No. 20-827

In The
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

ZAYN al-ABIDIN MUHAMMAD HUSAYN,
aka ABU ZUBAYDAH, et al.,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

BRIEF OF HUMAN RIGHTS ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

AVIDAN Y. COVER
avidan.cover@case.edu
MILTON A. KRAMER LAW
CLINIC CENTER
CASE WESTERN
RESERVE UNIVERSITY
SCHOOL OF LAW
11075 East Boulevard
Cleveland, OH 44106
(216) 368-5224

TIMOTHY J. DROSKE
Counsel of Record
droske.tim@dorsey.com
DORSEY & WHITNEY LLP
50 South Sixth Street
Suite 1500
Minneapolis, MN 55402
(612) 340-2600

JOSHUA COLANGELO-BRYAN
colangelo.joshua@dorsey.com
DORSEY & WHITNEY LLP
51 West 52nd Street
New York, NY 10019
(212) 415-9234

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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INTERESTS OF *AMICI CURIAE*

Amici curiae are human rights organizations committed to promoting the rule of law and respect for fundamental rights.[1] Of particular relevance here, *amici* are dedicated to promoting accountability and transparency in connection with human rights violations, including torture, as required by international law.

The **International Federation for Human Rights** ("FIDH") was founded in 1922 and is a federation of 192 national human rights organizations from 117 countries. It has a mandate to defend all rights set forth in the Universal Declaration of Human Rights and fight against impunity for the most serious crimes, including torture.

The **World Organization Against Torture** ("OMCT") works with 200 member organizations in over 90 countries to end torture, assist victims, and protect human rights defenders at risk. Collectively, OMCT is the largest global group actively opposing torture.

The **European Center for Constitutional and Human Rights** ("ECCHR") is an independent, nonprofit human rights organization based in Germany. ECCHR uses strategic international litigation to

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[1] No counsel for any party authored this brief in whole or in part. No person other than counsel for *amici* made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for each party has consented to the filing of this brief.

protect victims against human rights violations and hold perpetrators accountable for these egregious acts.

The **Center for Victims of Torture** ("CVT") is the oldest and largest torture survivor rehabilitation center in the United States. Through programs operating in the U.S., the Middle East, and Africa, CVT annually rebuilds the lives of nearly 30,000 survivors, including children. CVT also conducts research, training, and advocacy.

REDRESS is a non-governmental legal organization based in the United Kingdom and the Netherlands. Since 1992, REDRESS has represented several hundred survivors of torture and has intervened in many leading cases relating to torture around the world.

Partners in Justice International ("PJI") is a non-profit organization working to strengthen justice processes for victims and survivors of grave crimes such as crimes against humanity, war crimes, and genocide. PJI provides practical support to prosecutors, victim representatives, and investigators working in post-conflict and post-dictatorship jurisdictions.

Human Rights Advocates ("HRA") is a California non-profit founded in 1978 with national and international membership. It endeavors to advance the cause of human rights to ensure that the most basic rights are afforded to everyone. HRA has Special Consultative Status in the United Nations and has participated in meetings of U.N. human rights bodies for thirty years.

The **Global Justice Clinic** ("GJC") at the New York University School of Law works to prevent and redress violations of international human rights law. GJC has represented victims and survivors of torture before domestic and international courts. The views of the Global Justice Clinic, like all NYU clinics, do not purport to represent the views, if any, of the university.

The **International Human Rights Clinical Program** ("IHRC") at the Boston University School of Law works in the areas of immigration, refugee/asylum, humanitarian, and human rights litigation and advocacy. IHRC students collaborate with human rights organizations and non-governmental organizations in domestic courts and administrative bodies, utilizing regional and international human rights mechanisms.

The **Human Rights Policy Lab** ("HRPL") at the School of Law, University of North Carolina at Chapel Hill, engages in various law-related strategies and collaborates with human rights organizations on legislative and rule-making proposals, policy matters, research papers, and *amicus* briefs. The HRPL seeks to address a broad range of human rights issues including U.S. obligations under international law.

The **International Human Rights Clinic** at Santa Clara University School of Law focuses on international human rights litigation, advocacy, and policy projects. The clinic combines classroom education with supervised case and project management activities,

providing students with practical training, while serving its community and promoting social justice.

The **War Crimes Research Office** ("WCRO") at American University Washington College of Law serves as a critical resource for tribunals and other organizations promoting accountability for atrocity crimes at the international, regional and domestic level. The views of the WCRO do not purport to represent the views, if any, of the university.

SUMMARY OF ARGUMENT

For decades, the United States has played a crucial role in the creation of international law instruments that prohibit human rights abuses, including torture. These instruments provide that, in the case of abuses, remedies must be had. Based on such laws and the principles codified therein, the United States has often been a powerful voice advocating for transparency and accountability when other nations commit human rights abuses, whether in Russia, China, North Korea or elsewhere.

Amici are deeply concerned by the position of the U.S. government in this case. Rather than complying with the discovery process and assisting a legitimate judicial investigation into abuses inflicted upon Respondent Zayn al-Abidin Muhammad Husayn ("Abu Zubaydah")—a person in U.S. custody—the government argues that the state secrets privilege should be applied uniformly to prevent the disclosure of any and

all information relating to such abuses—even as to information that substantively has been in the public domain. Obviously, this position, if validated, would render the judiciary little more than a bystander in a proceeding where it has an indispensable, statutorily established role.

The government's position clashes irreconcilably with the international laws that the United States has helped create. It also is incompatible with the critical calls the United States has often made for other countries to be transparent and provide accountability for victims of human rights abuses. Furthermore, the government's position, if accepted, will damage the universal interest in preventing human rights violations and providing remedies if they occur. It will provide cover to authoritarian regimes that seek to conceal or even justify their abuses by pointing to instances when the United States has fallen short of accepted international standards. It also will damage the U.S.'s standing with its allies, causing strategic harm to U.S. policy goals. Put most simply, the government's position, if accepted, will do great damage to the laws and principles requiring accountability and transparency for human rights abuses, including torture, that have long been espoused by the United States.

ARGUMENT

I. IN ITS TREATMENT OF ABU ZUBAYDAH, THE UNITED STATES IGNORED LAWS AND PRINCIPLES OF HUMANE TREATMENT IT HAS DEVELOPED AND PROMOTED

For nearly two decades, the United States has held Abu Zubaydah in indefinite detention on the basis of threadbare allegations that he was an "enemy combatant." Beyond being detained without charge, Abu Zubaydah was subjected to torture through the CIA's "enhanced interrogation" program at "black sites," including in Poland.

As set forth in a comprehensive Senate report, Abu Zubaydah was taken into custody in Pakistan in March 2002, based on CIA claims that he was among the top three or four Al-Qaeda leaders and was involved in the September 11, 2001 attacks. *See* Senate Select Committee on Intelligence, *Committee Study of the Central Intelligence Agency's Detention and Interrogation Program*, S. Rep. No. 113-288, Executive Summary at 410 (2014) ("SSCI Report"). The CIA claimed further that Abu Zubaydah had specialized expertise to resist interrogation and that he was "certain" to be withholding information about future attacks. *Id.* at 410-11.

Putatively for these reasons, the United States abandoned its long-standing wartime interrogation practices, which were governed by standards set forth in international laws such as the Geneva Conventions, and determined that "enhanced interrogation" techniques were necessary. Understanding what

a dramatic break with existing law, policy and practice these techniques would represent, the CIA sought advice from the Department of Justice's Office of Legal Counsel ("OLC"). In seeking OLC's blessing, the CIA repeated its representations regarding Abu Zubaydah. In part on that basis, OLC opined that the "enhanced interrogation" techniques did not constitute torture and were not otherwise illegal. SSCI Report at 409-12.

Putting aside that the OLC's legal analysis has since been repudiated, the CIA's representations regarding Abu Zubaydah were, in fact, false. The CIA itself ultimately determined Abu Zubaydah was not a member of Al-Qaeda at all. SSCI Report at 411. Furthermore, CIA records never supported the assertion that he helped plan the September 11 attacks or had counter-intelligence capacities that would have assisted him in resisting interrogation. *Id.* at 410.

Beyond being legally (and morally) indefensible, the "enhanced interrogation" techniques approved by OLC rested on the weakest of methodological foundations. The techniques were devised by two psychologists, James Elmer Mitchell and John "Bruce" Jessen, working under contract for the CIA.[2] Neither had ever participated in a real-life interrogation. SSCI Report at 21. Notwithstanding their lack of expertise, Mitchell and Jessen developed numerous interrogation

[2] The SSCI Report refers to Mitchell and Jessen by the aliases SWIGERT and DUNBAR. Both have admitted to their roles in the CIA program in other litigation and disclosed their roles in other ways. *See* Answer to Complaint, *Salim v. Mitchell*, 268 F. Supp. 3d 1132 (E.D. Wash. 2016) (No. CV-15-0286-JLQ).

methods that were sanctioned by OLC and subsequently employed on Abu Zubaydah.

Mitchell and Jessen determined that "waterboarding" was an "absolutely convincing technique" to be used against Abu Zubaydah. SSCI Report at 36. Based on Mitchell and Jessen's recommendations, the CIA waterboarded Abu Zubaydah repeatedly, including 83 times in a single month. Consistent with Mitchell and Jessen's program, interrogators also made Abu Zubaydah maintain stress positions, hit him in the face, slammed him against walls, and subjected him to sleep deprivation. *Id.* at 42. During one 20-day period, U.S. personnel kept Abu Zubaydah in a coffin-size box for a total of 266 hours (11 days, 2 hours) and in another confinement box that had a width of 21 inches, a depth of 2.5 feet, and a height of 2.5 feet for an additional 29 hours. The CIA interrogators told Abu Zubaydah that the only way he would leave the facility was in the coffin-shaped box. *Id*. at 42. This is only a partial list of the brutal conduct inflicted upon Abu Zubaydah. *See generally* SSCI Report.

Put simply, Abu Zubaydah was tortured, as the Ninth Circuit and the European Court of Human Rights both found. *See Husayn v. Mitchell*, 938 F.3d 1123, 1127 (9th Cir. 2019); *Husayn (Abu Zubaydah) v. Poland*, No. 7511/13 (Eur. Ct. H.R. 2013). Indeed, if the treatment directed at Abu Zubaydah were ever inflicted upon U.S. service members or civilians by a foreign power, it would be unequivocally condemned as torture by the U.S. government and the response from the United States would be punishing. *See*, *e.g.*,

Evan Wallach, *Drop by Drop: Forgetting the History of Water Torture in U.S. Courts*, 45 Colum. J. Transnat'l L. 468, 477-93 (2007) (describing numerous U.S. prosecutions of Japanese officials for subjecting U.S. servicemen to the "water cure" and other torture during World War II).

Given this chronology, the instant litigation is, if anything, quite modest. This case arises from an application, pursuant to 28 U.S.C. § 1782, for discovery to be used in a foreign proceeding. Moreover, the Ninth Circuit order at issue did not direct the district court to order the release of information, but rather simply to separate privileged from non-privileged information.

As addressed in detail below, the United States has played an integral role in the development of a series of international legal instruments which—as a matter of human rights law and humanitarian law—prohibit torture and other inhumane treatment. These instruments, to which the United States is bound and has urged other countries to follow, require transparency and accountability in the event of violations. Abu Zubaydah's torture unquestionably violated the very legal instruments and standards the United States has helped develop and sought to promote. The U.S. government's current position that no disclosure of any information relating to the torture of Abu Zubaydah is permitted only compounds the U.S.'s failure to abide by the laws it has maintained should govern the conduct of the rest of the world's nations.

II. THE UNITED STATES HAS BEEN CRITICAL TO THE DEVELOPMENT OF INTERNATIONAL LAWS REQUIRING ACCOUNTABILITY AND TRANSPARENCY FOR HUMAN RIGHTS ABUSES

A. International Law Has Always Been Integral to the U.S. Legal System

The United States has viewed international law as integral to U.S. law since the Republic was founded. In the words of Alexander Hamilton:

> The Union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for injury ought ever to be accompanied by the faculty of preventing it. As the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all of the causes in which the citizens of other countries are concerned. This is not less essential to the preservation of the public faith than to the security of the public tranquility.[3]

The Constitution itself proclaims treaties—as well as the Constitution and federal statutes—to be the supreme law of the land. U.S. Const. art. VI, § 2.

This Court has long held that international law is part of U.S. law, and, whether or not directly applied in

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[3] Alexander Hamilton, *The Federalist No. 80*, at 536 (J. Cooke ed., 1961).

a particular instance, is relevant to interpreting U.S. law, where appropriate. *See The Paquete Habana*, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending on it are duly presented for their determination"); *Ex parte Quirin*, 317 U.S. 1, 27-28 (1942) (in assessing the rights of "unlawful combatants," observing that "from the very beginning of its history this Court has recognized and applied the laws of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals"). This Court also has affirmed "the Charming Betsy rule," *i.e.*, when appropriate, U.S. law should be interpreted consistently with international obligations. *Murray v. The Schooner Charming Betsy*, 6 U.S. 64, 118 (1804) ("an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains. . . .").

B. The United States Has Been a Driving Force in Crafting Specific International Humanitarian and Human Rights Laws Prohibiting Abuses

Beyond having had an abiding respect for existing international law from its founding, the United States has played an important role in developing new humanitarian and human rights instruments. Most relevant, the United States has championed a range of international laws designed to enhance transparency

and accountability for those held in wartime detention and those subjected to torture under any circumstances.

1. Law of War

The United States has played a leading role in the development of international humanitarian law—governing armed conflict—from before the country's founding through the execution of the Geneva Conventions in 1949. Indeed, during the Revolutionary War, George Washington refused to torture Hessian and British prisoners, including those who had previously abused his troops, writing in a letter to another American officer:

> Should any American soldier be so base and infamous as to injure any [prisoner] . . . I do most earnestly enjoin you to bring him to such severe and exemplary punishment as the enormity of the crime may require.

George Washington Papers, Series 4, General Correspondence: George Washington to Benedict Arnold, Quebec Campaign, Sept. 14, 1775 (on file with the Library of Congress). Washington also stated that the American army had to be "an army of liberty and freedom and that the rights for which they were fighting should be extended to their enemies," asserting that "victory would come because America deserves to win," in part due to humane treatment of enemy soldiers. David Hackett Fischer, *Washington's Crossing* 276 (2004).

President Lincoln promulgated General Order 100 (known as the "Lieber Code"), codifying the laws of war for U.S. forces. General Orders No. 100: Instructions for the Government of Armies of the United States in the Field (Apr. 24, 1863). This document greatly influenced subsequent international discussion that led to the codification of the laws of war, including the 1899 and 1907 Hague Conventions. *See* Manooher Mofidi and Amy Eckert, "*Unlawful Combatants" or "Prisoners of War": The Law and Politics of Labels*, 36 Cornell Int'l L.J. 59, 63 (2003).

During the First World War, the United States protested the mistreatment of its soldiers detained by Germany, with Secretary of State Lansing demanding that the German government "immediately take such steps as will effectively guarantee to American prisoners in its hands, both in letter and in spirit, that humane treatment which by all the principles of international law and usage is to be expected from the Government of a civilized state and its officials." 6 G. Hackworth, *Digest of International Law* § 577, at 278 (1943) (quoting Secretary of State (Lansing) to the Ambassador to Spain (Willard), telegram 850, Jan. 28, 1918, 1918 For. Rel. Supp. 2, at 19)).

During World War II, the United States warned Japan that it would be held accountable for the mistreatment of U.S. and allied soldiers. *See* Maj. Michael L. Smidt, *Yamashita, Medina & Beyond: Command Responsibility in Contemporary Military Operations*, 164 Mil. L. Rev. 155, 174 (2000) (citing 203 Judgment of the International Japanese War Crimes Trials in the

International Military Tribunal for the Far East 49, 748 (1948)); Wallach, *supra* at 477-93 (describing U.S. prosecutions for mistreatment, including "water cure"). The United States made similar entreaties to Germany, while maintaining that it would not respond in kind to any German mistreatment of U.S. prisoners of war. Dwight D. Eisenhower, *Crusade in Europe* 469 (1949). In response to a Soviet general's inquiry as to why the United States deemed it necessary to expend such considerable efforts to preserve the well-being of German prisoners, President Eisenhower stated:

> [I]n the first place my country was required to do so by the terms of the Geneva Convention. In the second place, the Germans had some thousands of American and British prisoners and I did not want to give Hitler the excuse or justification for treating our prisoners more harshly than he already was doing.

Id.

Having already been a party to the original 1864 Geneva Convention and one of only two countries to ratify initial attempts to expand the 1864 Convention, the United States signed the Geneva Conventions of 1949 in 1955.[4] U.S. officials also had advocated for several revisions of the 1949 Conventions to ensure they would provide minimum guarantees of humane treatment for persons in enemy hands, pursuant to

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[4] The United States ratified the 1949 Conventions in 1955 after the Korean War concluded, believing that more careful deliberation regarding the instruments could occur after the conflict ended. *See* S. Rep. No. 84-9, at 3 (1955).

Common Article 3 (which appears in all four Geneva Conventions). Among other things, Common Article 3 prohibits torture as well as cruel, humiliating and degrading treatment.[5] This Court in *Hamdan v. Rumsfeld*, 548 U.S. 557, 631-32 (2006), held that Common Article 3 protects those captured in hostilities with non-state terrorist groups, which is what the government alleges is the case with Abu Zubaydah.

2. Universal Declaration of Human Rights

The seminal Universal Declaration of Human Rights, G.A. Res 217A (III), U.N. Doc. A/810 at 71 (Dec. 10, 1948) ("UDHR"), established legal principles that were vital in and of themselves, but also provided the foundation for subsequent human rights treaties. The United States took a leading role in the negotiation and drafting of the UDHR. As a delegate to the United Nations and as the first Chairperson of the Commission on Human Rights, former First Lady Eleanor Roosevelt played an influential role in the creation of

[5] The policies of the U.S. armed forces, including the operative 2006 United States Army Field Manual for Human Intelligence Collector Operations, implement these and other provisions of the Geneva Conventions. *See* Department of the Army, *Human Intelligence Collector Operations*, FM 2-22.3 (FM 34-52) 5-26 (2006) ("Use of torture by US personnel would bring discredit upon the US and its armed forces while undermining domestic and international support for the war effort. It also could place US and allied personnel in enemy hands at a greater risk of abuse by their captors. Conversely, knowing the enemy has abused US and allied POWs does not justify using methods of interrogations specifically prohibited by law, treaty, agreement, and policy.").

the UDHR, which sought to set a "common standard of achievement for all peoples and nations" in recognition of the "inherent dignity" and "equal and inalienable rights" of all humans. UDHR, Preamble, U.N. Doc. A/810 at 71-72; *see generally* Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (2001).

Beyond that, the American Law Institute drafted the first document that would form the basis of the UDHR. *Am. Law Inst. v. Commonwealth*, 882 A.2d 1088, 1090 (Pa. Commonw. Ct. 2005). Another American civil society group, the American Jewish Committee, was also highly influential in shaping the UDHR, both at the United Nations and within the Truman Administration. *See* Tai-Heng Cheng, *The Universal Declaration of Human Rights at Sixty: Is it Still Right for the United States?*, 41 Cornell Int'l L.J. 251, 257 n.43 (2008). And, when the drafters of the UDHR convened in New York in the spring of 1948, at least 22 civil society organizations appeared; most were from the United States and they exerted considerable influence on the proceedings. *Id.* at 262-63.

The careful drafting of the UDHR indisputably reflected U.S. legal traditions. The Constitution's Bill of Rights served as a model for the UDHR. *See* Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, Intent* 1 (1999). Indeed, the documents essential to the founding of the United States have been characterized as human rights instruments. *See* Carol Devine et al., *Human Rights: The Essential Reference* 26-29 (1999) ("the American Declaration of

Independence was the first civic document that met a modern definition of human rights.").

The UDHR has obvious relevance in this case. Specifically, Article 5 of the UDHR states, "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Article 8 provides that "[e]veryone has the right to an effective remedy . . . for acts violating the fundamental rights granted him. . . ." These principles are entirely consistent with the U.S. legal tradition.

3. International Covenant on Civil and Political Rights

As with the UDHR, the foundational principles for the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 ("ICCPR"), derive in part from the Bill of Rights. *See* Christian Tomuschat, *Introductory Note, International Covenant on Civil and Political Rights*, U.N. Audiovisual Libr. Int'l L., para. 2, https://legal.un.org/avl/ha/iccpr/iccpr.html (last visited July 26, 2021). Furthermore, the United States directly contributed to the drafting of the ICCPR in the 1950s and 1960s under both Democratic and Republican administrations; in fact, the United States was one of only a handful of countries that commented on nearly every article of the draft. *See*, *e.g.*, Econ. & Soc. Council, Comm'n of Human Rts., Compilation of the Comments of Governments on the Draft International Covenant on Human Rights and on the Proposed Additional Articles, U.N. Doc. E/CN.4/365 (1950).

In 1977, the United States signed the ICCPR, but ratification initially stalled in the Senate. *See* Kristina Ash, *U.S. Reservations to the International Covenant on Civil and Political Rights: Credibility Maximization and Global Influence*, 3 Nw. J. Int'l Hum. Rts. 1 at ¶¶ 8, 11 (2005). The implications of this failure were noted by the Senate Committee on ratification, which stated:

> In view of the leading role that the United States plays in the international struggle for human rights, the absence of U.S. ratification of the Covenant is conspicuous and, in the view of many, hypocritical. The Committee believes that ratification will remove doubts about the seriousness of the U.S. commitment to human rights and strengthen the impact of U.S. efforts in the human rights field.

S. Rep. No. 102-23, at 3 (1992). Thus, when the United States ratified the ICCPR on November 21, 1991, a significant motivation was to show the world that the most powerful country on earth would undertake serious efforts to respect human rights and to urge others to do the same.

The ICCPR contains several provisions of relevance here. Article 7 provides that, "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Article 10 states that detainees "shall be treated with humanity and with respect for the inherent dignity of the human person." And Article 2(1) provides that states must undertake efforts "to respect and to ensure to all individuals . . .

the rights recognized in the present Covenant, without distinction of any kind. . . ."

The ICCPR also requires states to provide remedies for violations of its provisions. Article 2(3) provides that each State Party to the ICCPR will undertake:

> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
>
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
>
> (c) To ensure that the competent authorities shall enforce such remedies when granted.

In fact, the right to a remedy is widely recognized as a central feature of the ICCPR. *See* Paul M. Taylor, *A Commentary on the International Covenant on Civil and Political Rights* 59 (2020) (right to a remedy "is pivotal to securing 'respect' for and for ensuring to all individuals under a State's responsibility the rights enshrined in the Covenant"); Sarah Joseph & Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* 1861

(3d ed. 2013) (right to a remedy "is a key component of the ICCPR").[6]

The U.N. Human Rights Committee, an independent body tasked by the treaty with monitoring states' implementation of the ICCPR, emphasizes that remedies should not be theoretical, but that "States Parties must ensure that individuals . . . have *accessible and effective remedies* to vindicate" their rights. U.N. Human Rights Comm., General Comment No. 31 [80], *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 15, U.N. Doc. CCPR/C/21/Rev. 1/Add. 13 (May 26, 2004) (emphasis added). Denying such remedies would defeat the purposes of the ICCPR. *Id*. ¶ 17; *see also Bithashwiwa & Mulumba v. Zaire*, Comm. No. 241/1987, ¶ 14, U.N. Doc. CCPR/C/37/D/241/1987 (1989) (states must provide effective measures to remedy violations, including allowing victims to challenge violations in court).

4. Convention Against Torture

The United States played an important role in the development of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 ("Convention"). The United States supported an early draft

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[6] The ICCPR has had an even broader reach than the obligations it establishes itself. When new national constitutions are written, the ICCPR often serves as a "yardstick" against which fundamental rights are measured, and some domestic constitutions contain provisions instructing courts to interpret national laws in light of the ICCPR. *See* Tomuschat, *supra* at ¶ 8.

of the Convention and actively participated during seven subsequent years of revisions. *See* J. Herman Burgers & Hans Danelius, *The United Nations Convention Against Torture: A Handbook on the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment* 40 (1988); S. Exec. Rep. No. 101-30, at 2 (1990). Throughout this process, the United States provided commentary and drafting suggestions. *Id.* at 2-3.

Following execution of the Convention, President Reagan transmitted the document to the Senate, forcefully emphasizing that "[r]atification of the Convention by the United States will clearly express United States opposition to torture, an abhorrent practice unfortunately prevalent in the world today" and that "[b]y giving its advice and consent to ratification of this Convention, the Senate . . . will demonstrate unequivocally our desire to bring an end to the abhorrent practice of torture." Ronald Reagan, President, Message to the Senate Transmitting the Convention Against Torture and Inhuman Treatment or Punishment (May 20, 1988). After ratification was delayed, President George H.W. Bush sent the Convention to the Foreign Relations Committee in 1989, with a note stating that the Convention had an "urgent need for Senate approval." S. Exec. Rep. No. 101-30, at 2 (1990).

In 1990, the Committee unanimously voted on a resolution to ratify the Convention. *Id.* at 3. In the Committee's words, ratification would "demonstrate clearly and unequivocally U.S. opposition to torture and U.S. determination to take steps to eradicate it" as

well as put "the United States [] in a stronger position to prosecute alleged torturers and to bring to task those countries in the international arena that continue to engage in this heinous and inhumane practice." *Id.* at 3-4. In 1994, the United States ratified the Convention and, since then, the United States has consistently affirmed its commitment to the binding norms set forth in the Convention by way of reports to the United Nations. *See*, *e.g.*, One-Year Follow-up Response of the United States of America to Recommendations of the Committee Against Torture on its Combined Third to Fifth Periodic Reports (Nov. 27, 2015), https://2009-2017.state.gov/j/drl/rls/250342.htm ("The United States upholds the bedrock principle that torture and cruel, inhuman, and degrading treatment or punishment are categorically and legally prohibited always and everywhere, violate U.S. and international law, and offend human dignity. Torture is contrary to the founding principles of our country and to the universal values to which we hold ourselves and the international community.").

The Convention specifically prohibits both torture and other cruel, inhuman, or degrading treatment, while also requiring member States to provide effective remedies in the event of a breach. Article 14(1) provides that "[e]ach State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible."

The U.N. Committee Against Torture, which oversees State compliance with the Convention, has explained that redress, as required under Article 14 of the Convention, "encompasses the concept of 'effective remedy' and 'reparation.'" U.N. Comm. Against Torture, General Comment No. 3 on Implementation of Article 14 by States Parties, ¶ 2, U.N. Doc. CAT/C/GC/3 (Nov. 19, 2012). To be effective, a remedy must provide "fair and adequate compensation for torture or ill-treatment" and "should be sufficient to compensate for any economically assessable damage resulting from torture or ill-treatment, whether pecuniary or non-pecuniary." *Id.* ¶ 10. The Committee has emphasized the importance of judicial remedies for victims to achieve full rehabilitation: "*Judicial remedies must always be available to victims*, irrespective of what other remedies may be available, and should enable victim participation." *Id*. ¶ 30 (emphasis added).

Of particular significance in the instant matter, Article 9 provides:

> 1. States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of any of the offences referred to in article 4, including the supply of all evidence at their disposal necessary for the proceedings.[7]
>
> 2. States Parties shall carry out their obligations under paragraph 1 of this article

[7] Article 4 states, *inter alia*, "[e]ach State Party shall ensure that all acts of torture are offences under its criminal law."

> in conformity with any treaties on mutual judicial assistance that may exist between them.

The United States has, in many instances, strived to meet its Article 9 obligations—even when security challenges arise. For example, U.S. personnel in war-torn Afghanistan assisted British authorities in investigating former Afghan warlord Faryadi Sarwar Zardad, leading to his 2005 conviction for torture. Manfred Nowak et al., *The United Nations Convention Against Torture and Its Optional Protocol: A Commentary* 306 (2d ed. 2019).

III. THE UNITED STATES EXHORTS OTHER COUNTRIES TO FOLLOW INTERNATIONAL LAWS REQUIRING ACCOUNTABILITY AND TRANSPARENCY FOR HUMAN RIGHTS ABUSES

The United States has not only played an integral role with respect to the creation of the legal instruments addressed above, but has used its powerful position in the world to call for other nations to ensure transparency and accountability in the case of human rights violations, including torture:

- President Ronald Reagan: "Together, tonight, let us say what so many long to hear: that America is still united, still strong, still compassionate, still clinging fast to the dream of peace and freedom, still willing to stand by those who are persecuted or alone. . . . For those who

are victims of police states or government induced torture or terror, for those who are persecuted, for all the countries and people of the world who seek only to live in harmony with each other, tonight let us speak for them." Ronald Reagan, Candidate for U.S. President, Election Eve Address: A Vision for America (Nov. 3, 1980).

- President George H.W. Bush: "Great nations like great men must keep their word. When America says something, America means it, whether a treaty or an agreement or a vow made on marble steps . . . Good will begets good will. Good faith can be a spiral that endlessly moves on." George H.W. Bush, President, Inaugural Address (Jan. 20, 1988).

- President George W. Bush: "The United States is committed to the world-wide elimination of torture and we are leading this fight by example. I call on all governments to join with the United States and the community of law-abiding nations in prohibiting, investigating, and prosecuting all actions of torture and in undertaking to prevent other cruel and unusual punishment. I call on all nations to speak out against torture in all its forms and to make ending torture an essential part of their diplomacy. I further urge governments to join America and others in supporting torture victims' treatment centers, contributing to the UN Fund for

the Victims of Torture, and supporting the efforts of non-governmental organizations to end torture and assist its victims." Statement by President George W. Bush on International Day in Support of Victims of Torture (June 26, 2003).

- President Joseph Biden: "Torture goes against everything we stand for as a nation, and we must never again resort to its use. The late-Senator John McCain, my friend and a torture survivor, put it best: 'the use of torture compromises that which most distinguishes us from our enemies—our belief that all people, even captured enemies, possess basic human rights, which are protected by international conventions the U.S. not only joined, but for the most part authored.'" Statement by President Joseph R. Biden, Jr. on International Day in Support of Victims of Torture (June 26, 2021).

- Michael R. Pompeo, Secretary of State, in addressing the Chinese government's treatment of its Uighur Community: "The United States of America has led the world in holding the perpetrators of the most heinous human rights abuses accountable. . . . Americans have given voice to those who have been silenced by evil, and stood with the living who cry out for truth, the rule of law, and justice. We do so not because we are called to act by any international court, multilateral body, or domestic political concern. We do

so because it is right. . . . The United States calls upon the PRC immediately to . . . end all torture and abuse in places of detention." Michael R. Pompeo, Sec'y of State, Determination of the Secretary of State on Atrocities in Xinjiang, Press Statement (Jan. 19, 2021).

- John Kerry, Secretary of State, remarking on North Korea: "What goes on inside North Korea . . . these abuses are actually unfathomable to nearly the entire world, and they should have no place in the 21st century . . . We should all ask ourselves if we who are free, . . . if we don't stand with men and women suffering in anonymity in places like North Korea, then what do we stand for? And if we don't give voice to the voiceless, then why even bother to speak about these issues?" John Kerry, Sec'y of State, Remarks at Event on Human Rights in the D.P.R.K. (Sept. 23, 2014).

- Antony J. Blinken, Secretary of State: "[H]uman rights and dignity must stay at the core of the international order. The foundational unit of the United Nations . . . is not just the nation state. It's also the human being. . . . [T]he Universal Declaration of Human Rights begins with the word 'universal' because our nations agreed there are certain rights to which every person, everywhere, is entitled. Asserting domestic jurisdiction doesn't give any state a blank check to enslave,

> torture, disappear, ethnically cleanse their people, or violate their human rights in any other way." Antony J. Blinken, Sec'y of State, Virtual Remarks at the UN Security Council Open Debate on Multilateralism (May 7, 2021).

IV. WHEN THE UNITED STATES FAILS TO COMPLY WITH INTERNATIONAL LAW, SUCH FAILURES ARE EXPLOITED BY DESPOTS AND HARM THE UNITED STATES STRATEGICALLY

When the United States falls short of the high standards it has helped create, there are highly undesirable, real-world results. First, well-known human rights abusers, including China, North Korea, and Russia have all pointed to the U.S.'s failures to adhere to international norms as justification for their bad acts. By way of example, the U.S. Department of State releases an annual human rights report regarding other countries' adherence to "internationally recognized . . . rights, as set forth in the Universal Declaration of Human Rights and other international agreements." *Country Reports on Human Rights Practices*, U.S. Dep't of State, https://www.state.gov/reports-bureau-of-democracy-human-rights-and-labor/country-reports-on-human-rights-practices/ (last visited July 6, 2021). In 2016, the U.S. report "singled out" China for its "severe" repression of civil and political rights, noting specifically "that torture and illegal detentions at 'black jails' remained an issue." *Id*. ¶ 10.

Since 2000, the Chinese government has issued a putative human rights report, in a transparent attempt to divert attention from its own abuses and trivialize the issues raised in State Department reports. Adam Taylor, *U.S. Awash in 'Terrible' Human Rights Abuses, Chinese Government Report Claims*, Wash. Post, Mar. 10, 2017. In 2016, the Chinese report countered the above-cited U.S. report, asserting that the United States "pointed fingers and cast blame on the human rights situation in many countries while paying no attention to its own terrible human rights problems . . . The United States repeatedly trampled on human rights in other countries . . . The issue of illegal detention and torturing prisoners of other countries remained unsolved." *Human Rights Record of the United States in 2016*, Xinhuanet (Mar. 9, 3:09 PM) http://www.xinhuanet.com//english/china/2017-03/09/c_136115481.htm.

North Korea has taken a page from the same playbook. After the United Nations released a report on human rights abuses in North Korea in 2014, North Korea responded with its own report on the United States, stating "[t]he U.S. is the world's worst human right [*sic*] abuser and tundra of a human being's rights to existence." Adam Taylor, *North Korea Releases List of U.S. 'Human Rights Abuses': 'The U.S. is a Living Hell'*, Wash. Post, May 2, 2014.

After the United States sought to punish Russia for human rights abuses through the 2010 Magnitsky Act, and the United Nations issued a 2012 report accusing Russia of torture, Russia attempted to divert

attention from its conduct by criticizing the United States for the CIA's interrogation and detention program. David M. Herszenhorn, *Russia Denounces U.S. Over C.I.A. Torture Report*, N.Y. Times, Dec. 11, 2014. A Russian government official claimed the United States was guilty of hypocrisy by holding itself out as a global human rights standard-bearer while Guantanamo remained open: "This gloomy picture of history hasn't been closed yet. . . . This situation does not fit with the claims of the United States for the title of 'model of democracy.' This is far from reality." *Id.* The official specifically claimed that the "gross systemic rights violations" inflicted on Guantanamo detainees are contrary to the U.S.'s desire to be regarded as a model of democracy. *Russia Condemns U.S. Over 'Inquisitorial Torture,'* Reuters, Dec. 11, 2014.

Other countries have also pointed to the CIA's treatment of detainees. In 2014, China's state-run news agency wrote, "[p]erhaps the U.S. government should clean up its own backyard first and respect the rights of other countries to resolve their issues by themselves. . . . America is neither a suitable role model nor a qualified judge on human rights issues in other countries." *CIA 'Torture' Condemned by World Media*, BBC News, Dec. 10, 2014. A pro-China Hong Kong newspaper contended, "[t]he report will be powerful evidence that will totally unveil the ugly human rights face of the U.S. and will serve a heavy blow to its credibility and international image." *Id.* Iranian media wrote: "Torture, surveillance, shooting—the

three pillars of American human rights. . . . It puts a question mark over . . . American human rights." *Id.*

Beyond being cynically exploited by adversaries, failures of the United States to meet international standards weaken alliances to the U.S.'s strategic detriment. In one instance, the Netherlands delayed sending troops to join the U.S.–led coalition in Afghanistan due to concerns regarding the CIA interrogation program, until the United States provided assurances that such abuses would not be continued. Douglas A. Johnson, Alberto Mora, and Averell Schmidt, *The Strategic Costs of Torture*, Foreign Affairs 121, 125 (Sept./Oct. 2016), https://www.law.upenn.edu/live/files/5734-johnson-mora-schmidt-the-strategic-costs-of. Similarly, U.S. interrogation practices led the Finnish parliament to delay the execution of a U.S.–European Union extradition and legal cooperation treaty from 2005 to 2007. *Id.* at 125-26. Based on concerns that the United States was continuing its practice of secretly transporting detainees on airplanes, the United Kingdom and Irish governments imposed additional burdensome requirements on U.S. military flights between 2006 and 2008. *Id.* at 126. And military personnel from the U.S.'s closest intelligence partners, Australia, Canada, New Zealand, and the United Kingdom, informed the United States that its use of torture would adversely affect cooperation across military, intelligence, and law enforcement counterterrorism efforts. *Id.* at 125.

V. THE UNITED STATES MUST ABIDE BY THE LAWS AND PRINCIPLES OF TRANSPARENCY AND ACCOUNTABILITY IT HAS ESTABLISHED

As detailed, the United States has long held itself out to the world as a beacon of freedom. Beyond that, the United States has been critical to the development of legal instruments designed to prevent human rights abuses and ensure accountability when abuses occur. It also has been a powerful voice, urging nations of the world to abide by those legal instruments and the principles enshrined therein, including by making amends for human rights violations.

Given the U.S.'s role in this context, the path forward is clear in connection with the pending investigation into the treatment of Respondent. As delineated by laws the United States helped establish, such as the ICCPR and the Convention Against Torture, the United States must be transparent and accountable. Unfortunately, the government's position in this case contradicts the laws it has helped draft, the values reflected in those laws, and the exhortations it has often made to foreign countries that commit abuses.

Notably, the order at issue here is quite modest, directing the district court simply to separate information the district court found not subject to the state secrets privilege from privileged information. Yet, the government resists even this cabined directive in the hopes of securing blanket permission not to

have any information disclosed—even information the substance of which has already been in the public domain. In this manner, the government seeks effectively to remove the judicial branch from any review of the privilege claims in this case.

If the United States is allowed to preclude uniformly the disclosure of information about the torture of Abu Zubaydah it will obviously harm Respondents. But the harm will not be limited to Respondents. Rather, such secrecy will harm all those working globally to ensure transparency and accountability for human rights abuses (including authorities in Poland who are seeking to meet their human rights obligations as to Abu Zubaydah) and the victims of such abuses.

After all, if the country that has sought to be a standard bearer for protecting freedoms and rights is permitted to ignore its obligations in this context, it can only embolden bad actors around the world. In fact, dictators would be handed a golden opportunity to point to the United States to justify their own mistreatment of people—mistreatment the United States would rightly condemn, albeit with less moral force. Countries that are hostile to the United States and whose fundamental values do not align with the legitimate interests of the international community should be denied the opportunity to cite actual U.S. abuses as supposed justification for their own violations. In addition, if the government's arguments prevail, the relationship of the United States with critical allies will suffer, harming the U.S.'s strategic interests generally.

In sum, this country's credibility on these critical issues will be significantly weakened if the government's position is sustained. And, instead of seeking to act as a moral leader, the United States would obstruct the arc of justice, which all people of good faith want to see move away from torture and secrecy.

CONCLUSION

The Court should affirm the order of the Court of Appeals.

Respectfully submitted,

TIMOTHY J. DROSKE
Counsel of Record
DORSEY & WHITNEY LLP
50 South Sixth Street
Suite 1500
Minneapolis, MN 55402
(612) 340-2600

JOSHUA COLANGELO-BRYAN
DORSEY & WHITNEY LLP
51 West 52nd Street
New York, NY 10019
(212) 415-9234

AVIDAN Y. COVER
MILTON A. KRAMER LAW CLINIC
CASE WESTERN RESERVE UNIVERSITY
SCHOOL OF LAW
11075 East Boulevard
Cleveland, OH 44106
(216) 368-5224

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