110th Cong. 3 (2007)</i>	25-27
<i>Extraordinary Rendition in U.S. Counter Terrorism Policy: The Impact on Trans- Atlantic Relations: Joint Hearing before the Subcomm. on Int’l Orgs., Human Rights, and Oversight and the Subcomm. on Europe of the H. Comm. on Foreign Affairs, 110th Cong. 6 (2007) (statement of Julianne Smith, Director and Senior Fellow, Europe Program, Center for Strategic and International Studies).....</i>	26-27

Gen. Michael V. Hayden, Director, Central Intelligence Agency, Remarks at the Council on Foreign Relations (Sept. 7, 2007)..... 13-14

Hearing on the Treatment of Detainees in U.S. Custody: S. Comm. on Armed Services 110th Cong. 4 (2008) (statement of Alberto J. Mora, Former General Counsel of the Department of the Navy) 26

Subcomm. on Int't Orgs., Human Rights, and Oversight of the H. Comm. on Foreign Affairs, 110th Cong., The Decline in America's Reputation: Why? 14 (Comm. Print 2008) 27

INTEREST OF THE AMICI

Amici are former United States diplomats and State Department officials with extensive experience in government service. *Amici* are deeply concerned by the diplomatic harm caused by the “extraordinary rendition” practices alleged by plaintiffs in this case, including forced disappearance, secret detention, torture, and other violations of domestic and international law. *Amici* respectfully submit this brief to alert this Court to the additional national security concerns raised by the threshold dismissal of plaintiffs’ claims on the basis of the “state secrets privilege” and the resulting denial of any judicial forum for resolution of their allegations.

Amicus Morton Abramowitz is a former Ambassador to Thailand and Turkey and was Assistant Secretary of State for Intelligence and Research. He is a former President of the Carnegie Endowment for International Peace.

Amicus Jack Binns is a former Ambassador to Honduras and Deputy Chief of Mission in Spain and Costa Rica. During his twenty-five years in the Foreign Service, he served throughout Latin America and Western Europe.

Amicus Harry C. Blaney III was a Foreign Service Officer for more than twenty years. He was a member of the Secretary of State’s Policy Planning Staff, served as Senior Advisor to the Bureau of Intelligence and Research, and was posted abroad with the U.S. Missions to the European Union and NATO.

Amicus Marshall Carter-Tripp served as a Foreign Service Officer for twenty-four years in Europe and Latin America, and in the U.S. Mission to NATO.

Amicus Willard Ames De Pree served as Ambassador to Mozambique from 1976 to 1980 and to Bangladesh from 1987 to 1990.

Amicus Mary E. Gawronski was a Foreign Service Officer for more than thirty-three years, serving in Europe, Latin America, and North Africa. From 1990 to 1992 she was Deputy Director of the Office of European Affairs in the U.S. Information Agency.

Amicus F. Allen “Tex” Harris retired after serving with the United States Department of State for thirty-five years, including Foreign Service posts in Argentina, Australia, South Africa and Venezuela. Mr. Harris is a past President of the American Foreign Service Association.

Amicus Samuel F. Hart is a former Ambassador to Ecuador. During his twenty-seven year career as a Foreign Service Officer, Mr. Hart served in the Far East, Latin America and Israel.

Amicus Gilbert D. Kulik served as a Foreign Service Officer from 1966 to 1989, retiring as Deputy Director of Southern Africa Affairs.

Amicus Alfred H. Moses is a former Ambassador to Romania and Special Presidential Emissary for the Cyprus Conflict.

Amicus E. Michael Southwick is a former Ambassador to Uganda and served as Principal Deputy Assistant Secretary of State for Democracy, Human Rights, and Labor in the current Administration.

Amicus Paul K. Stahnke retired with the rank of Minister Counselor after serving as a Foreign Service Officer for thirty-nine years, including assignments in Germany, Italy, France, Japan, Thailand and Somalia.

Amicus Peter Wolcott served as Foreign Service Officer with the United States Information Agency from 1962 to 1983 in Indonesia, Malaysia, Finland and Australia.

All parties to this action have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs filed suit in the United States District Court for the Northern District of California, alleging they are victims of a practice commonly known as “extraordinary rendition,” executed by the Central Intelligence Agency (“CIA”) with the assistance of defendant Jeppesen Dataplan, Inc. (“Jeppesen”), a for-profit domestic corporation. The district court dismissed the suit at the threshold, before any answer was filed, discovery sought, or evidence presented. Although seemingly recognizing that extraordinary rendition “is not a ‘black box’ program, the very existence of which is secret,” the court nevertheless held that “proceeding with this case would jeopardize national security and foreign relations, and that no protective procedure can salvage this case.” Order Granting the United States’ Motion to Intervene and Granting the United States’ Motion to Dismiss with Prejudice (hereinafter “Order”) at 9, Feb. 13, 2008; Excerpt of R. at 9. The court concluded: “[T]he issues involved in this case are non-justiciable because the very subject matter of the case is a state secret.” Order at 9; Excerpt of R. at 9.

Plaintiffs’ brief on appeal persuasively shows this threshold dismissal was an improper application of *Al-Haramain Islamic Foundation, Inc. v. Bush*, 507 F.3d 1190 (9th Cir. 2007), because the district court improperly “merged the concept of ‘subject matter’ with the notion of proof of a prima facie case.” See Br. of Pls.-Appellants at 39. *Amici* focus their argument, however, on the diplomatic

and national security consequences of *threshold* dismissal, which denies plaintiffs a judicial forum for their allegations. *Amici* do not question that later stages of this case may “involve” privileged information that may warrant exclusion. *Cf. Al-Haramain*, 507 F.3d at 1201 (noting, with reference to the same possibility, that “that fact alone does not render the very subject matter of the action a state secret”).

As we show in more detail below, the practices alleged by plaintiffs have harmed the United States’ standing in the world and undermined its capacity to secure cooperation from foreign governments, including our oldest and closest allies. An increasing number of allied nations, on which we depend for counter-terrorism cooperation, have publicly condemned the CIA’s extraordinary rendition practices. So too have the European Parliament and the Parliamentary Assembly of the Council of Europe. *See infra* pp. 16-17.

The resulting harm to our national security is not hypothetical. Several European nations have closed their airspace to rendition flights. Others have commenced criminal investigations into rendition activities that took place within their borders, and prosecutors in Germany and Italy have indicted intelligence personnel for their participation in the rendition program. *See infra* pp. 18-25. The United Kingdom has publicly called for the release of plaintiff Mohamed, who was

“rendered” based in part on information provided by British intelligence.¹ Worse yet, our staunchest ally now acknowledges that it has cancelled joint intelligence operations with the United States, because the British Secret Intelligence Service “was not able to satisfy itself as to the likely treatment of the target.”²

Denial of a judicial forum to plaintiffs would exacerbate our allies’ concerns and further undermine our ability to obtain vital counter-terrorism cooperation from them. By immunizing unlawful conduct from judicial scrutiny at the behest of the executive branch, it would send a message that the courts of the United States cannot be relied upon to provide even a *possibility* of redress for those who allege flagrant abuses of both domestic and international law in the course of counter-terrorism operations. To our friends and allies, it would signal that the United States does not respect the rule of law in relation to such operations, and reinforce the concerns that already impede international cooperation. Since access to the courts “lies at the foundation of orderly government,” *Chambers v. Baltimore & Ohio R. Co.*, 207 U.S. 142, 148 (1907), such a result would also undermine the rule of law at home.

National security concerns, in short, stand on *both* sides of the scales when

¹ See Raymond Bonner, *Britain Sends Information on Suspect to the U.S.*, N.Y. Times, June 21, 2008, at A10; Intelligence and Security Committee, Rendition, 2007, Cm. 7171 (hereinafter “Rendition Report”), at 43. The Intelligence and Security Committee is a joint committee of the House of Lords and House of Commons with oversight responsibilities over the U.K. intelligence services.

² See Rendition Report at 27.

this Court considers the proper application of the state secrets privilege. Holding plaintiffs' claims inherently "non-justiciable" would not only affect their private interests; it would "jeopardize national security and foreign relations," Order at 9; Excerpt of R. at 9, thereby damaging the very interests that the privilege is intended to protect. This Court should enforce its previous holding that threshold dismissal on state secrets grounds is proper only in rare cases challenging "a truly secret or 'black box' program." *Al-Haramain*, 507 F.3d at 1193.

ARGUMENT

I. THE RULE OF LAW REQUIRES THAT A JUDICIAL FORUM BE AVAILABLE FOR VIOLATIONS OF ELEMENTARY CIVIL AND HUMAN RIGHTS

The allegations in this case describe intentional violations of core constitutional and human rights. As a general matter, nothing prevents federal courts from reviewing such allegations; indeed, Congress recently confirmed the federal courts' *criminal* jurisdiction over the conduct alleged here, and just last month, the Supreme Court held that the Constitution guarantees habeas corpus review in cases based on similar factual allegations. Further, our treaty obligations commit us to providing judicial redress in cases of torture and illegal detention. The default here, therefore, should be the availability of meaningful federal court jurisdiction.

The acts plaintiffs allege are violations not only of constitutional and international law,³ but also core federal criminal laws proscribing torture – 18 U.S.C. § 2340A (2000); kidnapping (18 U.S.C. § 1201 (2000)); conspiracy (18 U.S.C. § 373 (2000)); and assault (18 U.S.C. § 113(a)(4) (2000)) – all of which are routinely enforced in federal court.

Since September 11, 2001, Congress has twice confirmed that the federal courts' criminal jurisdiction reaches crimes committed by federal agents – including civilians – overseas. *See* USA PATRIOT Act, Pub. L. No. 107-56, § 804, 115 Stat. 377 (codified at 18 U.S.C. § 7(9)(A) (2000)) (extending special maritime and territorial criminal jurisdiction to reach “premises of United States diplomatic, consular, military or other United States Government missions or entities in foreign States”); Military Extraterritorial Jurisdiction Act of 2000, Pub. L. No. 106-523, §§ 1-2, 114 Stat. 2488 (codified at 18 U.S.C. §§ 3261-67 (2000)) (expanding U.S. criminal jurisdiction to encompass American civilians overseas whose “employment relates to supporting the mission of the Department of Defense overseas.”). By these Acts, Congress confirmed that examination of

³ Transfers to torture violate federal law even when they occur outside the United States. *See* Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242, 112 Stat. 2822-822 (codified as note to 8 U.S.C. § 1231 (2000)) (“It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, *regardless of whether the person is physically present in the United States.*”) (emphasis added).

criminal acts overseas, such as those alleged here, properly fall within the bailiwick of the federal courts.

Further, the Supreme Court held only last month that the Constitution *requires* federal district courts to adjudicate the facts of habeas petitions, brought by “enemy combatants” detained at Guantanamo Bay, many of which involve similar allegations of foreign kidnapping, detention and torture by U.S. agents. *See Boumediene v. Bush*, 128 S.Ct. 2229 (2008) (holding that Constitutional right of habeas corpus extends to Guantanamo detainees). The *Boumediene* Court recognized “that the Government has a legitimate interest in protecting sources and methods of intelligence gathering,” *id.* at 2276, but refused to allow these concerns to trump the detainees’ right to litigate the facts of their claims in a court of law, noting: “Security subsists, too, in fidelity to freedom’s first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers.” *Id.* at 2277.⁴

⁴ The *Boumediene* Court suggested that the state secrets privilege could provide a means of accommodating the government’s confidentiality interest *during the pendency* of habeas corpus proceedings, stating that an “evidentiary privilege” may be recognized where “there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged.” *Boumediene*, 128 S.Ct. at 2276 (quoting *United States v. Reynolds*, 345 U.S. 1, 10 (1963)). The Court’s discussion belies any suggestion that the state secrets privilege may be leveraged to bar the courthouse door to a litigant otherwise entitled to be there.

The availability of a civil remedy for the violations alleged here is also mandated by treaties that constitute the “Supreme Law of the Land.” U.S. Const. art. VI, cl. 2. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment not only requires the United States to refrain from torture; it also affirmatively obligates signatory nations to provide a civil remedy for the tortured. *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 14(1), Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85 (“Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible.”). Similarly, article 9(5) of the International Covenant on Civil and Political Rights requires that “Anyone who has been the victim of an unlawful arrest or detention shall have an enforceable right to compensation.” International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, S. Exec. Doc. E. 95-2, 999 U.N.T.S. 171. By holding plaintiffs’ claims “non-justiciable,” the district court effectively denied them the mandatory civil remedies promised by our government as redress for some of the most serious crimes known to mankind.

Our Constitution, our statutes and our treaties thus confirm that federal courts have the ability – and the obligation – to adjudicate the claims at issue here.

II. DENIAL OF A FORUM TO APPELLANTS WOULD FURTHER UNDERMINE OUR NATION’S INTERNATIONAL STANDING AND ITS ABILITY TO OBTAIN THE FOREIGN COOPERATION ESSENTIAL TO COMBAT TERRORISM.

As former diplomats, *amici* are acutely aware of America’s need for international cooperation in combating terrorism. Our ability to obtain such cooperation, however, has already been adversely affected by our allies’ understandable response to widespread allegations that the United States has engaged in kidnapping, lawless detentions and torture. These allegations have sparked international frictions, damaged our standing in the world, and demonstrably undermined our ability to obtain intelligence and logistical assistance from foreign governments. Denial of a forum for plaintiffs to seek compensation for the injuries they allege would compound the damage to our Nation’s global standing and hence security.

A. Cooperation from Foreign Governments is Essential to Combat International Terrorism.

After the September 11, 2001 terrorist attacks, the United States recognized the imperative need to strengthen diplomatic ties and cooperation with our international allies, and quickly moved to do so. By 2004, the 9/11 Commission reported, “[p]ractically every aspect of U.S. counterterrorism strategy relies on international cooperation.” Nat’l Comm’n on Terrorist Attacks Upon the U. S., *The 9/11 Commission Report* 379 (2004) (hereinafter “9/11 Commission Report”).

Looking forward, the Commission urged “a comprehensive coalition strategy against Islamic terrorism.” *Id.* at 379.⁵

The White House agreed. “To succeed in our own efforts, we need the support and concerted action of friends and allies.” *The National Security Strategy of the United States* 8 (March 16, 2006). *See also id.* at 35 (“Relations with the most powerful countries in the world are central to our national security strategy. Our priority is pursuing American interests within cooperative relationships, particularly with our oldest and closest allies and friends.”).⁶

American security is thus directly linked to our allies’ willingness to cooperate in the fight against global terrorism: “Since September 11, most of our important successes against Al-Qaida and other terrorist organizations have been made possible through effective partnerships. Continued success depends on the actions of a powerful coalition of nations maintaining a united front against terror.” *National Strategy for Combating Terrorism* 19 (September 2006).⁷ Just last September, the Director of the CIA put it in unequivocal terms:

⁵ The 9/11 Commission went on to explain that, to command a leadership role in the international community, the United States must “offer an example of moral leadership in the world, committed to treat people humanely, abide by the rule of law, and be generous and caring to our neighbors.” *Id.* at 376. The 9/11 Commission report is available at <http://www.911commission.gov/report/index.htm>.

⁶ The National Security Strategy of the United States is available at <http://www.whitehouse.gov/nsc/nss/2006/nss2006.pdf>.

⁷ The National Strategy for Combating Terrorism is available at <http://www.>

[T]his much is certain: America cannot win this war without allies. . . . I cannot overstate how vital these relationships are to our overall effort. For when I'm talking about winning this war, I do so in full knowledge. It's a highly complex struggle, a long-term struggle, and it's fought on two levels: what I call the close battle and the deep battle. And our foreign partners are pivotal to our success on both those fronts.

Gen. Michael V. Hayden, Director, Central Intelligence Agency, Remarks at the Council on Foreign Relations (Sept. 7, 2007) (hereinafter "CFR Remarks").⁸ On this point, *amici* wholeheartedly agree with General Hayden. Without allies, America cannot win the war on terrorism. And without respect for the rule of law – both abroad and at home – America cannot keep its allies at its side.

B. Impunity and Failure to Respect the Rule of Law Threaten to Undermine Essential Counter-Terrorism Cooperation.

America's reputation, and hence its ability to rally international coalitions to overcome terrorism, has already been badly wounded by the extraordinary rendition program. Some of our "oldest and closest allies and friends" now see the program as a gross violation of international law, express treaty obligations and basic human rights. When an American court invokes the state secrets privilege to confer blanket immunity for that same conduct, that damage is compounded. The

whitehouse.gov/nsc/nsct/2006/.

⁸ In the same address, General Hayden described "our rendition, detention and interrogation programs" as "carefully controlled and lawfully conducted." *Id.* General Hayden's CFR Remarks are available at <https://www.cia.gov/news-information/speeches-testimony/2007/general-haydens-remarks-at-the-council-on-foreign-relations.html>.

failure of the American judiciary even to consider whether the program is in fact “lawfully conducted,” *see* CFR Remarks, *supra* at p. 13, adds demonstrably to the unease of our allies, particularly in Europe, and their increasing reluctance to partner with the United States in counter-terrorism activities. While in certain circumstances, dismissal of a case on state secrets grounds may be unavoidable, the diplomatic consequences of premature dismissal underscore the need to make every effort to avoid outright denial of a judicial forum.

The 9/11 Commission sounded the alarm early regarding the consequences of failing to live up to America’s best traditions of the rule of law: “Allegations that the United States abused prisoners in its custody make it harder to build the diplomatic, political, and military alliances the government will need.” 9/11 Commission Report, at 379. The Commission recommended working more closely with allies to “develop mutually agreed on principles for the detention and humane treatment of captured international terrorists who are not being held under a particular country’s criminal laws.” *Id.*

A year later, the members of the 9/11 Commission reiterated these concerns:

The U.S. government’s treatment of captured terrorists, including the detention and prosecution of suspected terrorists in military prisons and secret detention centers abroad, as well as reports on the abuse of detainees, have elicited criticism from around the globe Dissention either at home or abroad on how the United States treats captured terrorists only makes it harder to build the diplomatic, political, and military alliances necessary to fight the war on terror effectively.

9/11 Public Discourse Project, *Report on the Status of the 9/11 Commission Recommendations: Part III: Foreign Policy, Public Diplomacy, and Nonproliferation* 8-9 (Nov. 14, 2005).⁹

1. The Conduct Alleged in This Case has Adversely Affected America's Relationship with its Allies.

The 9/11 Commission was prescient. In recent years, the “criticism from around the globe” has intensified, as our allies have concluded that the counter-terrorism practices we expected them to support are not simply morally abhorrent, but flatly illegal.

The European Commission for Democracy through Law (the “Venice Commission”) has issued a legal opinion concluding that the operation of a secret detention facility within a member State of the Council of Europe, as well as the participation in or tolerance of the extra-legal transfer of prisoners through a member state, violates the European Convention on Human Rights. See Eur. Comm. for Democracy through Law, *Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners*, ¶¶ 125, 143-45, Op. no. 363/

⁹ The 9/11 Public Discourse Project, *Report on the Status of the 9/11 Commission Recommendations: Part III: Foreign Policy, Public Diplomacy, and Nonproliferation* is available at <http://www.9-11pdp.org> (follow “Download the Report” hyperlink under “9/11 Commissioners Issue Third Report on Recommendations Part III: Foreign Policy, Public Diplomacy, and Nonproliferation”).

2005, Doc. No. CDL-AD(2006)009 (Mar. 17, 2006). Thus, European States now risk damage awards by the European Court of Human Rights if they facilitate, or even tolerate, extraordinary rendition activities within their borders.

Following a lengthy investigation, the Parliamentary Assembly of the Council of Europe issued its own report that was deeply critical of U.S. conduct, including American efforts to place its counter-terrorism activities beyond the reach of any courts:

The policy pursued by the current US administration has undeniably been a contributory factor in tarnishing the image of the United States, a country regarded as a model of democracy and respect for individual freedoms. The huge wave of sympathy for the American people following the tragic events of 11 September rapidly gave way to incomprehension, irritation and even overt hostility. The commission of unlawful acts – abductions, the exporting of torture to other countries even though they are regarded as “rogue states,” the setting up of detention centers beyond any judicial supervision – has severely affected the moral authority of the United States. Worse still, the world’s greatest power is becoming a negative role model for other countries, which feel that they may legitimately follow the same path and flout human rights.

Eur. Parl. Ass., Comm. on Legal Affairs & Human Rights, *Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe Member States: Second Report*, ¶ 337, Doc. No. 11302 rev. (Jun. 11, 2007) (hereinafter “PACE Report”).¹⁰

¹⁰ The PACE Report identifies defendant Jeppesen, by name, as “[t]he aviation services provider customarily used by the CIA.” *Id.* ¶ 185. The PACE Report is available at http://www.cfr.org/publication/13570/secret_detentions_and_illegal_transfers_of_detainees_involving_council_of_europe_member_states.html (follow “Secret Detentions and Illegal Transfers of Detainees involving Council of Europe

The PACE Report specifically “deplores the fact that the concepts of state secrecy or national security are invoked by many governments,” including the United States, “to obstruct judicial and/or parliamentary proceedings aimed at ascertaining the responsibilities of the executive in relation to grave allegations of human rights violations.” *Id.* at 1; *see also id.* at 7, ¶ 6 (“The invocation of state secrets should not be permitted when it is used to conceal human rights violations and should, in any case, be subject to rigorous oversight.”).

Similarly, the European Parliament has released a final report that unequivocally characterizes renditions, as allegedly carried out by the CIA, as “an extra-judicial practice which contravenes established international human rights standards.” Report on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners, Eur. Parl. Doc. A6-0020/2007 (2007) (hereinafter “EP Report”). The EP Report expressly “[c]ondemns extraordinary rendition as an illegal instrument used by the United States in the fight against terrorism.” *Id.* ¶ 39.¹¹

Prompted in part by these intergovernmental investigations and reports, some longstanding United States allies are now pursuing criminal cases against both U.S. and domestic actors for alleged extraordinary rendition activities. These

Member States: Second Report, June 2007” hyperlink).

¹¹ The EP Report is available at <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A6-2007-0020&language=EN&mode=XML>.

cases illustrate a growing consensus that accusations of gross human rights violations can and should be adjudicated in courts of law.¹² They also illustrate the deterioration of America's relationship with its allies and vividly demonstrate the corrosive effect of the rendition program on our ability to obtain ongoing counter-terrorism cooperation.

German prosecutors, investigating the rendition of its citizen Khalid El-Masri, issued arrest warrants in 2007 for thirteen suspected CIA agents and forwarded them to Interpol – meaning that they face arrest if they leave the United States.¹³ In a separate case, Bavarian prosecutors opened an investigation into

¹² In continental European legal systems, criminal actions are often vehicles for civil liability as well as criminal penalties. Victims are allowed to participate in criminal proceedings, and a single action can determine both punishment and compensation. See Jo-Anne Wemmers, *Victim Policy Transfer: Learning from Each Other*, 11(1) Eur. J. Crim. Pol. & Research 121, 125 (2005).

¹³ El-Masri was ultimately released without charges, apparently after the CIA concluded that it had the wrong man. See *Germany Issues Arrest Warrants for 13 CIA Agents in El-Masri Case*, Spiegel Online (F.R.G.), Jan. 31, 2007, available at <http://www.spiegel.de/international/0,1518,463385,00.html>; Mark Lander, *German Court Challenges C.I.A. over Abduction*, N.Y. Times, Feb. 1, 2007, at A1; John Goetz, Marcel Rosenbach & Holger Stark, *CIA Arrest Warrants Strain US-German Ties*, Spiegel Online (F.R.G.), Jun. 25, 2007, available at <http://www.spiegel.de/international/germany/0,1518,490514,00.html>; Michael Isikoff & Mark Hosenball, *Hunting the Hunters*, Newsweek Web Exclusive, Mar. 29, 2007, <http://www.newsweek.com/id/35902>; *U.S. Displeased over German Hunt for CIA Agents*, Spiegel Online (F.R.G.), Mar. 5, 2007, available at <http://www.spiegel.de/international/0,1518,469884,00.html>. In the face of strong U.S. opposition and internal disputes within its government coalition, the German government indicated in September 2007 that it would not pursue an extradition request with the United States. See *Germany Drops Pursuit of CIA Kidnappers*, Spiegel Online (F.R.G.), Sep. 24, 2007, available at <http://www.spiegel.de/international/>

evidence that a rendition flight carrying a different detainee stopped at Ramstein Air Force Base in Germany.¹⁴

The German Bundestag has also undertaken an investigation of German involvement in U.S. rendition practices.¹⁵ In July 2007, the Bundestag created an ad-hoc Committee of Inquiry on the issue of CIA flights and appointed a special investigator to determine whether terror suspects were rendered through German airspace and, if so, whether German officials were aware of the flights.¹⁶ In a clear signal that the investigation could affect future intelligence cooperation, the Bundestag also directed the Committee to investigate how the German government could prevent rendition flights in the future, close down secret prisons used to interrogate suspects, and avoid further participation by German intelligence

germany/0,1518,507455,00.html. In June of this year, El-Masri filed suit against the German government for its failure to pursue the indictments. *See Renditions Victim to Sue German Government*, Spiegel Online (F.R.G.), Jun. 9, 2008, available at <http://www.spiegel.de/international/germany/0,1518,558496,00.html>.

¹⁴ This case has not gone forward, due primarily to the inability of the prosecutors to obtain evidence from U.S. military authorities. Georg Mascolo & Matthias Gebauer, *The CIA in the Dock*, Spiegel Online (F.R.G.), Jan. 10, 2007, available at <http://www.spiegel.de/international/0,1518,458821,00.html>.

¹⁵ Victor Homola, *Spying Investigation Approved*, N.Y. Times, April 8, 2006, at A5.

¹⁶ *See* German Bundestag, Mandate for the Committee of Inquiry, 1 (July 6, 2007), available at http://www.bundestag.de/ausschuesse/ua/1_ua/auftrag (follow “Untersuchungsauftrag mit Erweiterung - Englische Version” hyperlink); John Goetz, Marcel Rosenbach & Andreas Wassermann, *Special Treatment for Uncle Sam?*, Spiegel Online (F.R.G.), Jul. 10, 2007, available at <http://www.spiegel.de/international/germany/0,1518,493605,00.html>.

services in such interrogations.¹⁷

In Italy, a judge has issued indictments for twenty-six Americans, mostly CIA officers, and over a half dozen members of the Italian secret service, all allegedly involved in the abduction and rendition of Osama Moustafa Hassan Nasr to Egypt.¹⁸ Although Italy has not pressed for the extradition of the U.S. suspects, they are being tried there in absentia and could face arrest should they travel outside of the United States.¹⁹ Meanwhile, law enforcement officers have arrested the Italian suspects, including senior military counterespionage officials, who are now on trial – essentially for the crime of cooperating with the United States.²⁰ Regardless of how that case comes out, no rational observer could doubt its effect on the willingness of other Italian intelligence personnel to provide similar cooperation now and in the future.

In Spain, the police opened a criminal investigation into the use of the Island of Majorca as a transit point for unlawful seizures and detentions by American

¹⁷ German Bundestag, Mandate for the Committee of Inquiry, *supra* note 16, at 1-3.

¹⁸ See Elisabeth Rosenthal, *Italian Trial of C.I.A. Operatives Begins with Torture Testimony*, N.Y. Times, May 15, 2008, at A10.

¹⁹ See Steven Grey & Elisabetta Povoledo, *Italy Arrests 2 in Kidnapping of Imam in '03*, N.Y. Times, Jul. 6, 2006, at A1; Craig Whitlock, *Computer Files Hold Key in CIA Case*, Wash. Post, Jun. 26, 2008, at A11; Rosenthal, *supra* note 18.

²⁰ See Grey & Povoledo, *supra* note 19; Whitlock, *supra* note 19; Rosenthal, *supra* note 18.

intelligence agencies.²¹ When the case commenced, Interior Minister Jose Antonio Alonso described the alleged renditions as “extremely serious, absolutely intolerable acts that violate rules for treating prisoners in a democratic society, and would demand a government response that would affect bilateral relations.”²² In 2007, and again this year, a judge of the *Audiencia Nacional* (Spain’s national court for terrorism-related cases) ordered the Spanish government to declassify and turn over documents relating to the CIA’s use of Spanish airspace and airports.²³

U.S. rendition practices in Sweden have also had a negative impact on counter-terrorism cooperation. After two Egyptian asylum seekers (including plaintiff Agiza) were seized in Stockholm and flown to Egypt, where they were allegedly tortured, Sweden’s Parliamentary Ombudsman commenced an investigation. Although the Ombudsman’s prosecutorial jurisdiction is limited to the activities of Swedish officials, his report stated: “Should Swedish officers have taken those measures, I would have prosecuted them without hesitation for the

²¹ See Stephen Grey & Renwick McLean, *Spain Looks into C.I.A.’s Handling of Detainees*, N.Y. Times, Nov. 14, 2005, at A8.

²² See Elizabeth Nash, *Madrid Begins Inquiry into CIA “Torture Flights,”* The Independent (U.K.), Nov. 16, 2005, at 26.

²³ See *Spanish Government to Declassify Documents on Alleged CIA Flights*, Associated Press, Feb. 9, 2007; *El Juez que Investiga los Vuelos de CIA Pide los Planes de Viajes a las Bases Aereas [The Judge Investigating CIA Flights Requests Flight Plans to Air Bases]*, La Vanguardia (Spain), May 28, 2008.

misuse of public power and probably would have asked for a prison sentence.”²⁴

The incident forced Sweden’s director of security police to agree that foreign agents would not be permitted to take command of further prisoner transfers and that Swedish police would conduct all body searches from now on.²⁵

In Britain, Parliament’s Intelligence and Security Committee undertook an extensive investigation of rendition. Its report, presented in July 2007, frankly describes the increasing reluctance of British intelligence agencies to share information with their American counterparts, due in large part to concerns that the U.S. will utilize such information in rendition operations.²⁶ Referring specifically to plaintiff al-Rawi, who was a British resident at the time of his rendition, the report states:

This case shows a lack of regard, on the part of the U.S., for UK concerns. Despite the Security Service prohibiting any action being taken as a result of its intelligence, the U.S. nevertheless planned to render [al-Rawi and another man] to Guantanamo Bay. They then

²⁴ See Craig Whitlock, *New Swedish Documents Illuminate CIA Action*, Wash. Post, May 21, 2005, at A01. See also U.N. Human Rights Comm., ¶ 3.26, *Communication No. 1416/2005*, U.N. Doc. CCPR/C/88/D/1416/2005 (Nov. 10, 2006).

²⁵ See Charles M. Sennott, *Italy Seethes at US Abduction of Iman*, Boston Globe, Jul. 3, 2005, at A9; Victor L. Simpson, *U.S. Allies Resist Secret Deportations*, Associated Press, June 19, 2005. The United Nations Committee Against Torture, which monitors and enforces compliance with the Convention Against Torture, also concluded that Sweden violated its international human rights obligations by participating in the transfer. See U.N. Comm. Against Torture, *Agiza v. Sweden*, U.N. Doc. CAT/C/34/D/233/2003 (May 2005).

²⁶ Rendition Report, *supra* note 1.

ignored the subsequent protests of both the Security Service and the Government. This has serious implications for the working of the relationship between the U.S. and UK intelligence and security agencies.

Rendition Report, at 43. Among the “serious implications” for the relationship between these two nations is a “greater caution in working with the U.S., including withdrawing from some planned operations, following these cases.” *Id.* at 29. At least one “operational proposal” that “might have provided high-value intelligence on a target” was abandoned by the U.K., “because [the Secret Intelligence Service] was not able to satisfy itself as to the likely treatment of the target.” *Id.* at 27; see also *id.* at 30 (operation was dropped because adequate “assurances on humane treatment” were not obtained).

Britain has also pressed the United States to release plaintiff Mohamed, who was a legal resident of the United Kingdom at the time of his rendition, and to investigate his claims of mistreatment – without success.²⁷ On June 6, 2008, the British Foreign Office turned over “exculpatory and relevant” classified material concerning Mohamed’s allegations of unlawful interrogation and torture so that he could use that material in U.S. proceedings.²⁸

Many other investigations have been undertaken by our allies into U.S.

²⁷ Bonner, *supra* note 1.

²⁸ *Id.* It would be ironic indeed if, after receiving such material lawfully from the government of the United Kingdom, plaintiff Mohamed still found himself shut out of the American court system based on the state secrets doctrine.

rendition practices. Canada, Norway, Sweden, Ireland, France, Switzerland, Scotland and Portugal have all commissioned inquiries into possible unlawful conduct within their borders.²⁹ Most recently – after reports emerged that CIA flights made use of landing strips in Greenland – Denmark announced that it too would conduct an investigation into rendition activity on its soil.³⁰

These prosecutions and investigations vividly illustrate the extent to which the CIA's extraordinary rendition program has harmed America's international standing and interfered with its ability to secure cooperation from its allies. They also reflect the consensus view, in democratic nations, that allegations of kidnapping, unlawful detention and torture are properly reviewed in courts of law even if carried out in the name of security. The district court's judgment to the contrary, if affirmed by this Court, would tend to confirm our allies' impression

²⁹ See Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar* (2006); Ministry of Foreign Affairs, Norges svar til Europarådet vedrørende ulovlig fangetransport [Norway's Answer to the European Parliament Concerning Illegal Rendition] (Feb. 22, 2006) (reporting in English in response to the PACE investigation); *Norway and Sweden Investigate Alleged Secret CIA Flights*, Deutsche Presse-Agentur (F.R.G.), Nov. 16, 2005; Irish Human Rights Commission, "Extraordinary Rendition": A Review of Ireland's Human Rights Obligations (2007), available at <http://www.ihrc.ie/home/default.asp> (follow "Download IHRC Rendition Report" hyperlink); Éric Decouty, *La France enquête sur les avions de la CIA [France Investigates CIA Planes]*, Le Figaro (Fr.), Oct 15, 2007; Balz Bruppacher, *Swiss Suspend CIA Abduction Probe*, Associated Press, Jan. 18, 2008; Paul Kelbie, *Call for Outlawing of "Rendition" Flights*, The Observer (U.K.), Oct. 28, 2007, at 4; *Portugal Probes Alleged CIA Flights*, Associated Press, Feb. 6, 2007.

³⁰ See *Denmark to Investigate Alleged CIA Flights*, L.A. Times, Feb. 1, 2008, at 10.

that the United States does not respect the rule of law, thus compounding the harm to our stature, our bilateral and multilateral relations, and our national security.

2. The Deterioration of America's Relationship with its Allies Threatens its National Security.

The reactions of our democratic allies to the conduct alleged in this case – including their growing reluctance to share intelligence or otherwise participate in counter-terrorism activities with the United States – have become a matter of substantial concern in Washington. Commenting on the early stages of the Italian criminal case discussed above, State Department Legal Advisor John Bellinger stated, “this furor over renditions and really now just the furor over flights alone and the suggestion that flights alone are somehow improper I think can ultimately and already is undermining intelligence cooperation”³¹ A year later, Bellinger commented again: “[T]hese continuing investigations can harm intelligence cooperation — that’s simply a fact of life.”³²

Both houses of Congress have convened hearings on the effect of extraordinary renditions on America’s moral credibility and ability to shape an effective counter-terrorism coalition. Speaking before the Senate Foreign Relations Committee, Major General Paul Eaton said, “we undoubtedly lost allies

³¹ See Transcript of Legal Advisor Bellinger’s Media Roundtable in Brussels, Belgium (May 4, 2006), available at <http://www.state.gov/s/l/rls/66494.htm>.

³² See Craig Whitlock, *U.S. Won't Send CIA Defendants to Italy*, Wash. Post, Mar. 1, 2007, at A12.

in the fight for Iraq, because of our policies on extraordinary rendition, secret detention, and the use of torture.”³³ Echoing General Eaton, the former General Counsel of the Navy told the Senate Armed Forces Committee:

For most, perhaps all, of our traditional allies, the cruel treatment of detainees is a criminal act. As these nations came to recognize the dimensions of our policy of cruelty, political fissures between them and us began to emerge because none of them would follow our lead into the swamp of legalized abuse

These adverse foreign policy consequences would inevitably damage our national security strategy and our operational effectiveness in the War on Terror. Our ability to build and sustain the broad alliance required to fight the war was compromised. International cooperation, including in the military, intelligence, and law enforcement arenas, diminished as foreign officials became concerned that assisting the U.S. in detainee matters could constitute aiding and abetting criminal conduct in their own countries.³⁴

Scholarly analysis points to the same conclusion:

[T]he issue of extraordinary rendition, along with press revelations about secret prisons in Europe, have cast a rather dark shadow on our relationship with our European allies. While transatlantic intelligence and law enforcement cooperation does continue, European political leaders are coming under increasing pressure to distance themselves from the United States. Over time, I do believe that this could pose a threat to joint intelligence activity with our European Allies.

Extraordinary Rendition in U.S. Counter Terrorism Policy: The Impact on Trans-

³³ *Extraordinary Rendition, Extraterritorial Detention and Treatment of Detainees: Restoring Our Moral Credibility and Strengthening Our Diplomatic Standing: Hearing before the Sen. Comm. on Foreign Relations, 110th Cong. 2 (2007)* (statement of Retired Major General Paul Eaton).

³⁴ *Hearing on the Treatment of Detainees in U.S. Custody: S. Comm. on Armed Services 110th Cong. 4 (2008)* (statement of Alberto J. Mora, Former General Counsel of the Department of the Navy).

Atlantic Relations: Joint Hearing before the Subcomm. on Int't Orgs., Human Rights, and Oversight and the Subcomm. on Europe of the H. Comm. on Foreign Affairs, 110th Cong. 6 (2007) (statement of Julianne Smith, Director and Senior Fellow, Europe Program, Center for Strategic and International Studies).³⁵

In its June 1, 2008 report, one House Subcommittee summed up: “It is hard for the Subcommittee to escape the conclusion that this reversal [in U.S. standing abroad] is due to the well-publicized reports of ‘secret prisons’ and torture and abuse of prisoners – at Abu Ghraib and Guantanamo prisons, and after ‘renditions’ to countries with a history of torturing prisoners.”³⁶

It is now beyond dispute that the extraordinary rendition program underlying plaintiffs’ claims has significantly damaged our Nation’s oldest and strongest alliances, and handicapped our ability to secure the international cooperation so essential to its long-term security. Denial of a forum to plaintiffs based on the state

³⁵ Senator Joseph Biden, speaking to the Foreign Relations Committee, put it even more starkly: “If we continue to pursue a rendition program ungoverned by law, without sufficient safeguards and oversight, we will perpetuate a short term solution that exacerbates the long term problem. We will take individual terrorists off the streets at the expense of the foreign coalitions that are essential to our efforts to combat international terrorism, at the expense of facilitating the recruitment of a new generation of terrorists who are just as dangerous and far more numerous.” *Extraordinary Rendition, Extraterritorial Detention and Treatment of Detainees: Restoring Our Moral Credibility and Strengthening Our Diplomatic Standing: Hearing before the Sen. Comm. on Foreign Relations*, 110th Cong. 3 (2007) (Statement of Sen. Biden).

³⁶ *Subcomm. on Int't Orgs., Human Rights, and Oversight of the H. Comm. on Foreign Affairs, 110th Cong., The Decline in America's Reputation: Why?* 14 (Comm. Print 2008).

secrets doctrine would exacerbate this harm by signaling – to allies and enemies alike – that the United States is not fully committed to the rule of law.

CONCLUSION

Amici recognize that – in the words of the Supreme Court – “the Government has a legitimate interest in protecting sources and methods of intelligence gathering.” *Boumediene*, 128 S.Ct. at 2276. But this interest does not permit the government to slam shut the courthouse door to prevent judicial scrutiny of its conduct – particularly where, as here, “freedom’s first principles” are at issue. *Id.* at 2277. Where less draconian methods will suffice to protect genuine state secrets, they should be preferred over the reflexive and uncritical application of the privilege to foreclose the *possibility* of redress for conduct which is squarely prohibited by our own laws and treaties and reviled by even our strongest, most loyal allies.

America’s independent judiciary, willing to administer justice impartially, is central to our influence abroad. It is hard to imagine a greater or more damaging offense to that influence than the heavy-handed use of the label “state secrets,” at the behest of the executive branch, to bar at the very threshold allegations that much of the world already believes to be true. Such a result would make the work of diplomacy even more difficult, and could damage incalculably our reputation, and our counter-terrorism goals.

Amici ask this Court to consider these vital concerns in determining whether the district court erred in holding plaintiffs' claims "non-justiciable."

Dated: New York, New York
July 10, 2008

Respectfully submitted,

Barbara Moses/DJS
Barbara Moses
David J. Stankiewicz
MORVILLO, ABRAMOWITZ, GRAND,
IASON, ANELLO & BOHRER, P.C.
565 Fifth Avenue
New York, New York 10017
(212) 880-9540

Aziz Huq
Jonathan Hafetz
BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW
161 Avenue of the Americas, 12th Floor
New York, New York 10013
(212) 992-8632


*Attorneys for Amici Curiae
Former United States Diplomats*

**CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P.
32(a)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NO. 08-15693**

I certify that:

- Pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is proportionally spaced, was prepared in Microsoft Word 2003 using a Times-Roman typeface of 14 points or more and contains 5401 words, or is
- Monospaced, has 10.5 or fewer characters per inch and contains not more than either 7000 words or 650 lines of text, or is
- Not subject to the type-volume limitations because it is an amicus brief of no more than 15 pages and complies with Fed. R. App. P. 32(a)(1)(5).

Dated: New York, New York
July 10, 2008



David J. Stankiewicz
MORVILLO, ABRAMOWITZ, GRAND,
IASON, ANELLO & BOHRER, P.C.
565 Fifth Avenue
New York, New York 10017
(212) 880-9431

CERTIFICATE OF SERVICE

I hereby certify that two (2) copies of this Brief Amicus Curiae of Former United States Diplomats Supporting Plaintiffs-Appellants and Reversal were sent by Federal Express Next Business Day Delivery to:

Ann Brick, Esq.
ACLU Foundation of
Northern California
39 Drumm Street
San Francisco, CA 94111
(415) 621-2493

Steven M. Watt, Esq.
American Civil Liberties
Union Foundation
125 Broad Street
New York, New York 10004
(212) 519-7870
Attorneys for Plaintiffs-Appellants

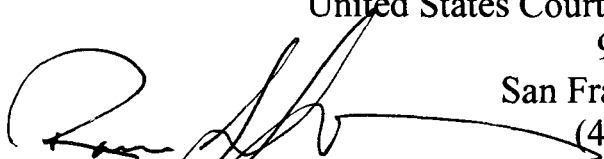
Daniel P. Collins, Esq.
Henry Weissmann, Esq.
Munger Tolles & Olson, LLP
355 S. Grand Avenue, Suite 3500
Los Angeles, CA 90071
(213) 683-9100
Attorneys for Defendant-Appellee

Michael P. Abate, Esq.
United States Department of Justice
Civil Division,
Federal Programs Branch
20 Massachusetts Avenue, NW
Washington, DC 20001
(202) 616-8209

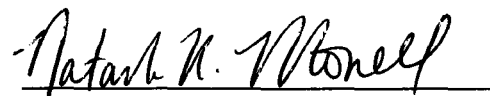
Douglas N. Letter, Esq.
United States Department of Justice
Civil Division, Appellate Staff
950 Pennsylvania Avenue, NW
Washington, DC 20530
(202) 514-3602
Attorneys for Intervenor-Appellee

I also certify that the original and fifteen (15) copies of this Brief Amicus Curiae of Former United States Diplomats Supporting Plaintiffs-Appellants and Reversal were also shipped via Federal Express Next Business Day Delivery to:

Clerk of Court
United States Court of Appeals, Ninth Circuit
United States Courthouse and Post Office Building
95 7th Street
San Francisco, California
(415) 355-8000


on this 10th day of July 2008.

Sworn to before me this
10th day of July, 2008
Notary Public, State of New York
RAMIRO A. HONEYWELL
No. 01HO6118731
Qualified in Kings County
Commission Expires Nov. 15, 2009


Natasha R. Monell, Esq.