No. 20-827

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

ZAYN AL-ABIDIN MUHAMMAD HUSAYN,
A.K.A. ABU ZUBAYDAH, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* BILAL ABDUL KAREEM IN SUPPORT OF THE RESPONDENTS

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MISCELLANEOUS:

INTEREST OF AMICUS[1]

There understandably would be little sympathy in this country for respondent Abu Zubaydah, if, as the CIA wrongly believed, he was a senior leader in al Qaida, assisting Osama bin Laden in ending the lives of 3,000 Americans and forever destroying their families and the sense of security taken for granted by millions of Americans. But he was not bin Laden's co-conspirator. He was not even al Qaida. The CIA brutally tortured him for no reason. Without apology, the government insists that it can hide behind the state secrets privilege to preclude Abu Zubaydah from deposing his torturers, not because the torture is secret, but because the proceedings implicate the widely known fact that it happened in Poland.

The rules that the government insists may be applied to deny Abu Zubaydah's request have been applied with equal force to foreclose relief to amicus curiae Bilal Abdul Kareem, a U.S. citizen and journalist whose only sin has been working in Syria for an independent news network that provides coverage of various anti-Assad rebels and others involved in the ongoing conflict there. In the government's stated view, the same rules would apply as well to a U.S. District Court Judge—or a Supreme Court Justice—who the government had secretly determined, based on unreviewable (state secret) findings, is a threat to national security. The incontestable invocation of the state

1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amicus curiae, or his counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

secrets privilege would prevent the suspected terrorist, the citizen journalist, and the Supreme Court Justice alike from seeking relief based on public knowledge to remedy or prevent deliberately inflicted and unlawful physical harm from the Executive Branch. This should not be the law. Amicus curiae Kareem offers his own story in asking this Court to declare that this is not the law, not in the case of a Supreme Court Justice, nor an American reporter, nor even a suspected terrorist.

In the summer of 2016, Bilal Abdul Kareem was nearly killed five separate times by U.S. launched missiles with him as the target. These strikes were precise, and Kareem was their only common denominator. He was struck twice at his office, twice in his vehicles, and again while reporting in an otherwise quiet area away from any field of active combat. Kareem reasonably believed, based on publicly available information about how the U.S. identifies targets for lethal action, that the locations of his cell phone and other signal-emitting devices he used while interviewing rebels had led U.S. agencies to conclude wrongly that he was a part of a terrorist organization and should be placed on the U.S. government's so-called Kill List. He was not and is not a terrorist.

In March 2017, Kareem filed a lawsuit seeking to learn whether he had been placed on this Kill List and, if so, as seemed certain, to contest this decision to take his life. *Kareem v. Haspel*, 412 F. Supp. 3d 52 (D.D.C. 2019), *vacated and remanded*, 986 F.3d 859 (D.C. Cir. 2021). Had he been arrested and charged with criminal conduct, his right to obtain this information and to defend against it before he was sentenced to death would be fundamental, and this Court would not have hesitated to protect it. As it

were, however, the government had not bothered to bring criminal charges against him but had simply ordered his execution without a shred of due process.

The district court hearing his civil case initially denied the government's motion to dismiss it on standing and political question grounds, declaring that he had pleaded a plausible claim and had a right as a U.S. citizen to invoke the Fifth Amendment and demand due process before the government could terminate his life. The government then invoked the state secrets privilege and again moved to dismiss on the grounds that whether Kareem had been targeted for death is a state secret and the government need not reveal it. This time, the government was successful, and the district court dismissed his claim. Kareem appealed to the D.C. Circuit, which found that Kareem lacked standing to sue. It reached that decision based on taking judicial notice of certain reports of bombs and missiles during combat in Syria, albeit at different places and different times and of different types than those that struck Kareem, finding that there was no plausible basis to conclude that he had been targeted. *Kareem v. Haspel*, 986 F.3d 859 (D.C. Cir. 2021). He was, and he may well remain, a target to this day.

Kareem therefore has a personal interest in ensuring that the state secrets privilege does not operate to foreclose accountability by the U.S. government for violations of law—both at home and abroad. Since the government has admitted nothing and suffers no questions, Kareem, like Abu Zubaydah, relied on public information to support his claim, information which the government somehow continued to insist was a state secret. As in the case at bar, the government's view on the inviolability of the state

secrets privilege led it to assert the chilling position that it could effectively grant itself immunity for executing its own citizens without any risk of judicial review. Kareem submits that this unbridled use of the privilege exceeds what established jurisprudence was intended to permit and has stripped the Judiciary of its constitutionally delegated powers to evaluate and reject assertions of the state secrets privilege.

SUMMARY OF ARGUMENT

The government's position in the case at bar reaffirms that, in its view, the state secrets privilege has no limiting principle whatsoever and that no role for the Judiciary exists in its application. In the nearly 70 years since this Court issued its decision in *United States v. Reynolds*, 345 U.S. 1, 11 (1953), in which it cautioned courts that where there is "a strong showing of necessity [for evidence], the claim of privilege should not be lightly accepted," courts have repeatedly and almost unwaveringly found that the government had satisfied all that is required of it each time it has invoked the privilege. The Ninth Circuit in the instant case is a lonely exception. It embraced the commonsense proposition that "in order to be a 'state secret,' a fact must first be a 'secret.'" *Husayn v. Mitchell*, 938 F.3d 1123, 1133 (9th Cir. 2019), *cert. granted sub nom. United States v. Husayn*, No. 20-827, 2021 WL 1602639 (U.S. Apr. 26, 2021).

The government's invocation of this privilege has gone unchecked by the Judiciary for too long, as the litigation over the state secrets privilege in *Kareem v. Haspel* attests. Amicus Kareem's own case offers this Court a telling example of the government's absolutist position

and the Judiciary's abdication of its role to review it. It shows that the government's assertion that the state secrets privilege is utterly sacrosanct leads to indefensible results. While protecting national security is of significant importance and a critical function of the Executive Branch, surely a common law evidentiary privilege cannot entitle the Executive to override fundamental due process, a bedrock principle of constitutional democracy. Separation of powers requires the Court to articulate safeguards against abuse of the state secrets privilege. It is, and always has been, the role of the Judiciary to control the evidence in its courts and to say what the law is. As conceived by the government, the state secrets privilege reallocates those functions to the Executive Branch in violation of the separation of powers.

Kareem's case vividly illustrates the need to examine invocations of the state secrets privilege in their specific settings. While disclosure of a certain type of information—such as who is on a government Kill List—may be harmful to U.S. security interests in specific instances, it is entirely possible that it is not in others, like where a U.S. citizen-journalist survives missile strikes to file suit to defend his life. The government's categorical approach to state secrets is wrong and dangerous to our constitutional structure.

Amicus Kareem respectfully urges the Court to clarify that the state secrets privilege is not beyond judicial review. It can lose its protected status, just like any other privileged information, including by waiver and disclosure to the public.

ARGUMENT

I. The government's position on the state secrets privilege has no limiting principle and leads to the absurd conclusion that it has the power to decide to kill its own citizens in secret without any due process or right to judicial relief.

The government's assertion of the privilege in Kareem's case is a compelling example of the urgent need for this Court to redefine the extent of deference due when the Executive Branch claims that national security precludes divulging evidence of its own unlawful activity. The government wielded the state secrets privilege to bar Kareem—a U.S. citizen and journalist—from availing himself of his due process rights where he sought to contest the substantive basis for his placement on the Kill List. In *Kareem v. Haspel*, the court's unquestioning deference to the Executive's view that even telling Kareem whether he was on the Kill List posed a reasonable danger to national security accepted as unreviewable the frightening proposition that the Executive can execute its own citizens without judicial oversight of any kind. This is an unacceptable outcome born of the absence of the judicial branch's refusal to articulate any limiting principle on the application of the state secrets privilege. The Court should take the opportunity presented in the case at bar to correct course.

A. The government used the state secrets privilege to foreclose Kareem's justiciable claim demanding his Fifth Amendment right to due process before his government could kill him.

What happened in Kareem's case should never be repeated. The district court held that it had the authority to adjudicate Kareem's case under the Due Process Clause. It denied the first motion to dismiss, rejecting the government's contention that the claim presented a nonjusticiable political question because it related to a national security decision. *Zaidan v. Trump*, 317 F. Supp. 3d 8 (D.D.C. 2018). As the district court correctly recognized, even though Kareem's claim raised "weighty matters of law and fact" concerning a decision made by the U.S. military and/or the Central Intelligence Agency, constitutional claims are the "bread and butter of the federal Judiciary," and Kareem had a "birthright" to make "a timely assertion of his due process rights under the Constitution to be heard before he might be included on the Kill List and his First Amendment rights to free speech before he might be targeted for lethal action due to his profession." *Id.* at 28, 29.

The government then formally asserted the state secrets privilege and moved to dismiss because disclosing whether or not it had, in fact, targeted Kareem for lethal action "could reasonably be expected to cause . . . harm to the national security . . . ." Govt. Mem. of Law at 2, *Kareem*, 412 F. Supp. 3d 52, ECF No. 24-1. Supporting the claim of privilege were generalized assertions that the government should not alert individuals whether they are on the Kill List because they could then try to avoid the strikes and/or act more freely in their wrongful activity.

Decl. of Patrick M. Shanahan ¶¶ 15-16, *id.*, ECF No. 24-2. Neither of these rationales made any sense with respect to Kareem, who sought relief precisely because he became aware that the U.S. government, without any genuine basis, *was* trying to kill him.

Central to the government's argument was that the privilege was "absolute" in civil cases. Govt. Mem. of Law at 9, *id.*, ECF No. 24-1. Kareem challenged the premise that his case was civil in any meaningful sense of the word, since the posture was dictated by the government's unilateral decision to bypass trial and move straight to summary execution. Opp. to Mot. to Dismiss at 7, *id.*, ECF No. 27. In any criminal action involving risk of execution, for instance, the privilege would "give way" to Kareem's constitutional rights. *Roviaro v. United States*, 353 U.S. 53, 61 (1957) (reversing conviction where government withheld informant's identity); *United States v. Abu-Jihaad*, 630 F.3d 102, 141 (2d Cir. 2010) (discussing when a defendant's right to present a defense "displaces" the state secrets privilege). The same should be true when an individual like Kareem plausibly alleges that he is facing ex ante extrajudicial execution.

However, the district court deemed itself constrained to determine whether the government had "satisfied the three procedural requirements for invoking the state secrets privilege" and conduct a "close examination" of the assertions of privilege. *Kareem*, 412 F. Supp. 3d at 56-57. The court acknowledged that there was a difference between Kareem's case and other cases where the privilege was invoked, "but the similarities are controlling and require the same conclusion." *Id.* at 61. No balancing of interests is permitted under the test; even though

Kareem's interest in his own life was "unquestionably strong," because D.C. Circuit precedent held that the privilege is "absolute" in a civil suit, and the information was necessary to litigate the case, the court dismissed the action. *Id.* at 57, 61.

B. The government admits that its view of the state secrets privilege is so sweeping that it would allow it to target and kill U.S. citizens without due process, including a federal judge on U.S. soil.

On appeal, the government doubled down on the assertion that no matter how compelling a need for the information, the privilege is absolute and there are no exceptions, not even for "Fifth Amendment claims." Br. for Appellees at 32, *Kareem v. Haspel*, 986 F.3d 859 (D.C. Cir. 2021). No matter who it targeted or where, it could not be compelled to disclose that information, much less defend its decision. *Id.* at 34. In the government's view, Kareem's interest in protecting his life from the government was just a competing "private interest." *Id.* at 31.

The lack of any limiting principle on the state secrets privilege in the government's brief was a feature, not a bug; its counsel confirmed this in a shocking colloquy during oral argument. The judge asked whether the government's position on the state secrets privilege would be different if *she* was on the Kill List and the government intended to kill *her* in the United States. Even then, the government did not retreat from the position the privilege would be absolute and foreclose relief:

> JUDGE MILLETT: That's, s[ay] you're targeting me to kill me without any process. And let's say I've gotten past standing. My car keeps blowing, I'm here in the U.S. and my car keeps blowing up and I keep getting shot at. And I say the only explanation for this is I'm on a kill list by the U.S. government. And let's also assume hypothetically that I actually am on a kill list by the U.S. Government. And the Government's position is tough luck. You have no rights. You have no capacity to get yourself off that list. I mean, you can write letters to the Government.
>
> MR. HINSHELWOOD: Your Honor, I think --
>
> JUDGE MILLETT: But that's it. The Government may execute me, and there's nothing anyone, I can do to stop it or anyone can do about it.

Appendix at 7a; Full Transcript of Oral Argument at 33-34, *Kareem v. Haspel*, 986 F.3d 859 (D.C. Cir. 2021), available at https://bit.ly/37REoiI/.

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> MR. HINSHELWOOD: Okay. In that circumstance, whether the Government both for reasons of a court's competence to adjudicate those kinds of questions, which gets to the political question issues, and the Court's ability

to adjudicate claims where the Government has properly invoked the state secrets privilege, and a court has properly determined that the Government has invoked that privilege, then –

JUDGE MILLETT: Then the answer is there's nothing I can do about it.

MR. HINSHELWOOD: There's no recourse you can get from --

JUDGE MILLETT: There's no difference between my, for your political question theory, there's no difference between me and Kareem.

MR. HINSHELWOOD: If we're talking about, you know, a U.S. citizen who is in Syria --

JUDGE MILLETT: No, no. No, no. I don't understand why from political question. There's nothing in your briefing that says it turns on his location. So I'm extending it to someone on U.S. soil. Nothing in your briefing turns on where his location is at all. If that's a factor now, you can tell us. But I assume it's not for state secrets.

MR. HINSHELWOOD: **Certainly not for state secrets, no.**

JUDGE MILLETT: All right. So then what, so you would still argue political question, just as you do here. And you would argue state secrets just as you do here. And if we rule for you, that

means I'm hosed. Nothing I can do about this death sentence.

MR. HINSHELWOOD: **Certainly as to the state secrets privilege. What that, the invocation of the privilege in this particular case means that the case cannot proceed.** Now, again, whether that could be different --

JUDGE MILLETT: Not just that -- no, no. What difference? What difference is it if me rather than Kareem and I'm here in the U.S.?

MR. HINSHELWOOD: Your Honor, I'm sorry. I don't want to suggest that there's, just to speak about how the privilege applies in these cases, **if your question is can a court once the privilege is properly invoked, which is an absolute[] privilege that the Government is able to invoke in this litigation, can a court then proceed to adjudicate the merits nevertheless or disregard the Government's application of the privilege, an invocation of the privilege in that circumstance, the answer is no.**

Now, as a result, as this Court explained in Halkin, the result may be that meritorious constitutional claims don't get litigated, and that the consequences –

JUDGE MILLETT: This is killing U.S. citizens. That's quite a power to say that the Executive Branch has and it's absolutely unchecked. There's no capacity whatsoever for

> judicial review, for a habeas action, or this type of civil action which is a functional equivalent of a habeas action. There's nothing whatsoever. There's no precedent for that.

Id. at 8a-10a. The judge then asked government counsel the same and obvious question Kareem had been asking all along: "Do you appreciate how extraordinary that proposition is, that the U.S. Government can, the Executive Branch can unilaterally decide to kill U.S. citizens…without any process whatsoever?" *Id.* at 11a.

Whatever the proper scope of the state secrets privilege, it cannot be so broad as to shield from review the Executive's unilateral, secret decision to kill its own citizens, in the United States, without any due process. That the government could even conceive of applying it in Kareem's case, or the case of an American judge on American soil no less, bespeaks the urgent need for the Court to clarify the limits of the privilege and the manner in which it should be evaluated.

II. Dispositive deference to the Executive's claim of a risk to national security violates the separation of powers and results in abuses of the state secrets privilege.

Petitioner's brief in this case posits that the Ninth Circuit's disagreement with its opinion that the well-known fact that Poland hosted a CIA black site constitutes a state secret is tantamount to a failure to afford appropriate deference. To the contrary, if the Judiciary is to do more than rubber stamp the government's invocation of the privilege, then deference cannot be the stick by which its

ruling on privilege is measured. If deference is an *ipse dixit* conclusion that there is a "reasonable danger" to national security, then the state secrets privilege becomes something very different from a privilege; it becomes a license for the Executive to violate the Constitution and commit crimes without accountability. The Court must define parameters to the privilege lest the label "national security" becomes a talisman to cover "a multitude of sins." *Mitchell v. Forsyth*, 472 U.S. 511, 523 (1985). Existing precedent provides inadequate guidance on the contours of *Reynolds*'s instruction that a court should "probe in satisfying itself that the occasion for invoking the privilege is appropriate." 345 U.S. at 11. *Reynolds* stops short of saying to what end, and the result is apparent in the case law.

As evidenced in the colloquy between the D.C. Circuit panel and the government in *Kareem v. Haspel*, it is critical to the rule of law that deference is not synonymous with mandatory acquiescence. Left unchecked, the Executive will abuse the privilege, and has inarguably done so on a multitude of occasions. It is not some far-fetched hypothetical that the United States would hide behind the state secrets privilege to execute its own citizens extrajudicially in a staggering violation of the Fifth Amendment. It claimed precisely this power in *Kareem v. Haspel*. And as a result, the district court abdicated its own constitutionally ordained role to control evidence to "the caprice of Executive officers." *Reynolds*, 345 U.S. at 9-10. The Executive can deploy the privilege to seize more than control of the evidence; in Kareem's case, it seized the power to decide what the Fifth Amendment requires before the government may execute a U.S. citizen. A world in which the Executive and not the Judiciary says what the

law is, is upside down. *Marbury v. Madison*, 5 U.S. 137, 177 (1803). This kind of "encroachment and aggrandizement [] has animated our separation-of-powers jurisprudence and aroused our vigilance against the 'hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power.'" *Mistretta v. United States*, 488 U.S. 361, 382 (1989).

It is the role of the Judiciary to distinguish between legitimate invocations of a common law privilege and abuses of it. Examples of such "historic judicial authority" exist because they are "necessary to provide an important safeguard against abuses of legislative and Executive power . . . as well as to ensure an independent Judiciary." *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 74 (1992). In this case, the Ninth Circuit rightly observed that "the rationale behind the state secrets privilege is to protect legitimate government interests, not to shield the government from uncomfortable facts that may be disclosed or discussed in litigation." *Husayn*, 938 F.3d at 1134. Requiring courts to defer to any invocation of a theoretical risk to national security and forbidding "second guessing" presumes the good faith of the Executive. *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1203 (9th Cir. 2007). But when litigants are coming to court to seek disclosure of secret death warrants and evidence of their torture, it is a strong indication that applying the presumption of good faith to the Executive's invocation of the state secrets privilege is—in certain cases—unwarranted.

III. Courts should evaluate claims of state secrets privilege in the specific context of the case and reject them where they are facially unreasonable.

Courts should evaluate invocations of the state secrets privilege not with respect to whether disclosure of the kind of information would be harmful in general, but whether in the specific case at hand, it poses any reasonable danger. This requires examination of the plausibility of the government's claims in the context of all the circumstances surrounding the case. *Ellsberg v. Mitchell*, 709 F.2d 51, 59 (D.C. Cir. 1983); *Molerio v. F.B.I.*, 749 F.2d 815, 822 (D.C. Cir. 1984) ("[T]he validity of the government's assertion must be judicially assessed").

In Kareem's case, the government advanced vague and generalized national security narratives that simply did not comport with the facts facing the court. The government filed declarations in support of its motion to dismiss from then Acting Secretary of Defense Patrick Shanahan and then Director of National Intelligence Daniel Coats that were not at all particular to Kareem. *Kareem*, 412 F. Supp. 3d 52, ECF Nos. 24-2, 24-3. The government argued that:

> confirming whether or not an individual is designated for the use of lethal force overseas would allow an individual who is being targeted to alter his behavior to evade direct action by the United States and would alert him and his associates to the fact that the U.S. Government is collecting intelligence on him, which could in turn risk intelligence sources and methods.

Govt. Mem. of Law at 11, *id.*, ECF No. 24-1. Informing "an individual" that he was not designated for lethal force could also "reveal the scope of U.S. operations" and lead to others seeking to "ascertain their own status." *Id.* at 11-12. Relying on Secretary Coats's declaration, the government contended that the intelligence community had special concerns:

> Confirming or denying whether or not the U.S. Intelligence Community targets individuals for the use of lethal force outside of the United States in the first place (and by implication uses such lethal force) would also cause harm by alerting terrorists and terrorist organizations to specific means that the U.S. Government is using, or has chosen not to use, to combat terrorism.

Id. at 12. Yet, as had been alleged in the Complaint, much of the information about the U.S. lethal targeting program and U.S. actions in Syria had been made public by U.S. government agents. Even more important, Kareem was *already aware* that the U.S. was trying to kill him and filed a lawsuit on that basis. He thus urged the court to

> deny the government's motion and rule instead that the government's targeting of a U.S. citizen for lethal action – at least in these narrow and exceptional circumstances in which that individual (i) has become aware of the intent to kill him, (ii) comes to the courthouse door seeking the due process that has been denied him, and (iii) plausibly alleges that the government has mistakenly designated him

> for lethal action – cannot be deemed a state secret protected by the common law evidentiary privilege invoked here.

Opp. to Mot. to Dismiss at 5, *id.*, ECF No. 27. The government's public disclosure that another U.S. citizen, Anwar al-Aulaqi, was on the Kill List, calls into question the argument that the government applies any consistent principles as opposed to making ad hoc political decisions. "Intelligence and counterterrorism officials" informed the New York Times that al-Aulaqi was on the Kill List before they then went ahead and killed him.[2] Given the fact that Kareem had already publicly announced that he had been targeted for lethal action, described in specific detail the strikes taken on him, had recourse to information made public by the government itself on how a person is identified and targeted, and that Secretary Shanahan himself conceded in his declaration that the United States was conducting drone strikes in Syria at the relevant time, it makes little sense to say that it undermines the Republic for the government to deny Kareem the information that had been disclosed to the other known U.S. citizen targeted for death.

IV. State secrets should be subject to the ordinary limitations on privilege.

Finally, courts must be able to bring to bear their judicial wisdom and experience in evaluating the government's claim that the disclosure of information

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2. Scott Shane, *U.S. Approves Targeted Killing of American Cleric*, The New York Times (Apr. 6, 2010), https://www.nytimes.com/2010/04/07/world/middleeast/07yemen.html.

poses a reasonable danger to national security. They are well-equipped to do so. Assessing whether privilege exists or has been broken is a "familiar judicial exercise" with judicially discoverable and manageable standards to apply and the fact that the information bears on national security or foreign policy does not affect the Judiciary's ability to perform its traditional duties. *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012). The state secrets privilege is a common law evidentiary rule. *Zuckerbraun v. Gen. Dynamics Corp.*, 935 F.2d 544, 546 (2d Cir. 1991). While the standards for invoking the privilege may be unique (*id.*), it remains subject to the ordinary limitations on privilege. Thus, even in the state secrets context, "prior disclosure of the specific information sought to be disclosed waives the privilege." *Nat'l Laws. Guild v. Att'y Gen.*, 96 F.R.D. 390, 402 (S.D.N.Y. 1982). Similarly, where a protected fact has become known to the persons from whom the information was protected, it is not privileged. *Roviaro v. United States*, 353 U.S. 53, 60 (1957). And, of course, where the information has been disclosed to the public, it is no longer privileged, even if it pertains to military matters and national security. For example, in *New York Times Co. v. U.S. Department of Justice*, the Second Circuit determined that the CIA had waived the right to assert secrecy over its lethal targeting program because its director had discussed the program in public. 756 F.3d 100, 122 (2d Cir. 2014), *opinion amended on denial of reh'g*, 758 F.3d 436 (2d Cir. 2014), *supplemented*, 762 F.3d 233 (2d Cir. 2014) (ordering CIA to submit Vaughan index in response to FOIA request about secret drone program).

Whether the government officially or unofficially discloses state secrets should not matter. There is no

principled distinction between disclosures made by U.S. officials privately to the press and official acknowledgments by the same U.S. officials that take place at a podium or in a press release. If the government is not above the law, their agents' disclosures of secret information to the press should constitute waiver of the privilege as to that information.

Kareem argued that the state secrets privilege should not apply to the fact of whether the CIA conducts lethal actions in Syria because it had been made public by government officials. In September 2015 the Washington Post reported that multiple U.S. officials disclosed that the "CIA and U.S. Special Operations forces have launched a secret campaign to hunt terrorism suspects in Syria as part of a targeted killing program that is run separately from the broader U.S. military offensive against the Islamic State" and that these "high value targets" "are being identified and targeted through a separate effort." Opp. to Mot. to Dismiss at 17, *Kareem*, 412 F. Supp. 3d 52, ECF No. 27. The Director of National Intelligence nevertheless maintained that "information regarding whether or not the United States Intelligence Community targets individuals for the use of lethal force outside the United States" is a state secret. Decl. of Daniel R. Coats ¶ 9, *id.*, ECF No. 24-3. While it is conceivable that publicly revealing the CIA's targeted killing program could impact national security, the choice had already been made. Nothing about the state secrets privilege requires courts to suspend common sense and the ordinary rules of privilege simply because the government changes its mind or regrets releasing the information once litigation commences.

CONCLUSION

The Court should affirm the judgment of the Ninth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX — EXCERPT OF TRANSCRIPT IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, DATED NOVEMBER 16, 2020

UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-5328

AHMAD MUAFFAQ ZAIDAN;
BILAL ABDUL KAREEM,

Appellants,

v.

DONALD J. TRUMP, PRESIDENT
OF THE UNITED STATES, *et al.*,

Appellees.

Monday, November 16, 2020
Washington, D.C.

The above-entitled matter came on for oral argument pursuant to notice.

BEFORE:

CHIEF JUDGE SRINIVASAN, AND CIRCUIT JUDGES HENDERSON AND MILLETT

APPEARANCES:

ON BEHALF OF THE APPELLANT:

TARA J. PLOCHOCKI, ESQ.

ON BEHALF OF THE APPELLEES:

BRAD HINSHELWOOD (DOJ), ESQ.

[28]you know, other, to engage in sort of whatever journalistic activities they were there to engage in. So, you know, there are other individuals in the area. So to suggest that that's a plausible allegation that he's been targeted by that particular attack, there's nothing to support that either.

JUDGE HENDERSON: And there's no allegation that this was the only Hellfire missile on that particular day.

MR. HINSHELWOOD: Right.

JUDGE HENDERSON: In other words, there could have been 20 of them dropping.

MR. HINSHELWOOD: Right. There's no sort of information provided in the complaint about --

JUDGE HENDERSON: As far as targeting. That's what I'm talking about, the targeting.

MR. HINSHELWOOD: Right. I mean, all we're told in the complaint is just specifically that, you know, he was there. He saw a drone at some time before the explosion, sometime later, there was an explosion which he assumes to be from a Hellfire missile because of the strength of that explosion. And that's the sum and substance of the allegation there. We don't have any other additional information on that score.

JUDGE SRINIVASAN: Can I take you to the merits for a second, to the state secrets question for a second, [29]unless there's further questions on standing? So on state secrets, it seems to me a lot of the force of a state secrets assertion made by the Government here and what affect it has on a case turns on whether we treat this as a civil case or a criminal case, or, as something that is somewhere in between but for various considerations, we ought to give it the rubric of one or the other.

And what do we do with a situation in which it's not a garden variety civil case because it's not seeking ex post compensation for a civil wrong that was imposed at prior time. It's also not a garden variety criminal case because the Government's not seeking to prosecute somebody. But it is a situation in which the allegations are that someone's been placed on a list for targeted killing by the United States. And so that is a context in which there's United States authority being visited on somebody in the nature of a criminal, the consequence of a criminal proceeding if it were a capital case. And so does it seem fair to you, then, just to treat that as a garden variety civil case, given that this is the context we're talking about?

MR. HINSHELWOOD: I think it makes sense to treat it as a civil case for a couple of reasons. One is that what this Court has recognized and what the Supreme Court has explained in *Reynolds* is that there are important [30]differences between civil and criminal cases. And that sort of the initiating party in these cases matters in significant ways. And that's not to dispute that, you know, Mr. Kareem has an important interest in these cases. But as this Court has explained in cases like *Halkin* II, where what the plaintiff is essentially asking the Court to do is balance the importance of their own interest against the Government's interest in maintaining state secrets, that's not an appropriate inquiry for application of the privilege.

That inquiry goes to the sort of detail and the care with which the district court is required to scrutinize the Government's indication of the privilege because the privilege itself is absolute. And that's because, as I was referencing a moment ago, when the Government is sued it doesn't have the same control over the case that it does when it brings a criminal prosecution. Right? The rationale of those cases, as *Reynolds* explains is that there the Government, in criminal cases, the Government has the ability to protect information and to make judgments in the course of charging those cases and prosecuting those cases that it cannot make when it's brought to suit by another plaintiff.

So in these circumstances, and I think Mr. Kareem's reply brief is very honest about this, it's simply asking, I want you to balance my interest against the [31]Government's interest and create a new rule. That's

exactly what this Court has said in cases like *Halkin* you don't do. The privilege exists, and it applies in these circumstances, and that it goes to the way we scrutinize the claims, the claim of privilege.

And the district court here did that, said it was carefully examining the Government's declarations to determine whether the occasion for invoking the privilege was appropriate. It correctly made that determination, you know, for all of the reasons we've explained and that are apparent I think both in the public and the classified declarations. And in that circumstance, the privilege applies. That's how the privilege operates in these cases.

JUDGE SRINIVASAN: So one response to that is that it's not the classic situation in which the Government's just responding to a lawsuit that's brought against it because the offensive move that the Government made is in the allegation that it put Kareem on the list. And then once Kareem, and we take that allegation to be true for present purposes. Once that has happened, then there's no, it's not as if it's a responsive offensive case to then bring a civil suit. It's just that this is all I have left to do. I've got to figure out some way to try to extricate myself from this predicament I'm in because I think it's just, it's just wrongly founded.

[32]MR. HINSHELWOOD: Your Honor, I mean, I think the same type of move could be made as to any sort of claim that seeks prospective relief. So if, for example, somebody thought they were a target of surveillance and didn't believe that surveillance was appropriate, you know,

in that circumstance, they could come in and say, well, you know, the Government has made the first move. It started to surveil me. And in this context, all I can do is bring a civil suit. So, you, please --

JUDGE MILLETT: Well, let's just say death is different, as the Supreme Court has said many times. And the Government is actually trying, taking the allegations here, there's two, the Government is actually trying to kill him. What's he supposed to do? And let's say the Government's made, hypothetically, as he says, a serious mistake. What is he supposed to do?

MR. HINSHELWOOD: Well, Your Honor, in that circumstance, it's not that the state secrets privilege would no longer apply because, again, the type of, the seriousness of the interest, and again, no one's disputing the seriousness of Mr. Kareem's interest, is the way it functions under the privilege is to calibrate the inquiry. But as this Court explained in *Halkin* as well, when there are, you know, allegations of serious issues that can't be addressed as a result of the invocation of state secrets [33]privilege, the correct recourse is to the political branches, right, is to ask Congress to engage in some sort of creation of a process, something like that. It's not --

JUDGE MILLETT: Sorry, he's supposed to try and get a bill passed, and then the Executive Branch would say Congress can override the Executive Branch's judgment about state secrets? That's your position?

MR. HINSHELWOOD: Your Honor, exactly the contours of what Congress could or could not do in this area would be --

JUDGE MILLETT: No, no, no, no. Come on. Come on.

MR. HINSHELWOOD: Your Honor --

JUDGE MILLETT: That's, so you're targeting me to kill me without any process. And let's say I've gotten past standing. My car keeps blowing, I'm here in the U.S. and my car keeps blowing up and I keep getting shot at. And I say the only explanation for this is I'm on a kill list by the U.S. Government. And let's also assume hypothetically that I actually am on a kill list by the U.S. Government. And the Government's position is touch luck. You have no rights. You have no capacity to get yourself off that list. I mean, you can write letters to the Government.

MR. HINSHELWOOD: Your Honor, I think --

JUDGE MILLETT: But that's it. The Government may [34]execute me, and there's nothing anyone, I can do to stop it or anyone can do about it.

MR. HINSHELWOOD: Your Honor, I think it's important to tease the Court two different things that I think are in your question. So one is, I think part of your question is getting to some of the political question doctrine issues in this case, which we --

JUDGE MILLETT: I'm just asking you is that your position that there's nothing I can do about it? That's just a bottom-line question.

MR. HINSHELWOOD: Excuse me, an individual in Mr. Kareem's position?

JUDGE MILLETT: My position. I'm on the kill list under this question.

MR. HINSHELWOOD: Okay. So an individual on the kill list, you know, hypothetical kill list overseas --

JUDGE MILLETT: Oh, no, no. Under my hypothetical, I am actually on the kill list.

MR. HINSHELWOOD: Right.

JUDGE MILLETT: I suspect I am, and it turns out I am.

MR. HINSHELWOOD: Okay. In that circumstance, whether the Government both for reasons of a court's competence to adjudicate those kinds of questions, which gets to the political question issues, and the Court's [35]ability to adjudicate claims where the Government has properly invoked the state secrets privilege, and a court has properly determined that the Government has invoked that privilege, then --

JUDGE MILLETT: Then the answer is there's nothing I can do about it.

MR. HINSHELWOOD: There's no recourse you can get from --

JUDGE MILLETT: There's no difference between my, for your political question theory, there's no difference between me and Mr. Kareem.

MR. HINSHELWOOD: If we're talking about, you know, a U.S. citizen who is in Syria --

JUDGE MILLETT: No, no. No, no. I don't understand why from political question. There's nothing in your briefing that says it turns on his location. So I'm extending it to someone on U.S. soil. Nothing in your briefing turns on where his location is at all. If that's a factor now, you can tell us. But I assume it's not for state secrets.

MR. HINSHELWOOD: Certainly not for state secrets, no.

JUDGE MILLETT: All right. So then what, so you would still argue political question, just as you do here. And you would argue state secrets just as you do here. And [36]if we rule for you, that means I'm hosed. Nothing I can do about this death sentence.

MR. HINSHELWOOD: Certainly as to the state secrets privilege. What that, the invocation of the privilege in this particular case means that the case cannot proceed. Now, again, whether that could be different --

JUDGE MILLETT: Not just that -- no, no. What difference? What difference is it if me rather than Mr. Kareem and I'm here in the U.S.?

MR. HINSHELWOOD: Your Honor, I'm sorry. I don't want to suggest that there's, just to speak about how the privilege applies in these cases, if your question is can a court once the privilege is properly invoked, which is an absolutely privilege that the Government is able to invoke in this litigation, can a court then proceed to adjudicate the merits nevertheless or disregard the Government's application of the privilege, an invocation of the privilege in that circumstance, the answer is no.

Now, as a result, as this Court explained in *Halkin*, the result may be that meritorious constitutional claims don't get litigated, and that the consequences --

JUDGE MILLETT: This is killing U.S. citizens. That's quite a power to say that the Executive Branch has and it's absolutely unchecked. There's no capacity whatsoever for judicial review, for a habeas action, or this [37]type of civil action which is a functional equivalent of a habeas action. There's nothing whatsoever. There's no precedent for that. You've got precedent generally on state secrets, but you've got nothing that says executing U.S. citizens, my hypothetical is on U.S. soil. This case involves not on U.S. soil.

MR. HINSHELWOOD: Your Honor, certainly there is no specific case that has addressed this specific type of claim. But the point is that the privilege itself, the very premise --

JUDGE MILLETT: No --

MR. HINSHELWOOD: -- the rationale of the privilege --

JUDGE MILLETT: Do you appreciate how extraordinary that proposition is, that the U.S. Government can, the Executive Branch can unilaterally decide to kill U.S. citizens, and you've given me no basis for distinguishing it even here on U.S., that power existing even here on U.S. soil without any process whatsoever. That would make a lot of things a lot easier.

MR. HINSHELWOOD: Your Honor, I don't mean to suggest that the analysis, if you were adjudicating such a case, would be different as to a person on U.S. soil. You know, we obviously haven't --

JUDGE MILLETT: Right. You don't think –

[38]MR. HINSHELWOOD: -- addressed that question here. My point is simply that as to the state --

JUDGE MILLETT: Is there anything in your arguments that would change based on whether it's U.S. soil? I didn't see anything at all that turned on that.

MR. HINSHELWOOD: Your Honor, we certainly didn't --

JUDGE MILLETT: Is it less of a political question if it's on U.S. soil in your theory?

MR. HINSHELWOOD: Your Honor, you know, whether or not there would be some differences, I simply don't have the, you know, we haven't had to address any of that at this point. But I take your questions to get to a significant concern that obviously engaging in a strike of this nature is a serious undertaking. And there's no question that's true. And the Government absolutely agrees that in this circumstance the district court has an important role to play in taking a careful look at the Government's assertion of the privilege to ensure that it is appropriate in the circumstances.

JUDGE SRINIVASAN: May I ask this question --

MR. HINSHELWOOD: And there was no question --

JUDGE SRINIVASAN: Can I ask this question? So in *Hamdi*, if the Government, there was no state secrets assertion in *Hamdi*. But if the Government had asserted the [39]state secrets privilege, would the result have been that the habeas case goes away and that the detention authority continues to exist?

MR. HINSHELWOOD: Your Honor, I'm not sure how that would have sort of played out in those circumstances because, remember, it's dependent on the specific facts that are and information that is removed from the case on the basis of the privilege. So here, Mr. Kareem cannot demonstrate even his standing without information covered by the privilege, or, nor for that matter can, it can be demonstrated whether or not he has standing at all. So or not he's on the, was the target of the --

JUDGE SRINIVASAN: Right. I guess I'm just hypothesizing a situation in which the Government would say that we can't get into whether, we can't get into the bona fides of the determination that Mr. Hamdi's an enemy combatant because if we did that, then it would reveal too much, and there's military secrets in play, and the proceeding just can't go forward in any way that would allow us to shed light on the decision-making there. And therefore, it's a military secret under *Reynolds*, and therefore the proceeding just stops. It's not criminal. It's civil because habeas is a petition that's filed by the detainee not an inquiry that's launched by the Government. And therefore, there's nothing further, we just continue to [40]detain.

MR. HINSHELWOOD: Your Honor, again, if the sort of occasion for invocation of the privilege is appropriate, then the consequences that flow from that are the consequences that flow from that. But of course, as we know, in the habeas context, the Government has proposed to the district court, and then ultimately has proceeded to litigate under certain protections those habeas petitions, over the last decade. But --

JUDGE SRINIVASAN: Without ever asserting the state secrets privilege as far as I know. Is that, I'm not aware of, I could be wrong about that, but I'm not aware of it.

MR. HINSHELWOOD: Right. It's not asserting the state secrets privilege in that context. Now, all that goes to show is that those cases don't have much to say about what

happens when the Government does properly invoke the privilege. And we know what the answer to that question is because of the Supreme Court's decision in *Reynolds*, and all of this Court's cases which have repeatedly echoed the basic premise that the particular strength of the interest goes to the scope of the inquiry and not to the availability of the privilege in the first instance.

JUDGE SRINIVASAN: Okay, thank you. Let me make sure my colleagues don't have further questions for you, Mr.

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