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P R O C E E D I N G S

(10:00 a.m.)

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

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

Mr. Fletcher.

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

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

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

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

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

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

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

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

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

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

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

16 I welcome the Court's questions.

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

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

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

25 MR. FLETCHER: It would make a

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

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

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

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

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

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

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

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

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

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

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

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

19 And as to those matters, I would think
20 that there's really no deference given to the
21 CIA director at all, in other words, as to what
22 level of necessity is at issue and how those two
23 things are weighed and how the segregation
24 analysis works. Aren't those judgments for
25 courts?

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

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

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

25 But the -- the sort of predictive

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

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

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

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

21 MR. FLETCHER: Yes.

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

1 what will protect that or not?

2 MR. FLETCHER: Well, I think --

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

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

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

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

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

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

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

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

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

10 JUSTICE SOTOMAYOR: Could I --

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

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

18 MR. FLETCHER: Correct.

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

25 It seems there was already a mechanism

1 for the Polish government to seek discovery.
2 They invoked it. The government said no on
3 state secret grounds.

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

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

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

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

23 But it seems to me there may be a lot
24 that they can talk about that have nothing to do
25 with the actual location at which events

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

5 MR. FLETCHER: Right.

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

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

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

22 So the very first sentence of the
23 Section 1782 application -- this is at page 110A
24 of the petition appendix -- says we are seeking
25 evidence to send to a prosecutor in Poland.

1 Twelve of the 13 written discovery requests
2 specifically refer to Poland.

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

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

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

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

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

5 Here, our basic submission -- and the
6 district court agreed with this -- is that it's
7 just not possible to do that because of the
8 nature of the proceeding. But even if you were
9 hesitant about that, I think that there are a
10 couple of other reasons to be resistant to this
11 code words approach that Respondents have
12 advanced now.

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

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

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

5 JUSTICE BARRETT: Is this mosaic?

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

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

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

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

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

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

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

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

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

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

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

25 JUSTICE BREYER: What's the president

1 of Poland -- didn't -- didn't the president of
2 Poland say something like that?

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

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

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

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

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

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

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

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

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

14 MR. FLETCHER: Right.

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

19 MR. FLETCHER: Yes. Correct.

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

22 MR. FLETCHER: So I think, ultimately,
23 the -- that would be a situation where the
24 colloquy that I had with Justice Kagan would be
25 relevant, where you had a party who was seeking

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

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

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

22 JUSTICE KAGAN: Suppose, Mr. Fletcher,
23 there were -- there was overwhelming, you know,
24 essentially incontrovertible evidence that the
25 acts here did take place in Poland. Suppose

1 somebody had leaked videos that everybody agreed
2 were authentic. You know, what then?

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

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

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

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

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

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

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

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

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

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

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

25 MR. FLETCHER: The requests come

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

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

19 MR. FLETCHER: I don't want to make
20 representations about exactly how the Polish
21 system works, but I think I can give you some
22 detail that confirms the thrust of your
23 question, which is that even after the regional
24 prosecutor began sending the first of the MLATs,
25 which began back in 2009, the Government of

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

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

11 JUSTICE KAVANAUGH: Mr. Fletcher?

12 MR. FLETCHER: Yes, Justice Kavanaugh.

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

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

24 In subsequent cases, like Nixon and
25 Egan, the Court has also made clear that it has

1 constitutional roots in the executive's Article
2 II authorities to protect the nation and
3 safeguard confidential information. So, you
4 know, I think it's -- it's both.

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

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

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

1 potential torture, et cetera. Does the
2 government have the right to participate and --
3 and ensure that those same safeguards are
4 present?

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

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

24 And so I think, to our view, that's
25 reason enough to conclude that the state secrets

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

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 Justice Thomas, anything further?

13 JUSTICE THOMAS: None for me, Chief.

14 JUSTICE SOTOMAYOR: I have one.

15 CHIEF JUSTICE ROBERTS: Please.

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

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

23 MR. FLETCHER: We're content to have
24 you think of it as either. In our view, it's
25 both and they dovetail, as you and I discussed.

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

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

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

20 JUSTICE SOTOMAYOR: Thank you.

21 CHIEF JUSTICE ROBERTS: Justice Kagan.

22 JUSTICE KAGAN: Just, again, Mr.
23 Fletcher, on this idea of using code words. I
24 mean, given that Petitioner was detained in two
25 separate locations, you know, isn't there a way

1 of enabling this information to go forward
2 without saying which of the two locations, you
3 know, these -- this treatment happened?

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

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

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

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

1 relevant to that Polish prosecution.

2 I think, at that point, it should be

3 --

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

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

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

25 I -- I still don't think it avoids the

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

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

11 CHIEF JUSTICE ROBERTS: Justice
12 Gorsuch.

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

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

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

22 MR. FLETCHER: It's a matter for the
23 Court, but I think the Court in Reynolds was
24 very clear that this is a privilege that can
25 only be waived by the government, not by others.

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

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

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

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

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

24 MR. FLETCHER: Yes. It --

25 JUSTICE GORSUCH: -- that the

1 government has chosen?

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

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

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

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

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

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

11 JUSTICE GORSUCH: Irrelevant in your
12 mind?

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

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

16 MR. FLETCHER: I think --

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

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

24 JUSTICE GORSUCH: That one the court
25 can take into account?

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

3 JUSTICE GORSUCH: Yes.

4 MR. FLETCHER: I -- I would think that
5 --

6 JUSTICE GORSUCH: No, of course.

7 MR. FLETCHER: Of course, yes.

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

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

15 JUSTICE GORSUCH: Through the lens of
16 deference.

17 MR. FLETCHER: Yeah.

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

25 MR. FLETCHER: I'm not aware of

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

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

18 JUSTICE GORSUCH: Thank you.

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

21 JUSTICE KAVANAUGH: No further
22 questions.

23 CHIEF JUSTICE ROBERTS: Justice
24 Barrett?

25 JUSTICE BARRETT: No.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 Mr. Klein.

4 ORAL ARGUMENT OF DAVID F. KLEIN
5 ON BEHALF OF THE RESPONDENTS

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

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

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

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

1 treatment at the Polish site identified by code
2 name. The government itself placed their
3 testimony online.

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

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

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

23 Poland would receive only a record
24 approved by the court after appropriate
25 objections and perhaps even another appeal.

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

5 Now I welcome the Court's questions.

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

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

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

1 of Human Rights. They represented that they had
2 interviewed 62 people to -- to learn what they
3 could about the site in Poland.

4 And they represented that they had
5 amassed 43 volumes of documents about it. And
6 they appeared and made those representations
7 that they had conducted what they thought was an
8 appropriate investigation.

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

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

21 JUSTICE THOMAS: At that specific
22 location?

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

1 as -- as we understand it. You know --

2 JUSTICE THOMAS: One last question.

3 MR. KLEIN: Sure.

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

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

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

23 JUSTICE BARRETT: Counsel, I guess
24 what I can't get past is similar to Justice
25 Thomas's question. You say that it's not a

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

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

14 Am I understanding you that --

15 MR. KLEIN: No.

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

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

25 JUSTICE BARRETT: So you don't need

1 them for that?

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

9 JUSTICE BARRETT: But if you --

10 MR. KLEIN: But --

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

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

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

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

1 fact that the site in Poland is a public fact.
2 It's not a secret.

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

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

18 The government's argument is that the
19 confluence of those facts is somehow a state
20 secret, and the government's argument -- and
21 what it -- what it really hinges on is this idea
22 that I can ask the same question -- well, let me
23 put it this way: Suppose -- suppose Salim's
24 lawyer asked, what happened to Abu Zubaydah on
25 January 1, 2003? That's not privileged. That's

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

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

10 JUSTICE BARRETT: So could you --

11 CHIEF JUSTICE ROBERTS: I don't --

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

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

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

20 MR. KLEIN: We share the Ninth
21 Circuit's view on this. The answer is yes,
22 because the fact of Poland itself is not secret.
23 But we -- from the very beginning, from the
24 moment the government filed its motion to quash,
25 we offered to -- to amend under Rule 45 to allow

1 the -- the -- the proceedings to go forward
2 without mentioning Poland.

3 CHIEF JUSTICE ROBERTS: So --

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

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

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

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

23 CHIEF JUSTICE ROBERTS: I -- I -- I
24 guess I'm having trouble following exactly what
25 it is you're looking for. And I don't think

1 you're grappling with the point that Justice
2 Barrett just raised, which is you -- everybody
3 may know about this. You know, as -- as you've
4 put it, it's no secret at all.

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

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

19 Well, then why do you need the
20 director of the CIA and the United States
21 Government to agree with what you say you've got
22 enough proof on, that there was this site in
23 Poland?

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

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

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

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

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

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

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

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

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

16 MR. KLEIN: No.

17 JUSTICE BREYER: You don't want that?

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

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

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

24 JUSTICE BREYER: Okay.

25 MR. KLEIN: -- we want --

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

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

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

11 MR. KLEIN: No.

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

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

16 JUSTICE BREYER: Yes.

17 MR. KLEIN: Abu Zubaydah cannot
18 testify.

19 JUSTICE BREYER: Why not?

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

23 JUSTICE BREYER: Why? Why? Does that
24 -- I mean, I'm not sure this relevant, but, I
25 mean, in Hamdi, we said you could hold people in

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

5 MR. KLEIN: Mister -- Justice --

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

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

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

13 MR. KLEIN: There has been a habeas
14 proceeding pending in D.C. for the last 14
15 years. There's no --

16 JUSTICE BREYER: Well, how --

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

18 JUSTICE BREYER: Don't they decide it?

19 JUSTICE BREYER: They don't decide it?

20 MR. KLEIN: I'm sorry?

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

23 MR. KLEIN: No.

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

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

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

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

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

13 MR. KLEIN: That -- that is correct.

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

19 MR. KLEIN: That's right.

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

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

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

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

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

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

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

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

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

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

1 JUSTICE SOTOMAYOR: No, no.

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

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

9 MR. KLEIN: All right.

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

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

20 MR. KLEIN: I -- I --

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

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

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

3 MR. KLEIN: And, to me --

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

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

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

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

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

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

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

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

15 But is there, in fact, evidence that
16 he was tortured in the dates that you're trying
17 to establish that he was tortured in? In other
18 words, I thought that the Senate report actually
19 talks a good deal about the Petitioner's --
20 the -- the torture that was -- that the
21 Petitioner was subject to, but in an earlier
22 date.

23 And what you need to continue on with
24 this investigation is essentially some evidence
25 that that treatment was continued at a later

1 date, the date in which you say he was in
2 Poland, and that is not in the public record.

3 Am I right about that?

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

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

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

24 JUSTICE KAGAN: I -- I -- I guess all
25 I was suggesting is that the government is here

1 to tell us that, look, they've conceded that Abu
2 Zubaydah was tortured, but, because of relations
3 with allies with cooperating intelligence
4 services, they won't say where it happened.

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

9 MR. KLEIN: So --

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

12 MR. KLEIN: -- so Mitchell and Jessen
13 have testified before when these things
14 happened, just not these particular things. By
15 the way, you know, it's important to understand
16 that the Ninth Circuit order, you -- you know,
17 the -- the government helpfully has placed
18 our -- our subpoena -- documentary subpoena
19 at the -- at the back of their reply brief.
20 Most of those requests were denied by the Ninth
21 Circuit, and among the things that were denied
22 was a request to establish the identities of
23 Polish nationals and contractual relationships
24 between the United States and the Polish
25 government in respect to the enhanced

1 interrogation techniques.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

24 There's an American on -- on the train
25 who is an eyewitness, okay? The prosecutor just

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

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

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

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

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

25 CHIEF JUSTICE ROBERTS: Well, that

1 seems to me that that's -- just to play out your
2 hypothetical, that's exactly what the American
3 government is saying. I'm not going to say
4 anything about what I saw in -- in -- in Hungary
5 because that might incriminate me. It might be
6 associated with me. And that would be a breach
7 of faith with our allies and friends around the
8 world.

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

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

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

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

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

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

22 MR. KLEIN: Well, I think they're both
23 factors. In -- in this case, there're two
24 removes. They -- they can't speak for the
25 government. They were never agents for the

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

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

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

22 If I turned around tomorrow and I were
23 deposing them in an entirely different case and
24 -- and asked the same questions, would they --
25 would it somehow become non-privileged? It's

1 already declassified.

2 So, you know, that's -- that's point
3 1. But point 2, again, Reynolds requires that
4 the director of the CIA or the head of whatever
5 agency it is that -- that is at issue, it
6 requires that he personally review and he
7 personally state his considered reasons for
8 invoking the privilege.

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

15 Thank you.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 Justice Thomas?

19 JUSTICE THOMAS: No.

20 CHIEF JUSTICE ROBERTS: Justice
21 Breyer?

22 Justice Sotomayor? Anything further?

23 Justice Kagan?

24 Justice Gorsuch?

25 Justice Kavanaugh, any further --

1 anything further?

2 JUSTICE KAVANAUGH: Nothing further.

3 CHIEF JUSTICE ROBERTS: Justice

4 Barrett? No?

5 MR. KLEIN: Thank you.

6 CHIEF JUSTICE ROBERTS: Thank you,

7 counsel.

8 Rebuttal, Mr. -- rebuttal, counsel?

9 REBUTTAL ARGUMENT OF BRIAN H. FLETCHER

10 ON BEHALF OF THE PETITIONER

11 MR. FLETCHER: Thank you, Mr. Chief

12 Justice.

13 JUSTICE GORSUCH: Mr. Fletcher, I

14 don't want to interrupt you later --

15 MR. FLETCHER: Please.

16 JUSTICE GORSUCH: -- so I'm just going

17 to do it up-front.

18 Why not make the witness available?

19 What is the government's objection to the

20 witness testifying to his own treatment and not

21 requiring any admission from the government of

22 any kind?

23 MR. FLETCHER: By "the witness" you

24 mean Abu Zubaydah? Right. So I was going to

25 address this point. It goes to Justice Breyer's

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

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

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

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

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

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

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

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

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

18 JUSTICE GORSUCH: Well, gosh --

19 MR. FLETCHER: -- at Guantanamo --

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

1 this?

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

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

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

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

24 JUSTICE SOTOMAYOR: Without the
25 government invoking a state secret privilege to

1 the testimony. Inherent in the question is are
2 you going to let him testify as to what happened
3 to him those dates?

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

12 JUSTICE SOTOMAYOR: Well, you're --

13 MR. FLETCHER: -- written submission.

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

22 JUSTICE ALITO: Mr. Fletcher, you are
23 here representing the government of the United
24 States in a certain capacity. What do you
25 understand to be the scope of your authority as

1 you stand before us here?

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

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

11 MR. FLETCHER: With respect to all
12 matters. Here the matter is directly relevant
13 to our --

14 JUSTICE ALITO: With respect to all
15 matters? I thought it would be with respect to
16 this litigation.

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

24 Justice Gorsuch, I understand your
25 question. We'd be happy to respond.

1 JUSTICE GORSUCH: Thank you.

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

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

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

15 Justice Kagan, you raised a question
16 about what evidence there is about Abu
17 Zubaydah's treatment after the point in time
18 where the SSCI report --

19 CHIEF JUSTICE ROBERTS: Please
20 continue.

21 MR. FLETCHER: When the SSCI report
22 says that enhanced interrogation techniques
23 stopped. The pit of testimony from the military
24 commissions that my friend referred you to is
25 cited in page 15 -- or footnote 15 of the red

1 brief.

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

8 And then, Mr. Chief --

9 CHIEF JUSTICE ROBERTS: One other --
10 one other -- finish your rebuttal.

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

21 And for the reasons that Justice Kagan
22 identified that they were integral to the
23 program, that they be testifying under oath
24 about information that they learned in the CIA
25 and that is subject to confidentiality

1 requirements, and they'd be doing so in a
2 proceeding designed to investigate and prosecute
3 our alleged former allies abroad, that would be
4 viewed as a serious breach of trust.

5 Thank you, Your Honor.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 JUSTICE KAVANAUGH: May I -- may I ask
9 one question?

10 CHIEF JUSTICE ROBERTS: Justice
11 Kavanaugh?

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

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

23 JUSTICE KAVANAUGH: Thank you.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel. Counsel, the case is submitted.

1 (Whereupon, at 11:10 a.m., the case
2 was submitted.)
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