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P R O C E E D I N G S

(10:00 a.m.)

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

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

Mr. Fletcher.

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

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

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

Respondents seek discovery that would
compel a breach of that trust by confirming or
denying the existence of an alleged CIA facility
in Poland, and Respondents seek that discovery
not to vindicate any rights under U.S. law but,
instead, in a discretionary Section 1782
application aimed at sending evidence abroad to
a foreign investigation whose very purpose is to
reveal and prosecute the alleged involvement of
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 --

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: 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 -- someone hurt by that brings a
4 case. We don't want to give it to you. It'll
5 hurt the United States. Well, it will, all
6 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. But 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 -- what --
4 what exactly does this privilege -- I mean,
5 maybe we should rename it or something. It's
6 not a state secrets 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,
21 you know, I understand that the hypotheticals
22 get difficult and you can posit, you know,
23 greater and greater certitudes of public
24 knowledge. But, in this case, I think the sort
25 of facts in the world and the evident importance

1 that the political branches in the United States
2 and our partners abroad have put on preserving
3 this confidentiality confirms that there is
4 something to it here, that there is a difference
5 between what's out there in public now and
6 confirmation 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 CHIEF JUSTICE ROBERTS: Justice
16 Sotomayor?

17 JUSTICE SOTOMAYOR: I have one.

18 CHIEF JUSTICE ROBERTS: Please.

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

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

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

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

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

23 JUSTICE SOTOMAYOR: Thank you.

24 CHIEF JUSTICE ROBERTS: Justice Kagan.

25 JUSTICE KAGAN: Just, again, Mr.

1 Fletcher, on this idea of using code words. I
2 mean, given that Petitioner was detained in two
3 separate locations, you know, isn't there a way
4 of enabling this information to go forward
5 without saying which of the two locations, you
6 know, these -- this treatment happened?

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

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

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

23 That's what raises the concern for us,
24 you know, especially when the whole thing is
25 premised on this notion that this is a

1 proceeding to get evidence for use in a Polish
2 prosecution. The evidence wouldn't even be
3 appropriate for disclosure unless it were
4 relevant to that Polish prosecution.

5 I think, at that point, it should be
6 --

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

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

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

1 mosaic theory to some extent in piecing together
2 information in ways that would be damaging.

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

12 But I -- I certainly acknowledge that
13 that does mitigate some of the concerns.

14 CHIEF JUSTICE ROBERTS: Justice
15 Gorsuch.

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

19 MR. FLETCHER: Under the standard set
20 forth in Reynolds, yes.

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

25 MR. FLETCHER: It's a matter for the

1 Court, but I think the Court in Reynolds was
2 very clear that this is a privilege that can
3 only be waived by the government, not by others.

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

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

17 JUSTICE GORSUCH: What's your
18 authority for that?

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

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

1 matters --

2 MR. FLETCHER: Yes. It --

3 JUSTICE GORSUCH: -- that the
4 government has chosen?

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

15 We cite those cases at pages 30 to 34
16 of our brief.

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

24 MR. FLETCHER: I guess I'm -- I'm not
25 sure that that would be directly relevant. I

1 think each assertion ought to stand on its own
2 bottom, and if it's a valid assertion and the
3 standard is met, then that would be appropriate.

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

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

14 JUSTICE GORSUCH: Irrelevant in your
15 mind?

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

17 JUSTICE GORSUCH: How about the fact
18 that the allegations are old, factually dated?

19 MR. FLETCHER: I think --

20 JUSTICE GORSUCH: Is that something
21 the court can take into account?

22 MR. FLETCHER: That's a circumstance,
23 I think, that may be relevant to whether
24 disclosure would affect national security and
25 so, like a number of the other circumstances

1 we've talked about, would be something that --

2 JUSTICE GORSUCH: That one the court
3 can take into account?

4 MR. FLETCHER: Through the lens of
5 deference.

6 JUSTICE GORSUCH: Yes.

7 MR. FLETCHER: I -- I would think
8 that, you know --

9 JUSTICE GORSUCH: No, of course.

10 MR. FLETCHER: Of course, yes.

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

16 MR. FLETCHER: Again, through the lens
17 of deference, but absolutely.

18 JUSTICE GORSUCH: Through the lens of
19 deference.

20 MR. FLETCHER: Yeah.

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

1 something the district court can take cognizance
2 of?

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

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

21 JUSTICE GORSUCH: Thank you.

22 CHIEF JUSTICE ROBERTS: Anything
23 further, Justice Kavanaugh?

24 JUSTICE KAVANAUGH: No further
25 questions.

1 CHIEF JUSTICE ROBERTS: Justice
2 Barrett?

3 JUSTICE BARRETT: No.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 Mr. Klein.

7 ORAL ARGUMENT OF DAVID F. KLEIN

8 ON BEHALF OF THE RESPONDENTS

9 MR. KLEIN: Mr. Chief Justice, and may
10 it please the Court:

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

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

22 These topics are declassified. The
23 government has allowed Mitchell and Jessen to
24 testify about them publicly twice before, in the
25 Salim case and before military commissions.

1 They testified about Abu Zubaydah's treatment in
2 general and at particular sites outside Poland.
3 They testified about another detainee's
4 treatment at the Polish site identified by code
5 name. The government itself placed their
6 testimony online.

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

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

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

1 Poland would receive only a record
2 approved by the court after appropriate
3 objections and perhaps even another appeal.
4 This is what courts do, and it's what they do
5 well. It's the very judicial function this
6 Court in Reynolds charged lower courts to carry
7 out.

8 Now I welcome the Court's questions.

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

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

23 So the Polish prosecutor has the
24 information -- as we understand it, has the
25 information about when and where. He has made

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

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

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

24 JUSTICE THOMAS: At that specific
25 location?

1 MR. KLEIN: Well, yes. Context -- the
2 context is a particular location that has been
3 established by -- by the Polish investigation
4 as -- as we understand it. You know --

5 JUSTICE THOMAS: One last question.

6 MR. KLEIN: Sure.

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

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

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

1 JUSTICE BARRETT: Counsel, I guess
2 what I can't get past is similar to Justice
3 Thomas's question. You say that it's not a
4 secret that there was a black site in Poland, so
5 you say it can't be a state secret if it's not a
6 secret because that's well established.

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

17 Am I understanding you that --

18 MR. KLEIN: No.

19 JUSTICE BARRETT: -- that would be
20 privileged?

21 MR. KLEIN: No, not necessarily -- not
22 -- not really. I guess the way I would describe
23 it, Justice Barrett, is we do need -- the
24 testimony -- the existence of the black site has
25 been established as a legal matter in the -- in

1 the European courts. We believe that it's not a
2 secret. That's a disputed question.

3 JUSTICE BARRETT: So you don't need
4 them for that?

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

12 JUSTICE BARRETT: But if you --

13 MR. KLEIN: But --

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

20 MR. KLEIN: To show that it happened
21 when he was in Poland.

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

1 MR. KLEIN: No. I -- I -- we don't
2 accept that. The Ninth Circuit concluded and
3 the district court concluded and we agree that
4 the fact that the site in Poland is a public
5 fact. It's not a secret.

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

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

21 The government's argument is that the
22 confluence of those facts is somehow a state
23 secret, and the government's argument -- and
24 what it -- what it really hinges on is the --
25 this idea that I can ask the same question --

1 well, let me put it this way: Suppose --
2 suppose Salim's lawyer asked, what happened to
3 Abu Zubaydah on January 1, 2003? That's not
4 privileged. That's not a privileged question
5 because he's asking it in the context of a
6 different proceeding. And questions like that
7 were asked, by the way.

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

14 JUSTICE BARRETT: So could you --

15 CHIEF JUSTICE ROBERTS: I don't --

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

20 MR. KLEIN: Under -- under our --
21 well, under the Ninth Circuit -- under --

22 JUSTICE BARRETT: Under your view.
23 Under your view of --

24 MR. KLEIN: We share the Ninth
25 Circuit's view on this. The answer is yes,

1 because the fact of Poland itself is not secret.
2 But we -- from the very beginning, from the
3 moment the government filed its motion to quash,
4 we offered to -- to amend under Rule 45 to allow
5 the -- the -- the proceedings to go forward
6 without mentioning Poland.

7 CHIEF JUSTICE ROBERTS: So --

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

15 MR. KLEIN: That it happened and that
16 it --

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

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

1 Abu Zubaydah's presence in Poland.

2 CHIEF JUSTICE ROBERTS: I -- I -- I
3 guess I'm having trouble following exactly what
4 it is you're looking for. And I don't think
5 you're grappling with the point that Justice
6 Barrett just raised, which is you -- everybody
7 may know about this. You know, as -- as you've
8 put it, it's no secret at all.

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

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

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

1 this site in Poland?

2 MR. KLEIN: Mr. Chief Justice, we
3 don't need the director of the CIA to agree with
4 us. And, in fact, we don't need any CIA
5 employee to agree with us. Mitchell --

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

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

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

1 And -- and that was the important
2 thing, all right? And -- and in that paragraph,
3 at I think 134A and 135A, in that one paragraph,
4 he uses the phrase "official acknowledgment or
5 official confirmation" and its converse eight
6 times, and he says what's -- what's really
7 crucial is not that the CIA -- the CIA exposes a
8 secret but officially acknowledges this
9 non-secret because he -- he was responding to
10 the fact that Poland's president had already
11 acknowledged it. And he said, but we're not.

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

16 JUSTICE BREYER: So is that what you
17 want? You want them officially to -- to
18 acknowledge it?

19 MR. KLEIN: No.

20 JUSTICE BREYER: You don't want that?

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

23 JUSTICE BREYER: All -- all you want
24 is to know what happened?

25 MR. KLEIN: We want the testimony --

1 we want -- exactly. We want --

2 JUSTICE BREYER: Okay.

3 MR. KLEIN: -- we want --

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

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

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

14 MR. KLEIN: Yeah.

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

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

19 JUSTICE BREYER: Yes.

20 MR. KLEIN: Abu Zubaydah cannot
21 testify.

22 JUSTICE BREYER: Why not?

23 MR. KLEIN: He -- he's -- because he
24 is being held incommunicado. He has been held
25 in Guantanamo incommunicado.

1 JUSTICE BREYER: Why? Why? Just out
2 of -- I mean, I'm not sure this is relevant,
3 but, I mean, in Hamdi, we said you could hold
4 people in Guantanamo. The words were: Active
5 combat operations against Taliban fighters
6 apparently are going on in Afghanistan. Well,
7 they're not anymore.

8 MR. KLEIN: Mister -- Justice --

9 JUSTICE BREYER: So -- so what's the
10 -- why is he there?

11 MR. KLEIN: That's a question to put
12 to the government. We don't know the answer to
13 that.

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

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

19 JUSTICE BREYER: Well, how --

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

21 JUSTICE BREYER: -- don't they decide
22 it? They don't decide it?

23 MR. KLEIN: I'm sorry?

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

1 MR. KLEIN: No.

2 JUSTICE BREYER: I guess this is not
3 relevant --

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

5 JUSTICE BREYER: -- but I'm just
6 curious about it.

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

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

16 MR. KLEIN: That is correct.

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

22 MR. KLEIN: That's right.

23 JUSTICE SOTOMAYOR: And that goes to
24 the government's mosaic theory, which is -- and
25 this is what you're disavowing -- because it's

1 not a state secret that he was tortured, the
2 date he was tortured is not a state secret. The
3 place may be, but he doesn't have to say the
4 place. You will let the Polish authorities
5 prove that some other way, correct?

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

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

16 What they're saying is our state
17 secret is we don't want the U.S. courts to
18 assist Poland --

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

20 JUSTICE SOTOMAYOR: -- in -- in --

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

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

1 MR. KLEIN: I think you do, Justice
2 Sotomayor. I apologize for interrupting a
3 moment ago.

4 JUSTICE SOTOMAYOR: No, no.

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

10 JUSTICE SOTOMAYOR: So that goes to
11 the -- mine goes back to the MLAT, which is --

12 MR. KLEIN: All right.

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

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

23 MR. KLEIN: I -- I --

24 JUSTICE SOTOMAYOR: So why don't we
25 view that or view this request as a request by

1 the Polish government?

2 MR. KLEIN: Well, I'm representing Abu
3 Zubaydah in this action.

4 JUSTICE SOTOMAYOR: No, no, I
5 understand.

6 MR. KLEIN: And, to me --

7 JUSTICE SOTOMAYOR: No, but you're --
8 you're doing it to assist the Polish
9 investigation.

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

14 JUSTICE SOTOMAYOR: But it doesn't act
15 on behalf of him. It acts on behalf of the
16 state of the nation, Poland.

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

23 He is a private individual. He is
24 certainly not the Polish government. He was not
25 given direction by the Polish government.

1 When -- when the MLATs were denied for the
2 seventh time, yes, the prosecutor did say, as I
3 understand it not having been there myself, said
4 to the Polish lawyer for Abu Zubaydah: I don't
5 have anything. You have rights under the law.
6 Why don't you submit something?

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

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

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

25 And what you need to continue on with

1 this investigation is essentially some evidence
2 that that treatment was continued at a later
3 date, the date in which you say he was in
4 Poland, and that is not in the public record.

5 Am I right about that?

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

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

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

1 JUSTICE KAGAN: I -- I -- I guess all
2 I was suggesting was that the government is here
3 to tell us that, look, they've conceded that Abu
4 Zubaydah was tortured, but, because of relations
5 with allies with cooperating intelligence
6 services, they won't say where it happened.

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

11 MR. KLEIN: So --

12 JUSTICE KAGAN: And that's the
13 problem.

14 MR. KLEIN: -- so Mitchell and Jessen
15 have testified before when these things
16 happened, just not these particular things.

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

1 relationships between the United States and the
2 Polish government in respect to the enhanced
3 interrogation techniques.

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

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

15 MR. KLEIN: I wouldn't -- no, I
16 wouldn't say a more official link. We're
17 looking for --

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

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

25 I want to shine a light inside it to

1 -- to understand what was happening there.

2 That's my sole role.

3 JUSTICE ALITO: Well, you know -- you
4 say you know what happened, and what you want to
5 add is where it happened, right? That's the
6 link. That's what this all boils down to.

7 MR. KLEIN: Well, I -- I -- I would
8 argue --

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

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

22 I -- I -- I would say, though, that --
23 that the links to the site are already there.
24 We're not trying to -- you know, there may be
25 information that the Polish authorities have

1 that the -- that the government would not like
2 them to have now.

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

13 MR. KLEIN: Well, with your
14 indulgence, let me offer a hypothetical, because
15 maybe that would help focus this a little bit.

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

1 There's an American on -- on the train
2 who is an eyewitness, okay? The prosecutor just
3 needs to ask him, what did you see? And that's
4 -- that's clearly relevant, it's clearly useful,
5 and it doesn't -- it -- he doesn't even need to
6 answer where were you -- the American doesn't
7 even have to know that he was in Hungary at the
8 time it happened.

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

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

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

25 MR. KLEIN: And he could do that here

1 as well. All the testimony will be --

2 CHIEF JUSTICE ROBERTS: Well, that
3 seems to me that that's -- just to play out your
4 hypothetical --

5 MR. KLEIN: Sure.

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

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

20 So it's -- it's -- it's not correct to
21 -- to say that the U.S. Government would be
22 admitting anything. If you look at -- at
23 Director Pompeo's affidavit, he cites this
24 Fitzgibbon case. That case and every other case
25 cited on both sides of the attribution issue,

1 they're all FOIA cases. They all say, unless
2 it's a current employee of the agency in
3 question, that's not an official confirmation of
4 anything.

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

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

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

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

1 MR. KLEIN: Well, I think they're both
2 factors. In -- in this case, they're too
3 removed. They -- they can't speak for the
4 government. They were never agents for the
5 government. They were never employed by the
6 government. They were never given authority to
7 speak for the government.

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

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

1 If I turned around tomorrow and I were
2 deposing them in an entirely different case and
3 -- and asked the same questions, would they --
4 would it somehow become de- -- non-privileged?
5 It's already declassified. So, you know, that's
6 -- that's point one.

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

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

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 Justice Thomas?

22 JUSTICE THOMAS: No.

23 CHIEF JUSTICE ROBERTS: Justice
24 Breyer?

25 Justice Sotomayor, anything further?

1 Justice Kagan?
2 Justice Gorsuch?
3 Justice Kavanaugh, any further --
4 anything further?
5 JUSTICE KAVANAUGH: Nothing further.
6 CHIEF JUSTICE ROBERTS: Justice
7 Barrett? No?
8 MR. KLEIN: Thank you.
9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.
11 Rebuttal, Mr. -- rebuttal, counsel?
12 REBUTTAL ARGUMENT OF BRIAN H. FLETCHER
13 ON BEHALF OF THE PETITIONER
14 MR. FLETCHER: Thank you, Mr. Chief
15 Justice.
16 JUSTICE GORSUCH: Mr. Fletcher, I
17 don't want to interrupt you later, so I'm just
18 going to --
19 MR. FLETCHER: Please.
20 JUSTICE GORSUCH: -- do it up front.
21 Why not make the witness available?
22 What is the government's objection to the
23 witness testifying to his own treatment and not
24 requiring any admission from the government of
25 any kind?

1 MR. FLETCHER: By "the witness," you
2 mean Abu Zubaydah? Right. So I -- I was going
3 to address this point. It goes to Justice
4 Breyer's question about the conditions of his
5 confinement right now.

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

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

21 MR. FLETCHER: We would allow him to
22 communicate about this subject under the same
23 terms as on anything else.

24 JUSTICE BREYER: The same terms?
25 Look, I don't understand why he's still there

1 after 14 years. It's a little hard to, given
2 Hamdi, but assuming that isn't in this case, why
3 not do just what Justice Gorsuch says? Just
4 say, hey, you want to ask what happened, ask him
5 what happened. And maybe this is special.

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

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

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

21 JUSTICE GORSUCH: Well, gosh --

22 MR. FLETCHER: -- who are running
23 Guantanamo --

24 JUSTICE GORSUCH: -- we've been --
25 this case has been litigated for years and all

1 the way up to the United States Supreme Court,
2 and you haven't considered whether that's an
3 off-ramp that -- that the government could
4 provide that would obviate the need for any of
5 this?

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

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

23 MR. FLETCHER: If -- if the Court
24 would like a direct answer to that question, of
25 course.

1 JUSTICE GORSUCH: I personally would
2 appreciate a direct answer to that question.

3 JUSTICE SOTOMAYOR: Without the
4 government invoking a state secret privilege to
5 the testimony. Inherent in the question is, are
6 you going to let him testify as to what happened
7 to him those dates?

8 MR. FLETCHER: And I think the -- the
9 -- we would invoke the state secrets privilege
10 always only over specific information, but I
11 will -- I will tell you that whatever he
12 proposes to do, we would want to apply the same
13 sorts of screening that we're applying here to
14 make sure that classified information is not
15 released in the process of his testimony or in a
16 --

17 JUSTICE SOTOMAYOR: Well, you're --

18 MR. FLETCHER: -- written submission.

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

1 for.

2 JUSTICE ALITO: Mr. Fletcher, you are
3 here representing the Government of the United
4 States in a certain capacity. What do you
5 understand to be the scope of your authority as
6 you stand before us here?

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

13 JUSTICE ALITO: To -- to represent
14 the -- the interests of the United States with
15 respect to what?

16 MR. FLETCHER: With respect to all
17 matters. Here, the matters directly relevant
18 are --

19 JUSTICE ALITO: With -- with respect
20 to all matters? I thought it would be with
21 respect to this litigation.

22 MR. FLETCHER: Correct. I'm sorry,
23 Justice Alito. That's a -- that's a better way
24 to put it. And because this is not an issue
25 that has been in this litigation up until now,

1 I'm not prepared to make representations for the
2 United States, especially on matters of national
3 security.

4 Justice Gorsuch, I understand your
5 question. We'd be happy to respond.

6 JUSTICE GORSUCH: Thank you.

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

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

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

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

24 CHIEF JUSTICE ROBERTS: Please
25 continue.

1 MR. FLETCHER: When the SSCI report
2 says that enhanced interrogation techniques
3 stop. The pit of testimony from the military
4 commissions that my friend referred you to is
5 cited in page 15 -- or Footnote 15 of the red
6 brief.

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

13 And, Mr. Chief --

14 CHIEF JUSTICE ROBERTS: One other --
15 one other -- finish your rebuttal.

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

1 And for the reasons that Justice Kagan
2 identified, that they were integral to the
3 program, that they'd be testifying under oath
4 about information that they learned in the CIA
5 and that is subject to confidentiality
6 requirements, and that they'd be doing so in a
7 proceeding designed to investigate and prosecute
8 our alleged former allies abroad, that would be
9 viewed as a serious breach of trust.

10 Thank you, Your Honor.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 JUSTICE KAVANAUGH: May I -- may I ask
14 one question?

15 CHIEF JUSTICE ROBERTS: Justice
16 Kavanaugh?

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

22 MR. FLETCHER: That is the
23 government's position, that notwithstanding the
24 withdrawal of troops from Afghanistan, we
25 continue to be engaged in hostilities with Al

1 Qaeda and, therefore, the detention under law of
2 war remains proper.

3 JUSTICE KAVANAUGH: Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel. Counsel, the case is submitted.

6 (Whereupon, at 11:10 a.m., the case
7 was submitted.)

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