

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, )  
Petitioner, )  
v. ) No. 20-827  
ZAYN AL-ABIDIN MUHAMMAD HUSAYN, )  
AKA ABU ZUBAYDAH, ET AL., )  
Respondents. )  
- - - - -

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1 P R O C E E D I N G S

2 (10:00 a.m.)

3 CHIEF JUSTICE ROBERTS: Justice  
4 Kavanaugh is participating remotely this  
5 morning.

6 We will hear argument in Case 20-827,  
7 United States versus Zubaydah.

8 Mr. Fletcher.

9 ORAL ARGUMENT OF BRIAN H. FLETCHER  
10 ON BEHALF OF THE PETITIONER

11 MR. FLETCHER: Thank you, Mr. Chief  
12 Justice, and may it please the Court:

13 Our nation's covert intelligence  
14 partnerships depend on our partners' trust that  
15 we will keep those relationships confidential.

16 Respondents seek discovery that would  
17 compel a breach of that trust by confirming or  
18 denying the existence of an alleged CIA facility  
19 in Poland, and Respondents seek that discovery  
20 not to vindicate any rights under U.S. law but,  
21 instead, in a discretionary Section 1782  
22 application aimed at sending evidence abroad to  
23 a foreign investigation whose very purpose is to  
24 reveal and prosecute the alleged involvement of  
25 Polish officials in covert CIA activities.

1           The CIA director explained why that  
2    compelled disclosure would seriously harm the  
3    national security. The Ninth Circuit should  
4    have afforded deference to that expert judgment,  
5    and it failed to do so because it made two  
6    fundamental legal errors.

7           First, the Ninth Circuit undertook its  
8    own inquiry into whether the existence of the  
9    alleged facility was a secret given public  
10   speculation on that subject. But, under this  
11   Court's decision in Reynolds, the question is  
12   not whether a court thinks that the information  
13   sought is secret in some abstract sense; it is  
14   whether compelled disclosure will harm the  
15   national security.

16           That is a question that squarely  
17    implicates the CIA director's special knowledge  
18    and expertise. And, here, the CIA director  
19    explained that compelled disclosure would harm  
20    the national security because there's a critical  
21    difference between speculation, even widespread  
22    speculation, and formal confirmation by people  
23    with firsthand knowledge.

24           Even the Ninth Circuit appeared to  
25    recognize the force of that point, and it did

1 not suggest that Respondents could have had the  
2 discovery they seek here from the CIA itself.

3 Instead -- and this was the Court's  
4 second error -- it held that two former  
5 contractors can be compelled to confirm or deny  
6 the existence of the facility under oath because  
7 they are not agents of the United States.

8 But, again, the question is not the  
9 contractors' status under domestic law; it is  
10 how their compelled testimony would affect  
11 national security. And, again, the Ninth  
12 Circuit should have deferred to the CIA  
13 director's expert judgment that our allies and  
14 adversaries would view compelled testimony by  
15 these contractors as a serious breach of trust.

16 I welcome the Court's questions.

17 JUSTICE THOMAS: The two contractors  
18 have testified about the treatment of detainees  
19 before, right?

20 MR. FLETCHER: That's correct, Justice  
21 Thomas.

22 JUSTICE THOMAS: So why couldn't they  
23 -- they also testify here? What difference  
24 would it make?

25 MR. FLETCHER: It would make a

1 difference because of the critical difference  
2 between the context of the testimony and what  
3 they would be conveying. In the prior contexts  
4 where they've testified, in the Salim litigation  
5 and in the military commissions at Guantanamo,  
6 their testimony has focused on the nature of the  
7 treatment of detainees, on the what was done.  
8 That is information that the executive branch,  
9 after extensive consultation internally and with  
10 Congress, decided to declassify in 2014 to  
11 facilitate public scrutiny of the United States'  
12 actions. So that information is no longer  
13 classified.

14 But part and parcel of that  
15 declassification decision was a decision to keep  
16 secret, to keep the trust with our foreign  
17 partners. And because this proceeding is all  
18 about revealing the involvement of foreign  
19 partners, it's fundamentally different from the  
20 testimony that has been given in the past.

21 JUSTICE THOMAS: You say -- you offer  
22 the utmost deference standard. How would the  
23 government fail that?

24 MR. FLETCHER: So I -- you know,  
25 candidly, we think that, as this Court has

1 recognized in -- in Nixon and in other cases  
2 implicating the executive branch's judgments  
3 about national security, a court should be  
4 hesitant to second-guess the executive branch on  
5 such predictive judgments and that --

6 JUSTICE THOMAS: So are you saying it  
7 should never fail?

8 MR. FLETCHER: No, certainly not,  
9 Justice Thomas, but I think the circumstances  
10 where it could should be relatively unusual,  
11 especially given the high requisites that the  
12 executive branch itself applies before asserting  
13 the state secrets privilege.

14 I could imagine -- you know, one  
15 example where a court found the executive's  
16 assertion insufficient was the D.C. Circuit's  
17 decision in Ellsberg, where the court explained  
18 that the executive branch's declarations just  
19 hadn't explained why one piece of information  
20 needed to be safeguarded. That seems like a  
21 circumstance where it's appropriate to say that  
22 the executive hasn't made the requisite showing.

23 But I think courts should be very  
24 reluctant to do what the Ninth Circuit did here,  
25 which is to essentially afford no judgment at

1 all to the executive branch's predictive  
2 judgments on core matters of national security.

3 JUSTICE KAGAN: Well, on this issue of  
4 the appropriate level of deference, I mean, the  
5 question is -- or one question is, what is the  
6 deference to? Surely, when the CIA director  
7 says here are threats to national security  
8 interests, here -- here's the harm to national  
9 security that we think will follow from  
10 something, that judgment is entitled to a great  
11 deal of deference. Courts are going to know  
12 less about that than the CIA director does.

13 But, as I understand the inquiry in  
14 Reynolds, the way this process works is that  
15 that judgment is weighed against something else,  
16 which is the question of the necessity that the  
17 -- that the requester has. And then, in  
18 addition, there's the question of segregation.

19 And as to those matters, I would think  
20 that there's really no deference given to the  
21 CIA director at all, in other words, as to what  
22 level of necessity is at issue and how those two  
23 things are weighed and how the segregation  
24 analysis works.

25 Aren't those judgments for courts?

1                   MR. FLETCHER: So I think I agree with  
2     you on those two points, but I just want to make  
3     sure that we're in agreement that the Ninth  
4     Circuit and Respondents are advocating for a  
5     lack of deference on other questions, on this  
6     threshold "is it a secret" question and on this  
7     notion of are these contractors the sorts of  
8     people who could give the kind of formal  
9     confirmation that would be damaging.

10                  But on the question -- if we're past  
11     that and the question is what's the level of  
12     necessity, I agree with you. I -- I do think,  
13     though, that in Reynolds the Court suggested  
14     that necessity goes not so much to do we, you  
15     know, give deference to the -- ultimately to the  
16     executive branch's judgments about national  
17     security. It's how far should the court probe.

18                  I think, in Reynolds, the Court was  
19     focused specifically on should we require in  
20     camera examination of materials or some  
21     examination of classified materials, and if  
22     there's a great showing of necessity, then maybe  
23     that's appropriate, and otherwise maybe it's  
24     not.

25                  But the -- the sort of predictive

1 national security judgments, I think, deserve  
2 deference no matter how great the showing of  
3 necessity is.

4 JUSTICE SOTOMAYOR: Mr. Fletcher, I'm  
5 a bit confused in this case because it seems to  
6 me that you came in to say no discovery  
7 whatsoever is appropriate. Yet, at -- in your  
8 introduction, you said that the terms of  
9 conditions of -- of interrogative techniques is  
10 no longer secret.

11 So it does seem to me that at least  
12 that could be separate -- separated out in any  
13 discovery. And there might be other things. I  
14 don't think we need to parse all of it in this  
15 case.

16 But is it your position -- I'm not  
17 quite sure what you're asking us to say. Are  
18 you asking us to say the government's due a  
19 great deal of deference on whether a security  
20 threat would exist as a result of a disclosure?

21 MR. FLETCHER: Yes.

22 JUSTICE SOTOMAYOR: Or are you asking  
23 us to say a security threat will exist and we  
24 have to give deference to your judgment, as  
25 opposed to the district court's judgment, as to

1     what will protect that or not?

2                   MR. FLETCHER: Well, I think --

3                   JUSTICE SOTOMAYOR: Because, at the  
4     end, the district court has a lot of power under  
5     Reynolds to fashion remedies that will protect  
6     that interest. You might disagree as to a  
7     remedy, but that's different from lack of  
8     deference. That's an abuse of discretion  
9     standard by the district court.

10                  MR. FLETCHER: So let me start with  
11     the district court because I -- I think,  
12     actually, the deference that should be afforded  
13     to district courts helps us here because  
14     Respondents made the same pitch that they make  
15     in part A of their brief and that you alluded to  
16     in the beginning of your question, this  
17     possibility that why can't Mitchell and Jessen  
18     testify about what was done but just not use the  
19     word "Poland," somehow divorce it from express  
20     geographic references.

21                  They made that request in the district  
22     court too, and the district court rejected it --  
23     this is at page 56A of the petition appendix --  
24     and explained that because this entire  
25     proceeding is predicated on assisting an

1 investigation in Poland by a Polish prosecutor,  
2 it would be disingenuous to try to pretend that  
3 it's not all about Poland by using code words.

4 So I think, actually, on -- on the  
5 question of the district court's management of  
6 the trial and on what methods of safeguards  
7 could be used to protect national security  
8 information, the judgment made by the district  
9 court here actually helps us and furthers the  
10 grounds --

11 JUSTICE SOTOMAYOR: Except that I see  
12 the Ninth Circuit's majority opinion as  
13 basically not understanding why the district  
14 court felt that the taking -- why the  
15 information couldn't be separated out, and all  
16 it was doing was sending it back for the  
17 district court to explain it in more detail.

18 I didn't read what you said in the  
19 district court's opinion. You may or may not be  
20 right, but I thought the Ninth Circuit was just  
21 unsure. So why shouldn't we send it back for  
22 the clarity of that ruling?

23 MR. FLETCHER: So, as to what the  
24 district court said -- and this goes to the  
25 Respondents' proposal about let the testimony

1 proceed, but use code words -- the district  
2 court rejected that very clearly at page 56A,  
3 and the Ninth Circuit didn't really adopt it  
4 either because Respondent -- what I understand  
5 Respondents to be advocating now is we don't  
6 need to mention Poland at all expressly. The  
7 government's concerned about confirming or  
8 denying a facility in Poland, so just let us  
9 have the discovery --

10 JUSTICE SOTOMAYOR: Could I --

11 MR. FLETCHER: -- without using that  
12 word.

13 JUSTICE SOTOMAYOR: -- I -- I have a  
14 different question. I mean, you led your brief  
15 with the state secrets argument, but you do an  
16 alternative, as you did in your cert petition,  
17 that this was an abuse of discretion under 1782  
18 --

19 MR. FLETCHER: Correct.

20 JUSTICE SOTOMAYOR: -- based almost on  
21 the same theory that it would be against U.S.  
22 interests once you said that there was a state  
23 secret. But I think it's also because you had  
24 already denied the MLAT, and that argument has  
25 some attractive force for me.

1           It seems there was already a mechanism  
2     for the Polish government to seek discovery.  
3     They invoked it. The government said no on  
4     state secret grounds.

5           Can you imagine a situation in which  
6     that denial shouldn't be enough for purposes of  
7     defeating a 1782?

8           MR. FLETCHER: It -- it's very hard  
9     for me to imagine one, Justice Sotomayor. And  
10    Respondents certainly haven't pointed to one.  
11    And I agree with your characterization of the  
12    relationship between the two issues, that they  
13    are very closely related, that in some ways the  
14    1782 issue is almost a fortiori from the state  
15    secrets privilege.

16          JUSTICE SOTOMAYOR: It seems to me  
17    that --

18          CHIEF JUSTICE ROBERTS: Counsel,  
19    the -- your -- your use of code words, I think,  
20    is -- is a little -- doesn't quite answer the  
21    question. That in -- that suggests that they  
22    really are going to be talking about Poland,  
23    they're just not going to say Poland.

24          But it seems to me there may be a lot  
25    that they can talk about that have nothing to do

1 with the actual location at which events  
2 occurred. Why shouldn't the district court go  
3 through the -- the -- the -- the testimony and  
4 say anything that looks like location, you can't  
5 get into?

6 MR. FLETCHER: Right.

7 CHIEF JUSTICE ROBERTS: But what did  
8 you do with the Petitioner? What was your  
9 relationship with other people? Nothing about  
10 Poland. Why can't that be a way to proceed?

11 MR. FLETCHER: So, Mr. Chief Justice,  
12 that worked in contexts like Salim and in  
13 contexts like the -- the military commissions,  
14 where the -- there was no focus, no relevance to  
15 the location at all and so it could be  
16 completely excluded.

17 What the district court found here is  
18 that you can't take the location out of this  
19 proceeding because the whole point of the  
20 proceeding is to get evidence for a Polish  
21 investigation. The evidence wouldn't be  
22 relevant unless it had occurred in Poland.

23 So the very first sentence of the  
24 Section 1782 application -- this is at page 110A  
25 of the petition appendix -- says we are seeking

1 evidence to send to a prosecutor in Poland.  
2 Twelve of the 13 written discovery requests  
3 specifically refer to Poland.

4 JUSTICE BARRETT: So, Mr. Fletcher,  
5 does that mean that if this were a United States  
6 court, it would be different and you wouldn't be  
7 asserting privilege over this material, as you  
8 didn't in Salim? The material -- I -- I mean,  
9 you know, the evidence of how he was treated and  
10 his torture.

11 MR. FLETCHER: If it was a tort suit  
12 in the United States court or a military  
13 commission in the United States court where the  
14 location was irrelevant, then I doubt that we  
15 would be asserting privilege, just as we didn't  
16 in Salim.

17 JUSTICE BARRETT: Well, doesn't that  
18 mean that it's not that the information that  
19 they say they want is itself privileged? It's  
20 something about the context that later creates a  
21 privilege, which seems odd, right?

22 MR. FLETCHER: Well, I -- I -- I guess  
23 I -- I'd resist that a little bit because I  
24 think you have to look at the -- all of the  
25 circumstances of the disclosure and here -- but

1 my -- my assumption in answering your question  
2 about in a different suit would be you could  
3 completely divorce any geographic references  
4 from the testimony, as was done in Salim, as was  
5 done in the military commissions.

6 Here, our basic submission -- and the  
7 district court agreed with this -- is that it's  
8 just not possible to do that because of the  
9 nature of the proceeding.

10 But even if you were hesitant about  
11 that, I think that there are a couple of other  
12 reasons to be resistant to this code words  
13 approach that Respondents have advanced now.

14 One of them is a concern that even the  
15 Ninth Circuit majority acknowledged and that  
16 Judge Gould highlighted in his dissent from the  
17 panel, which is that the purpose of this inquiry  
18 is to take evidence and ship it abroad to be  
19 used in a probe of alleged involvement by Polish  
20 officials in the CIA's covert activities.

21 And even if that information appears  
22 benign, you know, in and of itself, the whole  
23 point of the inquiry is to match it up with  
24 other information to shed further light on  
25 activities and -- and identities that everyone

1 agrees is -- are privileged.

2 And I think that in and of itself is a  
3 serious concern to sort of indirectly accomplish  
4 what even the Ninth Circuit and Respondents  
5 aren't contesting you couldn't do directly by --

6 JUSTICE BARRETT: Is this mosaic?

7 MR. FLETCHER: The -- the mosaic  
8 theory, exactly. And I think the second thing  
9 I'd say -- the sort of third response, but the  
10 first one being the -- the whole thing is about  
11 Poland, you can't extricate that, the second  
12 problem being the mosaic problem.

13 I think the third problem would be  
14 that this line of argument tries to leverage the  
15 government's past disclosures, first in the  
16 Senate report and then of similar information  
17 about the United States' own actions in cases  
18 like Salim, and use that to pry open the door  
19 and force the executive branch to go further  
20 than it's gone already.

21 And I think that's a dangerous thing  
22 to do. The executive branch, in consultation  
23 with Congress, went to great lengths to  
24 declassify information to facilitate scrutiny of  
25 our own actions but drew a line that has now

1     been adhered to across three different  
2     administrations scrupulously protecting the  
3     identities of our foreign partners.

4             And I think to say that because some  
5     of that information about our own conduct has  
6     been revealed and we have been accepting of  
7     scrutiny of our own actions, that should allow  
8     Respondents and others to leverage further  
9     disclosures that would implicate the concerns of  
10    our foreign partners, I think that's just a  
11    dangerous thing to do.

12            CHIEF JUSTICE ROBERTS: What if the  
13    foreign partners have no objection or, in fact,  
14    have confirmed the relationship themselves?

15            MR. FLETCHER: So I think that would  
16    change the inquiry. I'm sure that something  
17    like that is a factor that the CIA director or  
18    the other official would have to take into  
19    account in making the national security judgment  
20    in the first instance.

21            I don't think it would completely  
22    eliminate the concern. The CIA director here  
23    explained that the agency's relationships with  
24    its foreign intelligence partners are really  
25    generational relationships with those foreign

1 intelligence agencies and that the sort of trust  
2 that those relationships rely on depends not  
3 just on, you know, what's happening now, today,  
4 but also on the assurance that we'll preserve  
5 confidentiality even if other parts of the  
6 foreign government later take a different view  
7 or if the people were changed.

8 JUSTICE KAGAN: So you would go so far  
9 as to say that even if the Polish government  
10 filed an amicus brief in this Court saying okay  
11 with us, that still you would be up here making  
12 this argument?

13 MR. FLETCHER: Well, I think I would  
14 be making this argument only if the CIA director  
15 had concluded under the circumstances, of which  
16 this would be one, that there would be serious  
17 harm to national security if the disclosure went  
18 forward. And what I'm doing in candor is  
19 telling you that some of the concerns that  
20 Director Pompeo has identified here might  
21 continue to apply in a scenario like that.

22 But the judgment would have to be  
23 made, you know, under all of the circumstances,  
24 and, certainly, that one would be a relevant  
25 one.

1 JUSTICE BREYER: What's the president  
2 of Poland -- didn't -- didn't the president of  
3 Poland say something like that?

4 MR. FLETCHER: So the former --  
5 Respondents point to two press interviews by the  
6 former president of Poland that in sort of  
7 ambiguous terms acknowledge cooperation with the  
8 CIA. So we don't deny those.

9 But those statements contradict that  
10 former president's prior statements, and as the  
11 European Court of Human Rights decision that the  
12 parties cite explains, the government of Poland  
13 itself has denied participation in the program.  
14 It refused to cooperate in the ECHR litigation.

15 And I'm not aware of any change in --  
16 in Poland's official position on that question.

17 JUSTICE BREYER: What -- to go back to  
18 basics -- forget the facts of this case, all  
19 right? And I'm not saying that what I'm about  
20 to say has anything to do with it.

21 What's supposed to happen in the law  
22 if a -- a person in a foreign intelligence -- in  
23 a domestic intelligence agency acts in a way  
24 that is absolutely, you know, beyond the pale,  
25 against American law, against international law,

1     against anything in the world, all right?

2                 So then they come in and say: No,  
3     we're not going to -- someone hurt by that  
4     brings a case. We don't want to give it to you.  
5     It'll hurt the United States. Well, it will,  
6     all right?

7                 So does the Court have no way of  
8     getting such information?

9                 MR. FLETCHER: Well, I think the -- to  
10    begin with, I think the executive branch would  
11    take that very seriously and it --

12                JUSTICE BREYER: Yeah, yeah. We  
13    assume -- let me assume for purposes purely of  
14    my hypothetical --

15                MR. FLETCHER: Right.

16                JUSTICE BREYER: -- but, for purposes  
17    of my hypothetical, assume that the executive  
18    branch doesn't want this to get out. It was  
19    just a terrible thing, et cetera.

20                MR. FLETCHER: Yes. Correct.

21                JUSTICE BREYER: So I'm really  
22    interested in the power of the court.

23                MR. FLETCHER: So I think, ultimately,  
24    the -- that would be a situation where the  
25    colloquy that I had with Justice Kagan would be

1 relevant, where you had a party who was seeking  
2 the evidence to assert rights under domestic law  
3 in U.S. court, unlike this case, which is quite  
4 different. There would be a pretty strong  
5 showing of necessity, and so I think that would  
6 authorize the court to probe and say, I want to  
7 know more to understand the basis for this  
8 assertion.

9           Ultimately, of course, our view would  
10 still be that the executive's national security  
11 judgment is entitled to deference, and if, under  
12 that deferential standard, the court agrees that  
13 the disclosure would harm national security,  
14 then that evidence could not be disclosed.

15           And I -- I understand that that's a  
16 harsh consequence. That was the consequence in  
17 Reynolds itself, which was a tort suit against  
18 the United States, you know, for alleged  
19 malfeasance by the United States. So I -- I  
20 don't deny that that's a harshness of the  
21 doctrine, but I think that's also inherent in  
22 the state secrets doctrine.

23           JUSTICE KAGAN: Suppose, Mr. Fletcher,  
24 there were -- there was overwhelming, you know,  
25 essentially incontrovertible evidence that the

1 acts here did take place in Poland. Suppose  
2 somebody had leaked videos that everybody agreed  
3 were authentic. You know, what then?

4 MR. FLETCHER: So, again, I think the  
5 answer would be that those would be additional  
6 circumstances that the CIA director or whoever  
7 was making the judgment in the first instance  
8 would want to take into account and would have  
9 to explain in a declaration explaining why  
10 further disclosure could still harm national  
11 security.

12 You know, again, I think, even in that  
13 circumstance, there would be concerns. The CIA  
14 director here talks about there being a  
15 difference between even what appears to be  
16 definitive proof and actual formal confirmation  
17 by people with firsthand knowledge on the  
18 subject, that our allies and adversaries view  
19 those as two different things.

20 JUSTICE KAGAN: I -- I understand the  
21 argument about our relationships with our allies  
22 and it not necessarily being coextensive with  
23 the question whether something is a secret.  
24 But, at -- at a certain point, it becomes a  
25 little bit farcical, this idea of the assertion

1 of a -- a -- a -- a privilege, doesn't it?

2 I mean, if everybody knows what you're  
3 asserting privilege on, like, what exactly does  
4 this privilege -- I mean, maybe we should rename  
5 it or something. It's not a state secrets  
6 privilege anymore.

7 MR. FLETCHER: Well, I guess I'd  
8 resist the idea certainly that it's -- we're  
9 anywhere near the farcical zone here. I mean,  
10 this is a line, as I said, that the executive  
11 branch drew back in 2014 that it's adhered to  
12 ever since. The foreign countries that were  
13 involved in this program have -- none of them  
14 have come forward. All of them have viewed it  
15 as important to preserve the confidentiality of  
16 this information, notwithstanding all of the  
17 speculation that's out there and that's in the  
18 amicus briefs recited here, you know, much of  
19 which existed in 2014 too.

20 So I guess what I'd say here is that I  
21 understand that the hypotheticals get difficult  
22 and you can posit, you know, greater and greater  
23 certitudes of public knowledge. But, in this  
24 case, I think the sort of facts in the world and  
25 the evident importance that the political

1 branches in the United States and our partners  
2 abroad have put on preserving this  
3 confidentiality confirms that there is something  
4 to it here, that there is a difference between  
5 what's out there in public now and confirmation  
6 or denial in an official sense.

7 JUSTICE ALITO: What is the current  
8 status of the proceeding in Poland?

9 MR. FLETCHER: The proceeding -- I'm  
10 not sure exactly of the status. I know  
11 Respondents note in a footnote that one part of  
12 the investigation has been closed. The --  
13 what's in the record that I'm aware of are some  
14 reports that Poland has provided to the ECHR  
15 about the status of its investigation that  
16 basically say the investigation is ongoing.  
17 They note that they've sought information from  
18 the United States, but, as Justice Sotomayor and  
19 I discussed, the United States has refused to  
20 provide it under the MLAT because of national  
21 security concerns.

22 But, beyond that, I don't know the  
23 details of where things stand.

24 JUSTICE ALITO: Who in the Polish  
25 government can make a request under the MLAT?

1                   MR. FLETCHER: The requests come  
2                   through a central authority. Each treaty  
3                   partner has identified a central authority to  
4                   pass along requests under the MLAT. The  
5                   requests here originated with the regional  
6                   prosecutor and then were passed along by that  
7                   central authority.

8                   JUSTICE ALITO: So the regional  
9                   prosecutor here, I -- I assume -- maybe this is  
10                  incorrect -- is a typical civil law system  
11                  investigative magistrate who is operating  
12                  independently. It's not like someone in the  
13                  Department of Justice in the United State who's  
14                  -- States who's ultimately answerable to the  
15                  Attorney General? It is not the Government of  
16                  Poland in the same respect that a federal  
17                  prosecutor in the United States would be  
18                  exercising the authority of the -- the  
19                  Government of the United States?

20                  MR. FLETCHER: I don't want to make  
21                  representations about exactly how the Polish  
22                  system works, but I think I can give you some  
23                  detail that confirms the thrust of your  
24                  question, which is that even after the regional  
25                  prosecutor began sending the first of the MLATs,

1     which began back in 2009, the Government of  
2     Poland declined to release the former Polish  
3     president from his obligation of secrecy,  
4     refused to confirm or deny the allegations in  
5     the ECHR proceeding, didn't cooperate with that  
6     investigation.

7                 And so I -- I think what that tells  
8     you is that, whatever the inner workings of the  
9     Polish system, the official position of Poland  
10    is not necessarily reflected in the MLAT  
11    requests or in -- in the investigation.

12                JUSTICE KAVANAUGH: Mr. Fletcher?

13                MR. FLETCHER: Yes, Justice Kavanaugh.

14                JUSTICE KAVANAUGH: To what extent is  
15    the privilege a constitutional privilege? And  
16    to what extent do you think the privilege is a  
17    common law privilege that could be altered by  
18    Congress?

19                MR. FLETCHER: I think this Court  
20    hasn't had to answer that question. Reynolds,  
21    which was the first recognition of the  
22    privilege, said that it was firmly rooted in the  
23    law of evidence and -- the common law of  
24    evidence, and it was.

25                In subsequent cases, like Nixon and

1 Egan, the Court has also made clear that it has  
2 constitutional roots in the executive's Article  
3 II authorities to protect the nation and  
4 safeguard confidential information. So, you  
5 know, I think it's -- it's both.

6 And as to the question of what could  
7 Congress do to -- to change the privilege, I  
8 certainly think Congress might be able to set  
9 forth mechanisms for asserting the privilege.  
10 If Congress were to try to cut back on the core  
11 of the privilege recognized in Reynolds, then I  
12 think that would present the constitutional  
13 question suggested in -- in Egan and in Nixon  
14 but that this Court has never actually had to  
15 resolve.

16 JUSTICE BARRETT: Mr. Fletcher, in  
17 Salim, the government was present in the suit  
18 trying to police the boundaries of the  
19 contractors' testimony and to ensure like --  
20 that things like location were not revealed.

21 Would that be possible in this  
22 proceeding? Would the government be able to  
23 participate? Let's say that we -- we disagree  
24 with you and we say it's not privileged at least  
25 insofar as we're talking about the treatment --

1 at least insofar as we're talking about  
2 potential torture, et cetera. Does the  
3 government have the right to participate and --  
4 and ensure that those same safeguards are  
5 present?

6 MR. FLETCHER: So we do have the right  
7 to participate. We've intervened in the  
8 litigation, and I think all parties have assumed  
9 that that would give us the right to be present  
10 and to levy objections during discovery.

11 I do want to hesitate, though. To the  
12 extent your question suggests that that sort of  
13 participation would be sufficient in a  
14 proceeding like this one, I think it would run  
15 up against all of the concerns we talked about  
16 earlier with using code words, and also just  
17 sort of inherently it would raise the -- the  
18 concern that this Court alluded to in General  
19 Dynamics about the risks of inadvertent  
20 disclosure or about piecing together the puzzle  
21 that are especially acute when you have parties  
22 who have every incentive to probe right up to  
23 the line of privilege, which Respondents do  
24 here.

25 And so I think, to our view, that's

1 reason enough to conclude that the state secrets  
2 privilege precludes further discovery here.  
3 But, at a minimum, even if you don't get there,  
4 I think it's highly relevant to the  
5 consideration that Justice Sotomayor discussed  
6 under 1782, which is both this request  
7 circumvents the MLAT mechanism and the express  
8 exception in the negotiated treaty and also that  
9 it would be incredibly intrusive and burdensome  
10 to have discovery proceed in that fashion.

11 CHIEF JUSTICE ROBERTS: Thank you,  
12 counsel.

13 Justice Thomas, anything further?

14 JUSTICE THOMAS: None for me, Chief.

15 JUSTICE SOTOMAYOR: I have one.

16 CHIEF JUSTICE ROBERTS: Please.

17 JUSTICE SOTOMAYOR: Mr. Fletcher,  
18 should we be thinking about this as a Reynolds  
19 case or a -- an Intel case?

20 In my mind, your claim of state  
21 secrets really undermines the foundation of  
22 Reynolds, and so I'm hesitant to call it a  
23 Reynolds case. I think it's an Intel case.

24 MR. FLETCHER: We're content to have  
25 you think of it as either. In our view, it's

1 both and they dovetail, as you and I discussed.  
2 But, if -- if you are not willing to decide the  
3 privilege question all -- all the way or to take  
4 it as far as we would take it, then I think a  
5 perfectly appropriate disposition would be to  
6 say that, at a minimum, the circumvention of the  
7 MLAT process and the intrusion and burdensome  
8 nature of the discovery that would have to  
9 happen, and that would still carry risks of  
10 disclosing secret information.

11 JUSTICE SOTOMAYOR: Well, even in  
12 Intel, it's also the necessity, which is a  
13 question that I'm going to ask your adversary,  
14 so --

15 MR. FLETCHER: You're right exactly.  
16 And we're not talking about vindicating any U.S.  
17 rights. We're talking about just seeking  
18 evidence for a foreign proceeding, which is, we  
19 think, categorically a lesser showing of  
20 necessity.

21 JUSTICE SOTOMAYOR: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice Kagan.

23 JUSTICE KAGAN: Just, again, Mr.  
24 Fletcher, on this idea of using code words. I  
25 mean, given that Petitioner was detained in two

1     separate locations, you know, isn't there a way  
2     of enabling this information to go forward  
3     without saying which of the two locations, you  
4     know, these -- this treatment happened?

5             So you're -- you're saying, well,  
6     everybody would know it's Poland if there were  
7     such information about treatment. But maybe  
8     not. You know code words, and it could be  
9     Poland or it could be another location.

10            MR. FLETCHER: Well, Justice Kagan, I  
11     think I -- my -- my friend on the other side  
12     would have to speak to what it is that they  
13     are -- have in mind with this code words  
14     proposal, but quite a lot of information about  
15     Abu Zubaydah's treatment is already in the SSCI  
16     report and has been made public.

17            What I understand them to be seeking  
18     is tell us what happened at Detention Site Blue  
19     or tell us what happened between this date and  
20     this date where we believe he was in Poland.

21            That's what raises the concern for us,  
22     you know, especially when the whole thing is  
23     premised on this notion that this is a  
24     proceeding to get evidence for use in a Polish  
25     prosecution. The evidence wouldn't even be

1 appropriate for disclosure unless it were  
2 relevant to that Polish prosecution.

3 I think, at that point, it should be  
4 --

5 JUSTICE KAGAN: I guess what I'm  
6 suggesting is suppose the Petitioner just said  
7 tell us what happened wherever and didn't ask  
8 you to say anything about the location, whether  
9 it was the blue location or the green location.

10 And then the Petitioner had to come up  
11 with evidence on his own to satisfy the Polish  
12 authorities that it was one rather than the  
13 other, but that nothing in his request to you  
14 and nothing in the government's response to that  
15 request suggested whether it was the blue  
16 location or the green location in which the  
17 relevant acts took place.

18 MR. FLETCHER: So I guess, again, not  
19 for me to say, it's not clear how much good that  
20 would actually do them. But, if -- if you  
21 actually took both the code names and the dates  
22 out of it and just said what was done, I think  
23 that mitigates the concern that I had about the  
24 mosaic theory to some extent in piecing together  
25 information in ways that would be damaging.

1           I -- I still don't think it avoids the  
2   fundamental problem that the district court  
3   identified that at this late date, when this  
4   whole proceeding has been about Poland from day  
5   one from line one of the application, you can't  
6   take that out of the case by just not saying it  
7   out loud. So we still have concerns that this  
8   looks like a breach of trust if it goes forward  
9   at all.

10           But I -- I certainly acknowledge that  
11   that does mitigate some of the concerns.

12           CHIEF JUSTICE ROBERTS: Justice  
13   Gorsuch.

14           JUSTICE GORSUCH: Mr. Fletcher, do we  
15   start on an agreed premise that the government  
16   bears the burden of proving the privilege up?

17           MR. FLETCHER: Under the standard set  
18   forth in Reynolds, yes.

19           JUSTICE GORSUCH: Yeah. And -- and --  
20   and any privilege can be waived and -- and the  
21   determination of -- of the privilege's waiver,  
22   the scope of it, is a matter for the Court?

23           MR. FLETCHER: It's a matter for the  
24   Court, but I think the Court in Reynolds was  
25   very clear that this is a privilege that can

1       only be waived by the government, not by others.

2               JUSTICE GORSUCH:   Sure.   But then you  
3       -- you don't waive it as to what you choose --  
4       pick and choose to waive.   You waive it as to a  
5       subject matter.   That's -- that's how waiver  
6       usually works.   And it's determined by the  
7       court, not by the happenstance of the disclosing  
8       party's choices.

9               MR. FLETCHER:   I know that some  
10       privileges work that way, and in some contexts,  
11       courts have concerns about gamesmanship with  
12       selective assertions of privilege.   I don't  
13       think that's how concerns about national  
14       security have worked.

15              JUSTICE GORSUCH:   What's your  
16       authority for that?

17              MR. FLETCHER:   I -- I think a line of  
18       a cases from the lower courts addressing similar  
19       questions under FOIA, where there can be  
20       questions about --

21              JUSTICE GORSUCH:   Where they've  
22       expressly rejected the idea that waiver extends  
23       to subject matter and not to particular  
24       matters --

25              MR. FLETCHER:   Yes.   It --

1 JUSTICE GORSUCH: -- that the  
2 government has chosen?

3 MR. FLETCHER: There's a knowledge --  
4 there's a doctrine known as official  
5 acknowledgment, and the idea is that FOIA  
6 Exemption 1, which protects classified  
7 information, doesn't apply only if the  
8 government has officially acknowledged exactly  
9 the information that is being sought and is not  
10 waived by related disclosures by the government  
11 or by public speculation or by things of that  
12 nature.

13 We cite those cases at pages 30 to 34  
14 of our brief.

15 JUSTICE GORSUCH: Thank you. And when  
16 it -- when -- when the district court is  
17 considering the degree of deference due an  
18 assertion of secrecy, is it entitled to take  
19 into consideration the increased number of  
20 classification -- increased classification of  
21 documents these days?

22 MR. FLETCHER: I guess I'm -- I'm not  
23 sure that that would be directly relevant. I  
24 think each assertion ought to stand on its own  
25 bottom, and if it's a valid assertion and the

1 standard is met, then that would be appropriate.

2 JUSTICE GORSUCH: How about the  
3 increased assertion of a state secrets  
4 privilege? Is that something a district court  
5 can take into account?

6 MR. FLETCHER: Again, I -- I -- I --  
7 I'm not sure how that would be relevant to the  
8 inquiry. I think the question for the Court is  
9 always is this disclosure a threat to national  
10 security and has the executive branch  
11 established that under the standard in Reynolds.

12 JUSTICE GORSUCH: Irrelevant in your  
13 mind?

14 MR. FLETCHER: I think so, Your Honor.

15 JUSTICE GORSUCH: How about the fact  
16 that the allegations are old, factually dated?

17 MR. FLETCHER: I think --

18 JUSTICE GORSUCH: Is that something  
19 the court can take into account?

20 MR. FLETCHER: That's a circumstance,  
21 I think, that may be relevant to whether  
22 disclosure would affect national security and  
23 so, like a number of the other circumstances  
24 we've talked about, would be something that --

25 JUSTICE GORSUCH: That one the court

1 can take into account?

2 MR. FLETCHER: Through the lens of  
3 deference.

4 JUSTICE GORSUCH: Yes.

5 MR. FLETCHER: I -- I would think  
6 that, you know --

7 JUSTICE GORSUCH: No, of course.

8 MR. FLETCHER: Of course, yes.

9 JUSTICE GORSUCH: And same thing with  
10 the -- the extent of public knowledge. I -- I  
11 assume you'd agree that that one is also  
12 something the district court can take account  
13 of?

14 MR. FLETCHER: Again, through the lens  
15 of deference, but absolutely.

16 JUSTICE GORSUCH: Through the lens of  
17 deference.

18 MR. FLETCHER: Yeah.

19 JUSTICE GORSUCH: And then how about  
20 the nature of the allegation and the seriousness  
21 of it, an allegation of torture? Is that -- is  
22 that something that the district court, that  
23 Justice Breyer was touching on this, is that  
24 something the district court can take cognizance  
25 of?

1                   MR. FLETCHER: I'm not aware of  
2     authority that speaks to that one way or the  
3     other. The way I -- I could imagine it being  
4     relevant is potentially in the necessity  
5     inquiry, but I think the way that that would be  
6     relevant is not just about the seriousness of  
7     the conduct at issue but what is the need that  
8     the party seeking the information has for it.

9                   And so, if you had a party that was  
10    asserting rights in U.S. court, substantive  
11    legal rights in U.S. court, the gravity of those  
12    rights might weigh into the necessity inquiry.  
13    Here, though, I understand, you know, the  
14    seriousness of the allegations about treatment,  
15    but I think the necessity inquiry and the  
16    necessity analysis looks very different because  
17    it's ultimately evidence for a foreign  
18    proceeding, not rights under U.S. law.

19                  JUSTICE GORSUCH: Thank you.

20                  CHIEF JUSTICE ROBERTS: Anything  
21    further, Justice Kavanaugh?

22                  JUSTICE KAVANAUGH: No further  
23    questions.

24                  CHIEF JUSTICE ROBERTS: Justice  
25    Barrett?

1 JUSTICE BARRETT: No.

2 CHIEF JUSTICE ROBERTS: Thank you,  
3 counsel.

4 Mr. Klein.

5 ORAL ARGUMENT OF DAVID F. KLEIN

6 ON BEHALF OF THE RESPONDENTS

7 MR. KLEIN: Mr. Chief Justice, and may  
8 it please the Court:

9 Let me start by making one thing  
10 clear. I'm not planning to ask did it happen in  
11 Poland. The Polish prosecutor already has  
12 information about that and doesn't need U.S.  
13 discovery on the topic.

14 What he does need to know is what  
15 happened inside Abu Zubaydah's cell between  
16 December 2002 and September 2003. So I want to  
17 ask simple questions like, how was Abu Zubaydah  
18 fed? What was his medical condition? What was  
19 his cell like? And, yes, was he tortured?

20 These topics are declassified. The  
21 government has allowed Mitchell and Jessen to  
22 testify about them publicly twice before, in the  
23 Salim case and before military commissions.  
24 They testified about Abu Zubaydah's treatment in  
25 general and at particular sites outside Poland.

1 They testified about another detainee's  
2 treatment at the Polish site identified by code  
3 name. The government itself placed their  
4 testimony online.

5 The government's briefs make no  
6 pretense that these topics are privileged. The  
7 remand directs the district court only to  
8 consider whether classified and declassified  
9 information can be separated. It does not  
10 require discovery. It leaves that to the  
11 district court.

12 If the district court does allow  
13 discovery, then it can use the same tools it  
14 used in Salim to protect state secrets, and,  
15 yes, Justice Barrett, I do believe that the  
16 government would be in attendance just as it was  
17 in the Salim case and would be able to object.

18 It could enter an order limiting  
19 deposition topics. It could have depositions  
20 proceed under seal. And it can propose -- it  
21 can postpone answers to any questions that --  
22 that draw objection until the -- until the court  
23 has ruled on them.

24 Poland would receive only a record  
25 approved by the court after appropriate

1 objections and perhaps even another appeal.  
2 This is what courts do, and it's what they do  
3 well. It's the very judicial function this  
4 Court in Reynolds charged lower courts to carry  
5 out.

6 Now I welcome the Court's questions.

7 JUSTICE THOMAS: Mr. Klein, you said  
8 that much of this has already been disclosed.  
9 If it has been, what -- why do you need  
10 additional testimony?

11 MR. KLEIN: Well, frankly, what has  
12 been disclosed is not limited to a date range.  
13 So we know it -- it's well-publicized that Abu  
14 Zubaydah was tortured. In fact, this is -- this  
15 is referenced in Mr. Mitchell's book and  
16 described in excruciating detail, but he doesn't  
17 -- he doesn't say that it was at a particular  
18 place or in a particular -- at times, he says in  
19 a particular time, but he doesn't speak to our  
20 time frame.

21 So the Polish prosecutor has the  
22 information -- as we understand it, has the  
23 information about when and where. He has made  
24 representations to the European Court of Human  
25 Rights -- you know, they were a willing

1 participant, by the way, in the European Court  
2 of Human Rights. They represented that they had  
3 interviewed 62 people to -- to learn what they  
4 could about the site in Poland, and they  
5 represented that they had amassed 43 volumes of  
6 documents about it. And they appeared and made  
7 those representations that they had conducted  
8 what they thought was an appropriate  
9 investigation.

10 JUSTICE THOMAS: So how -- how do you  
11 square that with how you started your argument  
12 that you're not -- you -- you seem to suggest  
13 that you are not interested in the location.  
14 But it seems as though you're looking for more  
15 information to tie it to Poland.

16 MR. KLEIN: Well, I -- I would say  
17 that we're not -- we -- we no longer need  
18 information to tie it to Poland. We know where  
19 Abu Zubaydah was. We want to establish how he  
20 was treated there. That's -- that is what we're  
21 looking for. So --

22 JUSTICE THOMAS: At that specific  
23 location?

24 MR. KLEIN: Well, yes. Context -- the  
25 context is a particular location that has been

1 established by -- by the Polish investigation  
2 as -- as we understand it. You know --

3 JUSTICE THOMAS: One last question.

4 MR. KLEIN: Sure.

5 JUSTICE THOMAS: The -- how does  
6 helping a prosecutor in Poland amount to the  
7 necessity that you would need under Reynolds?

8 MR. KLEIN: Well, under -- under  
9 Polish law, Abu Zubaydah has particular rights  
10 to -- frankly, to stand as an accuser of those  
11 who -- who have assaulted him. That's -- that's  
12 a feature of Polish law. Not only can he be a  
13 complainant, but he can submit evidence to the  
14 prosecutor, and -- and if the prosecutor  
15 declines to go forward with the prosecution, he  
16 has a right of appeal in Poland as well. He can  
17 appeal to a court.

18 So, as a practical matter, in the way  
19 we conceive of it, he's more like a party, not  
20 that that would matter under 1782, because all  
21 it requires is that he be an interested person  
22 and not necessarily a litigant, as this Court  
23 held in Intel.

24 JUSTICE BARRETT: Counsel, I guess  
25 what I can't get past is similar to Justice

1 Thomas's question. You say that it's not a  
2 secret that there was a black site in Poland, so  
3 you say it can't be a state secret if it's not a  
4 secret because that's well established.

5 And then it's not a secret that he was  
6 tortured either. So it seems to me that if  
7 that's all you wanted to prove, by your own  
8 characterization of those facts, you don't  
9 really need them. And then, in your answer to  
10 Justice Thomas, you suggested that, no, what we  
11 really do need is the testimony of the  
12 contractors to show that it happened in Poland.  
13 But you've also conceded, I thought, that that  
14 testimony would be privileged.

15 Am I understanding you that --

16 MR. KLEIN: No.

17 JUSTICE BARRETT: -- that would be  
18 privileged?

19 MR. KLEIN: No, not necessarily -- not  
20 -- not really. I guess the way I would describe  
21 it, Justice Barrett, is we do need -- the  
22 testimony -- the existence of the black site has  
23 been established as a legal matter in -- in the  
24 European courts. We believe that it's not a  
25 secret. That's a disputed question.

1 JUSTICE BARRETT: So you don't need  
2 them for that?

3 MR. KLEIN: We don't -- we don't need  
4 it if we -- if we adopt the -- the protocol that  
5 was used in Salim and simply don't refer to the  
6 site by name and/or -- and for that matter, it  
7 doesn't even have to be referred to by alter  
8 ego, like Detention Site Blue, even though  
9 that's plastered across the record.

10 JUSTICE BARRETT: But if you --

11 MR. KLEIN: But --

12 JUSTICE BARRETT: -- don't need them  
13 to establish the existence of the site in Poland  
14 and you don't need them to establish what  
15 happened to him, the torture that he underwent,  
16 what do you need them for? To show that it  
17 happened in Poland, right?

18 MR. KLEIN: To show that it happened  
19 when he was in Poland.

20 JUSTICE BARRETT: And do you accept --  
21 I kind of read your brief to accept that that  
22 particular piece of it would be privileged? Am  
23 I misunderstanding that?

24 MR. KLEIN: No. I -- we don't accept  
25 that. The Ninth Circuit concluded and the

1 district court concluded and we agree that the  
2 fact that the site in Poland is a public fact.  
3 It's not a secret.

4 JUSTICE BARRETT: But the fact that he  
5 was tortured by these contractors in Poland,  
6 that's not a state secret?

7 MR. KLEIN: We're -- we're not  
8 necessarily -- well, I would say that that is  
9 not a state secret as well, that's correct,  
10 because the very fact of torture, the so-called  
11 enhanced interrogation techniques, are not a  
12 secret. They are declassified by the  
13 government. The -- the fact that the site is in  
14 Poland and that he was taken there was found by  
15 a court of law and also acknowledged by Poland's  
16 president, who said that he approved it. So,  
17 no, we don't -- we don't think that those facts  
18 are state secrets.

19 The government's argument is that the  
20 confluence of those facts is somehow a state  
21 secret, and the government's argument -- and  
22 what it -- what it really hinges on is this idea  
23 that I can ask the same question -- well, let me  
24 put it this way: Suppose -- suppose Salim's  
25 lawyer asked, what happened to Abu Zubaydah on

1 January 1, 2003? That's not privileged. That's  
2 not a privileged question because he's asking it  
3 in the context of a different proceeding. And  
4 questions like that were asked, by the way.

5 But, if I ask the same question for  
6 use by a Polish prosecutor, asking, again --  
7 forget about Poland for a minute -- what  
8 happened to Abu Zubaydah on January 1, 2003, the  
9 government says that that is privileged in that  
10 context and that context only.

11 JUSTICE BARRETT: So could you --

12 CHIEF JUSTICE ROBERTS: I don't --

13 JUSTICE BARRETT: -- ask him, did you  
14 torture Abu Zubaydah in Poland on this date?  
15 Could you ask that question under your view of  
16 the privilege?

17 MR. KLEIN: Under -- under our --  
18 well, under the Ninth Circuit -- under --

19 JUSTICE BARRETT: Under your view.  
20 Under your view of --

21 MR. KLEIN: We share the Ninth  
22 Circuit's view on this. The answer is yes,  
23 because the fact of Poland itself is not secret.  
24 But we -- from the very beginning, from the  
25 moment the government filed its motion to quash,

1 we offered to -- to amend under Rule 45 to allow  
2 the -- the -- the proceedings to go forward  
3 without mentioning Poland.

4 CHIEF JUSTICE ROBERTS: So --

5 JUSTICE BARRETT: But it seems to me  
6 that since all that is public and -- and this --  
7 and I'll end after this -- it seems to me the  
8 only thing you gain is an acknowledgment by  
9 people who worked for the government that it  
10 happened, like -- that that's the piece that  
11 you're missing?

12 MR. KLEIN: That it happened and that  
13 it --

14 JUSTICE BARRETT: So you kind of want  
15 the United States' official involvement to be  
16 part of the record, and you say that's not a  
17 state secret?

18 MR. KLEIN: We're not looking for the  
19 United States' official acknowledgment. That's  
20 -- but what we do gain is placing some of the  
21 torture in a particular time frame, which --  
22 which the Polish prosecutor has associated with  
23 Abu Zubaydah's presence in Poland.

24 CHIEF JUSTICE ROBERTS: I -- I -- I  
25 guess I'm having trouble following exactly what

1 it is you're looking for. And I don't think  
2 you're grappling with the point that Justice  
3 Barrett just raised, which is you -- everybody  
4 may know about this. You know, as -- as you've  
5 put it, it's no secret at all.

6 But you don't have the United States  
7 Government acknowledging that. And the United  
8 States Government says this is critically  
9 important because our friends, allies,  
10 intelligence sources around the world have to  
11 believe that we keep our word, and our word was  
12 this is -- this is secret.

13 And so they may be -- you know, the  
14 CIA director may be the last person in the world  
15 to -- to have said this is where the site is,  
16 but that's what's important, what -- what the  
17 United States has revealed, not what you find.

18 You say you're not going to ask  
19 anything about -- about Poland. Well, then why  
20 do you need the director of the CIA and the  
21 United States Government to agree with what you  
22 say you've got enough proof on, that there was  
23 this site in Poland?

24 MR. KLEIN: Mr. Chief Justice, we  
25 don't need the director of the CIA to agree with

1 us. And, in fact, we don't need any CIA  
2 employee to agree with us. Mitchell --

3 CHIEF JUSTICE ROBERTS: But, by -- by  
4 the director, I -- I meant the -- you -- you  
5 need the director not to acknowledge or to  
6 withdraw the, you know, assertion under -- you  
7 -- you need somebody from the United States  
8 Government to acknowledge the existence of this  
9 site, right?

10 MR. KLEIN: We -- we need a court,  
11 this Court, to acknowledge a rule of law and --  
12 and determine whether -- whether the -- the CIA  
13 director's statement in paragraph 17 of his  
14 declaration, which is at the center of this, is  
15 well taken.

16 And this is what the Ninth -- at the  
17 core of what the Ninth Circuit did in addressing  
18 what I call the attribution question. The CIA  
19 director said, we can't have it attributed  
20 officially to the CIA that these things happened  
21 in Poland, whether it's true or false. We can't  
22 acknowledge or deny it.

23 And -- and that was the important  
24 thing, all right? And -- and in that paragraph,  
25 at I think 134A and 135A, in that one paragraph,

1 he uses the phrase "official acknowledgment or  
2 official confirmation" and its converse eight  
3 times, and he says what's -- what's really  
4 crucial is not that the CIA -- the CIA exposes a  
5 secret but officially acknowledges this  
6 non-secret because he -- he was responding to  
7 the fact that Poland's president had already  
8 acknowledged it. And he said, but we're not.

9 That's important because what he's  
10 saying -- what he's saying sub rosa is this is  
11 not a secret, but it's important that the CIA  
12 not be heard officially to acknowledge it.

13 JUSTICE BREYER: So is that what you  
14 want? You want them officially to -- to  
15 acknowledge it?

16 MR. KLEIN: No.

17 JUSTICE BREYER: You don't want that?

18 MR. KLEIN: No, we don't -- we don't  
19 need that. What we want is --

20 JUSTICE BREYER: All -- all you want  
21 is to know what happened?

22 MR. KLEIN: We want the testimony --  
23 we want -- exactly. We want --

24 JUSTICE BREYER: Okay.

25 MR. KLEIN: -- we want --

1 JUSTICE BREYER: If it's exactly, why  
2 don't you ask Mr. Zubaydah? Why doesn't he  
3 testify? Why doesn't Mr. Zubaydah -- he was  
4 there. Why doesn't he say this is what  
5 happened? And -- and they won't deny it, I  
6 mean, I don't think, if he's telling the truth.

7 MR. KLEIN: You're talking about  
8 Mitchell or Jessen when you say --

9 JUSTICE BREYER: No, I'm not. I'm  
10 saying the person who was there --

11 MR. KLEIN: Yeah.

12 JUSTICE BREYER: -- was -- was -- I  
13 don't know if he's your client. Isn't he your  
14 client? His name is on this thing.

15 MR. KLEIN: Abu Zubaydah can't --

16 JUSTICE BREYER: Yes.

17 MR. KLEIN: Abu Zubaydah cannot  
18 testify.

19 JUSTICE BREYER: Why not?

20 MR. KLEIN: He -- he's -- because he  
21 is being held incommunicado. He has been held  
22 in Guantanamo incommunicado.

23 JUSTICE BREYER: Why? Why? Just out  
24 of -- I mean, I'm not sure this is relevant,  
25 but, I mean, in Hamdi, we said you could hold

1 people in Guantanamo. The words were: Active  
2 combat operations against Taliban fighters  
3 apparently are going on in Afghanistan. Well,  
4 they're not anymore.

5 MR. KLEIN: Mister -- Justice --

6 JUSTICE BREYER: So -- so what's the  
7 -- why is he there?

8 MR. KLEIN: That's a question to put  
9 to the government. We don't know the answer to  
10 that.

11 JUSTICE BREYER: I mean, have you  
12 filed a habeas or something to get him out?

13 MR. KLEIN: There's been a habeas  
14 proceeding pending in D.C. for the last 14  
15 years. There's been --

16 JUSTICE BREYER: Well, how --

17 MR. KLEIN: -- there's been no action.

18 JUSTICE BREYER: -- don't they decide  
19 it? They don't decide it?

20 MR. KLEIN: I'm sorry?

21 JUSTICE BREYER: I mean, you just let  
22 it sit there? All right.

23 MR. KLEIN: No.

24 JUSTICE BREYER: I guess this is not  
25 relevant --

1 MR. KLEIN: Well, I -- I -- I -- I --

2 JUSTICE BREYER: -- but I'm just  
3 curious about it.

4 MR. KLEIN: -- personally, I'm not  
5 handling that proceeding, but, no, we're -- my  
6 understanding is that we -- we've done  
7 everything we could to -- to move it forward,  
8 but it simply has not moved forward. And --

9 JUSTICE SOTOMAYOR: Mr. Klein, am I --  
10 I think I understand, because you're held in  
11 Guantanamo, you're not permitted to sign  
12 affidavits or give any testimony, correct?

13 MR. KLEIN: That is correct.

14 JUSTICE SOTOMAYOR: And so what you're  
15 saying to me is that you believe what's missing  
16 from the Polish investigation is someone who  
17 actually that says on this date, regardless of  
18 where it is, Mr. Zubaydah was tortured?

19 MR. KLEIN: That's right.

20 JUSTICE SOTOMAYOR: And that goes to  
21 the government's mosaic theory, which is -- and  
22 this is what you're disavowing -- because it's  
23 not a state secret that he was tortured, the  
24 date he was tortured is not a state secret. The  
25 place may be, but he doesn't have to say the

1 place. You will let the Polish authorities  
2 prove that some other way, correct?

3 MR. KLEIN: If -- if that's the way  
4 we're directed, if we're not allowed to utter  
5 the word "Poland" in asking deposition  
6 questions, absolutely.

7 JUSTICE SOTOMAYOR: So this goes  
8 directly to the government's point, which is the  
9 state secret -- they're going further than state  
10 secret because the torture is not a secret.  
11 That's been testified to in a variety of  
12 different places.

13 What they're saying is our state  
14 secret is we don't want the U.S. courts to  
15 assist Poland --

16 MR. KLEIN: But that's not --

17 JUSTICE SOTOMAYOR: -- in -- in --

18 MR. KLEIN: -- that's --

19 JUSTICE SOTOMAYOR: -- investigating  
20 what may or may not happen there even if the  
21 evidence here doesn't name Poland? Do I got  
22 this right?

23 MR. KLEIN: I think you do, Justice  
24 Sotomayor. I apologize for interrupting a  
25 moment ago.

1 JUSTICE SOTOMAYOR: No, no.

2 MR. KLEIN: I -- I -- I think that  
3 goes to the heart of it. We're not talking  
4 about a secret anymore. We're talking about a  
5 -- a governmental wish, not -- not to assist  
6 this Polish investigation. That's a policy.

7 JUSTICE SOTOMAYOR: So that goes to  
8 the -- mine goes back to the MLAT, which is --

9 MR. KLEIN: All right.

10 JUSTICE SOTOMAYOR: -- this is a  
11 government agreement with Poland about what  
12 happens when a state secret is evoked --  
13 invoked. And both governments have agreed that  
14 when each side invokes a state secret, the other  
15 can say -- they can say no.

16 Aren't we ignoring that agreement  
17 between governments? You represent the Polish  
18 government in this action. You're acting to  
19 help them.

20 MR. KLEIN: I -- I --

21 JUSTICE SOTOMAYOR: So why don't we  
22 view that or view this request as a request by  
23 the Polish government?

24 MR. KLEIN: Well, I'm representing Abu  
25 Zubaydah in this action.

1 JUSTICE SOTOMAYOR: No, no, I  
2 understand.

3 MR. KLEIN: And, to me --

4 JUSTICE SOTOMAYOR: No, but you're --  
5 you're doing it to assist the Polish  
6 investigation.

7 MR. KLEIN: Well, I -- I -- I would  
8 say the Polish investigation is -- is looking  
9 after Abu Zubaydah's interests, not the other  
10 way around. Abu Zubaydah has -- has -- has --

11 JUSTICE SOTOMAYOR: But it doesn't act  
12 on behalf of him. It acts on behalf of the  
13 state of the nation, Poland.

14 MR. KLEIN: I -- I would agree with  
15 that. But the Polish government did not direct  
16 Abu Zubaydah to pursue this claim. That was  
17 initiated -- that was initiated by his counsel  
18 in Europe filing a complaint. It was -- it's  
19 Abu Zubaydah's interests we represent.

20 He is a private individual. He is  
21 certainly not the Polish government. He was not  
22 given direction by the Polish government.  
23 When -- when the MLATs were denied for the  
24 seventh time, yes, the prosecutor did say, as I  
25 understand it not having been there myself, said

1 to the Polish lawyer for Abu Zubaydah: I don't  
2 have anything. You have rights under the law.  
3 Why don't you submit something?

4 And that -- and -- and so that was a  
5 self-initiated act. That was not an instance of  
6 the Polish prosecutor saying go file a 1782  
7 request and see what comes of it. That's not  
8 why we were there.

9 JUSTICE KAGAN: Mr. Klein, I -- I -- I  
10 may just not be understanding this, but when you  
11 say it's not a secret, I mean, there are several  
12 things that aren't secrets. There's plenty of  
13 evidence that the Petitioner was tortured in  
14 some location. But is there, in fact, evidence  
15 that he was tortured in the dates that you're  
16 trying to establish that he was tortured in?

17 In other words, I thought that the  
18 Senate report actually talks a good deal about  
19 the Petitioner's -- the -- the torture that was  
20 -- that the Petitioner was subject to, but in an  
21 earlier date.

22 And what you need to continue on with  
23 this investigation is essentially some evidence  
24 that that treatment was continued at a later  
25 date, the date in which you say he was in

1 Poland, and that is not in the public record.

2 Am I right about that?

3 MR. KLEIN: You're basically right  
4 about that, yes. There are hints of it. And --  
5 and what I would point to in particular in the  
6 Guantanamo proceedings in the -- before the  
7 military commissions, when Mitchell testified,  
8 he -- he said -- and this is -- this is a thin  
9 read, I will acknowledge -- but he said that --  
10 that Abu Zubaydah was -- was treated very  
11 shabbily when he was held in Poland.

12 And there was no lawyer there to  
13 represent Abu Zubaydah's interests at the time.  
14 It was Khalid Sheikh Mohammed's trial, and so  
15 there was no one to follow up on that question  
16 or with an interest to follow up on that  
17 question on behalf of Abu Zubaydah.

18 But having -- having read Mitchell's  
19 book, I can tell you that that's a lingo --  
20 that's a -- a language that he tends to use to  
21 describe much more serious treatment, just as  
22 the term "enhanced interrogation" --

23 JUSTICE KAGAN: I -- I -- I guess all  
24 I was suggesting was that the government is here  
25 to tell us that, look, they've conceded that Abu

1     Zubaydah was tortured, but, because of relations  
2     with allies with cooperating intelligence  
3     services, they won't say where it happened.

4             And you're here saying: I need to  
5     know when it happened. And to know when it  
6     happened, the government would essentially be  
7     saying where it happened too.

8             MR. KLEIN: So --

9             JUSTICE KAGAN: And that's the  
10    problem.

11            MR. KLEIN: -- so Mitchell and Jessen  
12    have testified before when these things  
13    happened, just not these particular things.

14            By the way, you know, it's important  
15    to understand that the Ninth Circuit order,  
16    you -- you know, the -- the government helpfully  
17    has placed our -- our subpoena -- documentary  
18    subpoena at the -- at the back of their reply  
19    brief. Most of those requests were denied by  
20    the Ninth Circuit, and among the things that  
21    were denied was a request to establish the  
22    identities of Polish nationals and contractual  
23    relationships between the United States and the  
24    Polish government in respect to the enhanced  
25    interrogation techniques.

1           We haven't appealed that. We never  
2    appealed that. So that's -- that's not before  
3    the Court. And it's important because it  
4    underscores that the Ninth Circuit did -- did  
5    distinguish between what it perceived to be  
6    secret and what it perceived not to be secret.

7           JUSTICE ALITO: Can this whole thing  
8    be boiled down into much simpler terms? Is it  
9    correct that what you want in the -- in the end  
10   is a more official link between what happened  
11   and Poland?

12          MR. KLEIN: I wouldn't -- no, I  
13   wouldn't say a more official link. We're  
14   looking for --

15          JUSTICE ALITO: All right. What you  
16   want is a link between what happened and Poland?

17          MR. KLEIN: We're looking for  
18   eyewitness testimony. For -- to the Polish  
19   prosecutor, the site is a black box. He knows  
20   where it is. He knows when it was there. He  
21   can't look inside it.

22          I want to shine a light inside it to  
23   -- to understand what was happening there.  
24   That's my sole role.

25          JUSTICE ALITO: Well, you know -- you

1 say you know what happened, and what you want to  
2 add is where it happened, right? That's the  
3 link. That's what this all boils down to.

4 MR. KLEIN: Well, I -- I -- I would  
5 argue --

6 JUSTICE ALITO: You want to do it  
7 indirect -- you -- you think you can do it  
8 indirectly. This will be a contributing piece  
9 of evidence that will enable you to show more --  
10 more -- more confidently than you can right now  
11 where it happened.

12 MR. KLEIN: And, Justice Alito, I --  
13 I -- I think the way I would put it, the where  
14 and the when are -- are already known but not  
15 the what. I -- I -- I -- I would -- I would put  
16 it this way: You know, the government has  
17 argued that -- that there's sort of a relevance  
18 issue.

19 I -- I -- I would say, though, that --  
20 that the links to the site are already there.  
21 We're not trying to -- you know, there may be  
22 information that the Polish authorities have  
23 that the -- that the government would not like  
24 them to have now.

25 JUSTICE ALITO: I mean, the subtlety

1 of this is somewhat -- somehow escaping me. You  
2 claim you have everything and yet you have a --  
3 a -- a need for this additional information. I  
4 -- it -- it does seem to me all you want is a  
5 more official link from these government  
6 contractors that what you say happened occurred  
7 in Poland and not in some other location.  
8 Otherwise, I don't see what need you have for  
9 any of what you're asking for.

10 MR. KLEIN: Well, with your  
11 indulgence, let me offer a hypothetical, because  
12 maybe that would help focus this a little bit.

13 Imagine there's a murder on the Orient  
14 Express, all right? The train passes through  
15 many countries on the way to its ultimate  
16 destination. The prosecutor in Budapest has  
17 determined already that the murder happened on  
18 the train in Hungary. Maybe the -- the  
19 passenger got on the plane in Hungary -- on the  
20 train in Hungary in the first place, and he was  
21 dead before it reached the border. So he's  
22 established that.

23 There's an American on -- on the train  
24 who is an eyewitness, okay? The prosecutor just  
25 needs to ask him, what did you see? And that's

1 -- that's clearly relevant, it's clearly useful,  
2 and it doesn't -- it -- he doesn't even need to  
3 answer where were you -- the American doesn't  
4 even have to know that he was in Hungary at the  
5 time it happened.

6 JUSTICE ALITO: Well, I'm not sure how  
7 that helps you. So what did he see? Like, who  
8 did he see stab this person or shoot this  
9 person? That's what you want? You want to know  
10 who in Poland did the things that you claim  
11 happened?

12 MR. KLEIN: No. We -- we've been  
13 prohibited by the Ninth Circuit from asking that  
14 question. The prosecutor has what he has.  
15 We're simply trying to supplement information he  
16 has -- already has with information that is  
17 acknowledged to be not privileged.

18 CHIEF JUSTICE ROBERTS: And -- and if  
19 the American were in an American court, he could  
20 invoke his Fifth Amendment rights against  
21 self-incrimination, right?

22 MR. KLEIN: And he could do that here  
23 as well. All the testimony will be --

24 CHIEF JUSTICE ROBERTS: Well, that  
25 seems to me that that's -- just to play out your

1       hypothetical --

2                   MR. KLEIN:   Sure.

3                   CHIEF JUSTICE ROBERTS:  -- that's  
4       exactly what the American government is saying.  
5       I'm not going to say anything about what I saw  
6       in -- in -- in Hungary because that might  
7       incriminate me.  It might be associated with me.  
8       And that would be a breach of faith with our  
9       allies and friends around the world.

10                  MR. KLEIN:  Well, the breach of faith  
11       would be if we were identifying the -- the  
12       individuals involved.  The Polish government,  
13       qua government, has asked for this information.  
14       The prosecutor was centrally appointed.  
15       Originally, it was a Warsaw prosecutor, and it  
16       was transferred, okay.

17                  So it's -- it's -- it's not correct to  
18       -- to say that the U.S. Government would be  
19       admitting anything.  If you look at -- at  
20       Director Pompeo's affidavit, he cites this  
21       Fitzgibbon case.  That case and every other case  
22       cited on both sides of the attribution issue,  
23       they're all FOIA cases.  They all say, unless  
24       it's a current employee of the agency in  
25       question, that's not an official confirmation of

1 anything.

2 JUSTICE KAGAN: Does -- does -- is  
3 that in the end what your argument depends on,  
4 that we should treat the contractors differently  
5 from an employee? If -- if these people were  
6 current employees, would your entire argument go  
7 up in smoke?

8 MR. KLEIN: I -- I think the answer  
9 might be different in those circumstances, but I  
10 -- I don't think it's the only -- the only route  
11 for us. Again, it -- it -- it -- it's the  
12 confluence, it's the combination of what they  
13 would be saying and who they are.

14 A U.S. Government employee, you  
15 know -- the CIA director could certainly testify  
16 himself about declassified information, all  
17 other things being equal. We're talking about  
18 information that's declassified and --

19 JUSTICE KAGAN: And is -- when you --  
20 when you say this is relevant, is it the  
21 question of past versus present, or is it the  
22 question of contractor versus employee?

23 MR. KLEIN: Well, I think they're both  
24 factors. In -- in this case, they're too  
25 removed. They -- they can't speak for the

1 government. They were never agents for the  
2 government. They were never employed by the  
3 government. They were never given authority to  
4 speak for the government.

5 JUSTICE KAGAN: And if I think that it  
6 would not make a lot of sense in this context to  
7 distinguish between contractors and employees  
8 because our foreign allies are not  
9 distinguishing in that way, they knew these two  
10 men as the architects of this program, you know,  
11 whether they were employees or whether they were  
12 contractors seems pretty irrelevant to anything  
13 and certainly irrelevant to our foreign allies,  
14 then what?

15 MR. KLEIN: Well, I'm -- I'm -- two  
16 answers to that. First of all, even -- even if  
17 that were the Court's view in the end with  
18 respect to them, it would -- it would still be a  
19 question of whether there was a secret at all  
20 that -- can they testify about non-secrets? Is  
21 context enough to change declassified  
22 information into classified information?

23 If I turned around tomorrow and I were  
24 deposing them in an entirely different case and  
25 -- and asked the same questions, would they --

1 would it somehow become de- -- non-privileged?  
2 It's already declassified. So, you know, that's  
3 -- that's point one.

4 But point two, again, Reynolds  
5 requires that the director of the CIA or the  
6 head of whatever agency it is that -- that is at  
7 issue, it requires that he personally review and  
8 he personally state his considered reasons for  
9 invoking the privilege.

10 And he stated his reasons in writing  
11 here, and they were exceedingly narrow. He said  
12 the government itself cannot be heard to  
13 officially admit or deny certain facts,  
14 officially. And that's not what he would be  
15 doing here. Thank you.

16 CHIEF JUSTICE ROBERTS: Thank you,  
17 counsel.

18 Justice Thomas?

19 JUSTICE THOMAS: No.

20 CHIEF JUSTICE ROBERTS: Justice  
21 Breyer?

22 Justice Sotomayor, anything further?

23 Justice Kagan?

24 Justice Gorsuch?

25 Justice Kavanaugh, any further --

1 anything further?

2 JUSTICE KAVANAUGH: Nothing further.

3 CHIEF JUSTICE ROBERTS: Justice

4 Barrett? No?

5 MR. KLEIN: Thank you.

6 CHIEF JUSTICE ROBERTS: Thank you,

7 counsel.

8 Rebuttal, Mr. -- rebuttal, counsel?

9 REBUTTAL ARGUMENT OF BRIAN H. FLETCHER

10 ON BEHALF OF THE PETITIONER

11 MR. FLETCHER: Thank you, Mr. Chief

12 Justice.

13 JUSTICE GORSUCH: Mr. Fletcher, I  
14 don't want to interrupt you later, so I'm just  
15 going to --

16 MR. FLETCHER: Please.

17 JUSTICE GORSUCH: -- do it up front.

18 Why not make the witness available?

19 What is the government's objection to the  
20 witness testifying to his own treatment and not  
21 requiring any admission from the government of  
22 any kind?

23 MR. FLETCHER: By "the witness," you  
24 mean Abu Zubaydah? Right. So I was going to  
25 address this point. It goes to Justice Breyer's

1 question about the conditions of his confinement  
2 right now.

3 He is not being held incommunicado.  
4 He is subject to the same restrictions that  
5 apply to other similar detainees at Guantanamo.  
6 His communications are subject to security  
7 screening for classified information and other  
8 security risks. But he's able to communicate  
9 with his lawyers about his case proceeding.

10 JUSTICE GORSUCH: That -- that's not  
11 really answering my question, I don't think,  
12 because I understand there are all sorts of  
13 protocols that may or may not, in the  
14 government's view, prohibit him from testifying.  
15 But I'm asking much more directly, will the  
16 government make the Petitioner available to  
17 testify on this subject?

18 MR. FLETCHER: We would allow him to  
19 communicate about this subject under the same  
20 terms as on anything else.

21 JUSTICE BREYER: The same terms?  
22 Look, I don't understand why he's still there  
23 after 14 years. It's a little hard to, given  
24 Hamdi, but assuming that isn't in this case, why  
25 not do just what Justice Gorsuch says? Just

1 say, hey, you want to ask what happened, ask him  
2 what happened. And maybe this is special.

3 MR. FLETCHER: So the -- because the  
4 detainees at Guantanamo are all subject to a  
5 regime, a protective order in their habeas  
6 litigation --

7 JUSTICE GORSUCH: I'm not asking -- I  
8 understand there are all sorts of rules and  
9 protective orders. I'm aware of that. I'm  
10 asking much more directly, and I'd just really  
11 appreciate a straight answer to this, will the  
12 government make Petitioner available to testify  
13 as to his treatment during these dates?

14 MR. FLETCHER: I cannot offer that now  
15 because that's a request that has not been made,  
16 and so we have not taken that back to the folks  
17 at DoD --

18 JUSTICE GORSUCH: Well, gosh --

19 MR. FLETCHER: -- who are running  
20 Guantanamo --

21 JUSTICE GORSUCH: -- we've been --  
22 this case has been litigated for years and all  
23 the way up to the United States Supreme Court,  
24 and you haven't considered whether that's an  
25 off-ramp that -- that the government could

1 provide that would obviate the need for any of  
2 this?

3 MR. FLETCHER: Well, Justice Gorsuch,  
4 we considered the request that was put before  
5 the district court and the Ninth Circuit under  
6 Section 1782. Our position as to all  
7 communications by Abu Zubaydah is that he can  
8 communicate subject to security screening, which  
9 would include -- and I just want to be clear --  
10 would include eliminating classified  
11 information.

12 JUSTICE GORSUCH: Which -- which takes  
13 us right back to where we are. And I -- that --  
14 and -- and -- and it doesn't answer the  
15 question. And I guess will the government at  
16 least commit to answering, informing this Court  
17 whether it will or will not allow the Petitioner  
18 to testify as to -- as to his treatment during  
19 these dates?

20 MR. FLETCHER: If -- if the Court  
21 would like a direct answer to that question, of  
22 course.

23 JUSTICE GORSUCH: I personally would  
24 appreciate a direct answer to that question.

25 JUSTICE SOTOMAYOR: Without the

1 government invoking a state secret privilege to  
2 the testimony. Inherent in the question is, are  
3 you going to let him testify as to what happened  
4 to him those dates?

5 MR. FLETCHER: And I think the -- the  
6 -- we would invoke the state secrets privilege  
7 always only over specific information, but I  
8 will -- I will tell you that whatever he  
9 proposes to do, we would want to apply the same  
10 sorts of screening that we're applying here to  
11 make sure that classified information is not  
12 released in the process of his testimony or in a  
13 --

14 JUSTICE SOTOMAYOR: Well, you're --

15 MR. FLETCHER: -- written submission.

16 JUSTICE SOTOMAYOR: -- you're begging  
17 the question. I want, I think Justice Gorsuch  
18 -- and he can correct me if I'm wrong -- we want  
19 a clear answer, are you going to permit him to  
20 testify as to what happened to him those dates  
21 without invoking a state secret or other  
22 privilege? Yes or no? That's all we're looking  
23 for.

24 JUSTICE ALITO: Mr. Fletcher, you are  
25 here representing the Government of the United

1 States in a certain capacity. What do you  
2 understand to be the scope of your authority as  
3 you stand before us here?

4 MR. FLETCHER: To represent the legal  
5 position of the United States, but in doing  
6 that, it's important to me, as it always is, to  
7 make sure that I'm representing my clients with  
8 full consultation of what's being put before  
9 them. I understand the question.

10 JUSTICE ALITO: To -- to represent  
11 the -- the interests of the United States with  
12 respect to what?

13 MR. FLETCHER: With respect to all  
14 matters. Here, the matters directly relevant  
15 are --

16 JUSTICE ALITO: With -- with respect  
17 to all matters? I thought it would be with  
18 respect to this litigation.

19 MR. FLETCHER: Correct. I'm sorry,  
20 Justice Alito. That's a -- that's a better way  
21 to put it. And because this is not an issue  
22 that has been in this litigation up until now,  
23 I'm not prepared to make representations for the  
24 United States, especially on matters of national  
25 security.

1                   Justice Gorsuch, I understand your  
2 question. We'd be happy to respond.

3                   JUSTICE GORSUCH: Thank you.

4                   MR. FLETCHER: Justice Breyer, you  
5 also asked questions -- just to wrap up a few  
6 details and then close maybe on a broader point.

7                   You asked a question about his habeas  
8 litigation. It is ongoing. He has a pending  
9 motion for release that raises exactly the  
10 question that you asked, does you change --  
11 recent events in Afghanistan change the  
12 authority to detain him?

13                  I believe the government is filing a  
14 surreply on that question tomorrow. So that's  
15 an active litigation in his habeas proceeding  
16 that is being handled there.

17                  Justice Kagan, you raised a question  
18 about what evidence there is about Abu  
19 Zubaydah's treatment after the point in time  
20 where the SSCI report -- Mr. Chief Justice?

21                  CHIEF JUSTICE ROBERTS: Please  
22 continue.

23                  MR. FLETCHER: When the SSCI report  
24 says that enhanced interrogation techniques  
25 stop. The pit of testimony from the military

1 commissions that my friend referred you to is  
2 cited in page 15 -- or Footnote 15 of the red  
3 brief.

4 I don't have it with me, but my  
5 recollection is that what Mitchell says is that  
6 enhanced interrogation techniques were not used  
7 on Abu Zubaydah at that time but that he was  
8 treated more shabbily than necessary, and that's  
9 all that there is on that point.

10 And, Mr. Chief --

11 CHIEF JUSTICE ROBERTS: One other --  
12 one other -- finish your rebuttal.

13 MR. FLETCHER: Mr. Chief Justice, I  
14 was just going to say, I wanted to close where I  
15 began and where Justice Kagan ended questioning  
16 of my friend, that I think everyone acknowledges  
17 the importance of trust in covert relationships,  
18 and so really what this case comes down to is  
19 the Ninth Circuit's holding, which my friend  
20 defended, that testimony from these two  
21 contractors would not breach that trust because  
22 they are contractors.

23 And for the reasons that Justice Kagan  
24 identified, that they were integral to the  
25 program, that they'd be testifying under oath

1     about information that they learned in the CIA  
2     and that is subject to confidentiality  
3     requirements, and that they'd be doing so in a  
4     proceeding designed to investigate and prosecute  
5     our alleged former allies abroad, that would be  
6     viewed as a serious breach of trust.

7             Thank you, Your Honor.

8             CHIEF JUSTICE ROBERTS: Thank you,  
9     counsel.

10            JUSTICE KAVANAUGH: May I -- may I ask  
11     one question?

12            CHIEF JUSTICE ROBERTS: Justice  
13     Kavanaugh?

14            JUSTICE KAVANAUGH: Mr. Fletcher,  
15     following up on Justice Breyer's question, is  
16     the United States still engaged in hostilities  
17     for purposes of the AUMF against Al Qaeda and  
18     related terrorist organizations?

19            MR. FLETCHER: That is the  
20     government's position, that notwithstanding the  
21     withdrawal of troops from Afghanistan, we  
22     continue to be engaged in hostilities with Al  
23     Qaeda and, therefore, the detention under law of  
24     war remains proper.

25            JUSTICE KAVANAUGH: Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you,  
2 counsel. Counsel, the case is submitted.  
3 (Whereupon, at 11:10 a.m., the case  
4 was submitted.)

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