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.

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

REPLY BRIEF FOR THE UNITED STATES

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Over the dissent of twelve judges, the Ninth Circuit rejected the government's assertion of the state-secrets privilege and allowed respondents to seek discovery of classified information from two former Central Intelligence Agency (CIA) contractors. Any information respondents obtain would be used exclusively in a foreign criminal proceeding, the very purpose of which is to probe clandestine CIA activities that allegedly occurred in Poland.

The government's opening brief demonstrates that the Ninth Circuit seriously erred by failing to accord appropriate deference to the CIA Director's considered national-security judgment. Instead, the Ninth Circuit improperly relied on its own belief—based largely on its assessment of purported "public knowledge"—that the compelled evidence would not harm the CIA's foreign

intelligence partnerships or otherwise compromise national security. And even setting aside the state-secrets privilege, the government's brief also shows that the Ninth Circuit's judgment should be reversed on the independent ground that 28 U.S.C. 1782 does not authorize the extraordinary discovery sought here. Respondents offer no persuasive response to either argument, and their effort to defend the Ninth Circuit's judgment on other grounds is equally unsound.

A. Respondents Seek Discovery That Would Confirm Or Deny Whether A CIA Detention Facility Existed In Poland

The essential premise of the Ninth Circuit's decision was that the state-secrets privilege does not cover certain purported "basic facts" involving Poland. Pet. App. 18a. Specifically, the Ninth Circuit held that the privilege does not extend to whether the CIA held Abu Zubaydah at an alleged "detention facility in Poland" or to "details of Abu Zubaydah's treatment there." *Id.* at 21a. Tellingly, respondents' lead argument in this Court does not try to defend that central holding. Instead, respondents assert (Br. 26-29) that their requested discovery could proceed without confirming or denying whether a CIA detention facility existed in Poland. That assertion strains credulity—which is precisely why the district court rejected it.

1. The subpoenas respondents served on Mitchell and Jessen (App., *infra*, 1a, 3a-14a) expressly and repeatedly demand discovery about a purported "detention facility in Stare Kiejkuty, Poland." *Id.* at 7a-8a, 13a-14a. As the district court explained, all but one of the subpoenas' 13 document requests "specifically reference Poland." Pet. App. 56a. And by their very na-

ture, *all* of respondents' requests necessarily seek evidence about Poland: Respondents themselves have consistently argued that discovery is warranted because Abu Zubaydah "filed a criminal complaint in Poland seeking to hold Polish officials accountable for their complicity in [his] unlawful detention and torture" at an alleged CIA facility "in Stare Kiejkuty, Poland"; that the resulting "Polish criminal investigation" is "examining whether Polish officials violated [Polish] law"; and that the discovery respondents seek from Mitchell and Jessen—who respondents contend have evidence about "crimes committed against Abu Zubaydah on Polish soil" in the "presence of Polish officials"—"would aid the Polish prosecutors in their understanding of Polish civilian and governmental complicity" in the operation of the alleged CIA detention facility in Poland. *Id.* at 113a-114a, 116a.

Given that context, respondents cannot plausibly maintain that discovery could avoid confirming or denying the existence of an alleged detention facility in Poland merely by avoiding express geographic references. Cf. Resp. Br. 28. As the district court explained in rejecting the same suggestion, "[a]llowing the matter to proceed with a code word, such as 'detention site blue,' to replace Poland seems disingenuous." Pet. App. 56a. After all, "the entire premise of the proceeding" is to seek evidence to aid "Polish prosecutorial efforts." *Id.* at 31a (dissent). Indeed, if the requested evidence were not relevant to those Polish proceedings, there would be no basis for allowing discovery. See *In re Schlich*, 893 F.3d 40, 52 (1st Cir. 2018) (Section 1782 applicant must show that discovery is "relevan[t]" to the foreign proceeding).

2. Respondents emphasize (Br. 7-10, 27-29) that Mitchell and Jessen have testified about the treatment of CIA detainees in other contexts. But that only underscores the problem: In those proceedings, the testimony did not reveal anything about the information the government seeks to protect here—the locations of former CIA detention facilities and the involvement of its foreign partners.

The *Salim* plaintiffs, for instance, asserted federal damages claims against the CIA contractors based on the contractors' own actions. See Cert. Reply Br. 6. Those claims hinged on the nature of plaintiffs' treatment in CIA custody; *where* that treatment occurred was irrelevant, and the *Salim* court properly protected that location information from discovery. *Ibid.* Similarly, when the contractors' testified about detainees' treatment in military-commission proceedings, the tribunal consistently and properly prohibited testimony that might identify the locations of CIA facilities.[1] Here, by contrast, respondents' requests are inescapably tied to Poland because they seek evidence for a Polish criminal investigation into alleged "Polish official complicity" in Abu Zubaydah's alleged detention in Poland. Pet. App. 114a.

3. Leveraging prior authorized disclosures of other information to compel discovery here would create perverse incentives and undermine transparency. The government has acknowledged—and has facilitated public

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[1] See, *e.g.*, 1/21/2020 Tr. at 30,164-30,166, 30,190, *United States* v. *Khalid Shaikh Mohammad* (Military Comm., Guantanamo Bay, Cuba), https://go.usa.gov/xMx35; 9/9/2019 Tr. at 24,842-24,843, *Mohammad*, *supra*, https://go.usa.gov/xMCtF; Appellate Ex. 013BBBB, at 5, 16, *Mohammad*, *supra* (July 6, 2015), https://go.usa.gov/xMCeV.

scrutiny of—the former use of enhanced interrogation techniques (EITs), which Senate Report No. 288, 113th Cong., 2d Sess. (2014) (*SSCI Report*), addresses at length. After extensive internal and inter-Branch discussions, the Executive Branch made "unprecedented efforts to enable the release of as much of the [*SSCI Report*] as possible," thereby enabling an important public debate while continuing to protect other information in light of the "enduring need to protect national security." Office of the Dir. of Nat'l Intelligence, *DNI Message to the Intelligence Community Workforce on the Release of the SSCI Report* (Dec. 9, 2014), https://go.usa.gov/xFhMX; see U.S. Br. 3, 5-6; Exec. Order No. 13,526, § 3.1(d), 3 C.F.R. 306 (2009 comp.) (50 U.S.C. 3161 note) (authorizing "discretion[ary]" declassification by the Executive Branch of properly classified information in "exceptional cases" if it determines that "the public interest in disclosure outweighs the damage to the national security that might reasonably be expected from disclosure"). In the wake of that public debate, Congress prohibited federal agencies like the CIA from using interrogation techniques not authorized by the Army Field Manual. 42 U.S.C. 2000dd-2; see U.S. Br. 19 n.2.

That prior release of information facilitated public examination of *the United States'* actions. But it did not vitiate the government's need to protect evidence confirming or denying whether *particular foreign countries* hosted the CIA's clandestine detention facilities. The presence of former CIA facilities in those countries remains properly classified and, as CIA Director Pompeo explained, cannot be confirmed or denied by Mitchell and Jessen without jeopardizing critical current and

future clandestine intelligence cooperation from those (and other) foreign partners. U.S. Br. 10-13, 38.

Compelling Mitchell and Jessen to produce the privileged evidence because of the government's prior declassification of other information would effectively penalize the government for its earlier declassification decision. In so doing, it would create "a strong disincentive [for the government] ever to provide its citizenry with [information] of any kind on sensitive topics." *Public Citizen* v. *Department of State*, 11 F.3d 198, 203 (D.C. Cir. 1993); cf. *National Sec. Archive* v. *CIA*, 752 F.3d 460, 464 (D.C. Cir. 2014) (Kavanaugh, J.).

B. The State-Secrets Privilege Bars Respondents' Discovery Request

Because respondents' discovery requests would inevitably confirm or deny whether a CIA detention facility existed in Poland and their allegations about Abu Zubaydah's treatment there, their case depends on the Ninth Circuit's holding that the state-secrets privilege does not cover that information. But that holding was badly flawed. As the CIA Director explained, a court order requiring CIA contractors to produce CIA location evidence would significantly undermine the United States' ability to provide our clandestine intelligence partners "an assurance of confidentiality that is as absolute as possible" and would significantly prejudice the government's "'compelling interest in protecting * * * the appearance of confidentiality so essential to the effective operation of our foreign intelligence service,'" *CIA* v. *Sims*, 471 U.S. 159, 175 (1985) (citation omitted). In matters of foreign intelligence, "[g]reat nations, like great men, should keep their word." *Id.* at 175 n.20 (citation omitted). The Ninth Circuit's decision flouts that fundamental principle.

1. The Ninth Circuit failed to afford appropriate deference to the CIA Director's national-security judgment

The Ninth Circuit's mistakes began with its failure to afford appropriate deference to the CIA Director's expert judgment about national-security harms. U.S. Br. 22-26. This Court has long emphasized the "high degree of deference" that should be afforded to such judgments. *United States* v. *Nixon*, 418 U.S. 683, 710-711 (1974); see U.S. Br. 22-25. And the need for deference is even greater here because respondents seek evidence to furnish to foreign prosecutors for use in a foreign criminal investigation probing alleged clandestine CIA intelligence activity abroad. Respondents offer no persuasive justification for the Ninth Circuit's contrary approach.

a. Respondents principally attack a strawman, asserting (Br. 41-44) that the government seeks "blind deference" to "entirely escape judicial oversight." That is not so. No one denies that a court presented with an assertion of the state-secrets privilege must "determine whether the circumstances are appropriate for the claim of privilege." *United States* v. *Reynolds*, 345 U.S. 1, 8 (1953). But the court must make that determination "without forcing a disclosure of the very thing the privilege is designed to protect" or substituting its judgment for the Executive Branch's on matters squarely within the Executive Branch's responsibility and expertise. *Ibid.*; see, *e.g.*, *Sims*, 471 U.S. at 170.

The problem here thus is not that the Ninth Circuit examined the claim of privilege; it is that the court did so without affording "any apparent deference" to the CIA Director's judgment on critical national-security matters. Pet. App. 93a (dissent from denial of rehearing en banc). Even respondents themselves ultimately do

not argue otherwise. To the contrary, they acknowledge (Br. 26) that the Ninth Circuit "declined to defer" to the CIA Director's judgment that compelling Mitchell and Jessen to confirm or deny the existence of a CIA facility in Poland would harm the national security.[2]

b. Respondents defend the Ninth Circuit's refusal to defer by asserting (Br. 43) that "there is no reason for deference on the antecedent question of whether a secret actually exists." But *Reynolds* demonstrates that there is no such "antecedent question." And even if there were, deference would still be warranted.

In *Reynolds*, this Court held that the state-secrets privilege applies if there is a "reasonable danger" that compelled disclosure would expose matters that, "in the interest of national security, should not be divulged." 345 U.S. at 10; cf. *Weinberger* v. *Catholic Action of Haw./Peace Educ. Project*, 454 U.S. 139, 146-147 (1981). That governing standard does not include a preliminary assessment by the court to decide whether it believes

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[2] Respondents err in asserting (Br. 45-46) that the government previously embraced the approach employed by the Ninth Circuit here. The brief on which respondents rely emphasized that "'utmost deference'" was required and that the court of appeals there had followed "established principles." U.S. Br. in Opp. at 13, 15, *Mohamed* v. *Jeppesen Dataplan, Inc.*, 563 U.S. 1002 (2010) (No. 10-778) (citation omitted), https://go.usa.gov/xM2S8. As that case illustrates, judicial use of the word "'skeptical'" is consistent with the understanding that "[a]ppropriate judicial oversight" can include "'very careful'" review of a privilege assertion while still providing "'utmost deference'" to Executive-Branch judgments. *Abilt* v. *CIA*, 848 F.3d 305, 312, 314 (4th Cir. 2017) (citations omitted). By contrast, the Ninth Circuit here applied an unprecedented form of review that the court itself deemed "contradictory" to its prior decisions that "'acknowledge[d] the need to defer to the Executive,'" Pet. App. 14a-15a, 17a n.14 (citation omitted). See U.S. Br. 25.

that the evidence a party seeks to compel is sufficiently "secret."

Under *Reynolds*, harm to national security remains the touchstone. Here, for example, the question is not whether the existence of a purported CIA detention facility in Poland or the details of Abu Zubaydah's alleged treatment there are "secret" in some abstract sense given public speculation on those matters. Instead, the question is whether compelling former CIA contractors to confirm or deny that speculation under oath could reasonably be expected to harm national security—by, for example, undermining the CIA's relationships with foreign partners who rely on the CIA's assurances of confidentiality. *That* question indisputably implicates "specialized executive-branch knowledge regarding national security" (Resp. Br. 26). The Ninth Circuit thus seriously erred in refusing to afford any meaningful deference to the CIA Director's judgment.

In any event, even if the question whether a matter is "secret" could somehow be separated from a judgment about the likely effect of its disclosure on national security, substantial deference would still be required. Determining whether a secret "exists" in the sense respondents apparently mean (Br. 43) would require a judgment about, *inter alia*, the broader intelligence landscape and the accuracy or inaccuracy of public speculation about clandestine CIA activities. Those matters lie squarely within the expertise of the CIA Director. And requiring the government to litigate such issues without deference would risk thwarting the state-secrets privilege by "forcing a disclosure of the very thing the privilege is designed to protect." *Reynolds*, 345 U.S. at 8.

c. Even greater deference is warranted here, where respondents seek sensitive evidence from former CIA

contractors for export to a foreign investigation into alleged clandestine CIA activities abroad. U.S. Br. 39-42. Respondents' efforts to resist that commonsense conclusion are unconvincing.

First, respondents assert (Br. 40-41) that "[t]he intended use of evidence is irrelevant to whether it is privileged." But *Reynolds* says otherwise. "In each case," this Court instructed, "the showing of necessity which is made will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate." 345 U.S. at 11.

Second, respondents argue (Br. 39-40) that they have made a strong showing of necessity. Respondents emphasize that Abu Zubaydah has procedural rights under Polish law and that his detention prevents him from participating in the Polish proceedings himself.[3] But respondents ignore entirely that *Reynolds*' discussion of necessity focused on litigants' need for evidence "to make out their case" in a *United States court* adjudicating rights conferred *by United States law*. *Reynolds*, 345 U.S. at 11. Respondents have no comparable need here. They present no substantive claims to a United States court and assert no substantive rights under United States law; instead they seek to use the federal courts "as a vehicle for obtaining information that will be sent to Poland, which has already tried but failed to obtain this information through diplomatic channels." Pet. App. 108a (dissent from denial of rehearing en

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[3] The continuing necessity of Abu Zubaydah's law-of-war detention is periodically reviewed; his habeas case is pending; and he communicates with his counsel for those proceedings. See Periodic Review Secretariat, U.S. Dep't of Def., *Subsequent Full Review*, https://go.usa.gov/xMxnZ; Cert. Reply Br. 5 n.*; Doc. 78, at 20-30, *Husayn* v. *Austin*, No. 1:08-cv-1360 (D.D.C. Jan. 9, 2009).

banc). Even if such a request were a proper use of 28 U.S.C. 1782, but see pp. 21-24, *infra*, it would at minimum be a far less weighty need than that shown by the domestic claims at issue in *Reynolds* and most other state-secrets cases.

Third, respondents mistakenly argue (Br. 40-41) that exporting evidence to a foreign tribunal beyond the control of the United States courts poses no heightened risks. In cases adjudicated in the United States, a domestic court can maintain control over the evidence with protective orders and *in camera* proceedings that allow it to consider national-security risks on an ongoing basis. With such continuing control, a court can change course and curtail proceedings if the litigation's evolution made those risks more apparent, and the United States could seek appellate review if such protective action was declined. By contrast, the role of United States courts in this Section 1782 proceeding would end once the evidence was exported overseas.

The national-security risks from that loss of control are manifest. As the Ninth Circuit itself candidly acknowledged, its decision would allow discovery of "context[ual]" information for the express purpose of allowing foreign prosecutors to "corroborate" matters such as the purported identities and roles of allegedly cooperating foreign intelligence personnel. Pet. App. 25a; see U.S. Br. 41-42. Even the Ninth Circuit recognized that those matters are state secrets and that compelling Mitchell and Jessen to confirm or deny them directly would have harmed national security. Pet. App. 25a. But having done so, the Ninth Circuit erred by facilitating the same harmful result indirectly, through the

overseas completion of a factual mosaic using evidentiary tiles extracted from former CIA contractors.[4]

2. Mitchell and Jessen's contractor status does not diminish the national-security harm from discovery

Despite the CIA Director's considered determination that significant national-security harm reasonably could be expected to result from "Mitchell or Jessen confirming or denying" whether a CIA detention facility was in Poland, Pet. App. 134a; see *id.* at 126a, 130a, the Ninth Circuit decided for itself that they could provide such evidence without producing such harm, *id.* at 18a. In so doing, the Ninth Circuit did not address the Director's judgment that official confirmation or denial of the matters at issue here would harm national security in a way that unofficial allegations never could. *Id.* at 17a n.15. Instead, the Ninth Circuit reasoned that, as former contractors, Mitchell and Jessen could not provide the sort of "official" confirmation or denial that would harm the CIA's foreign partnerships. Respondents repeat the Ninth Circuit's error, maintaining (Br. 36-39) that the contractors cannot "officially" confirm or deny anything and "would merely provide *unofficial* confirmation."

Courts have long recognized, however, that evidence from former officials and contractors is harmful in a way that entirely "unofficial" speculation by government outsiders is not. See U.S. Br. 26-31. "[P]articularly 'in the arena of intelligence and foreign relations,'

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[4] The government has previously explained that the suggestion that it improperly invoked the privilege in *Reynolds*, see Council of American-Islamic Relations Amici Br. 3-5, lacks merit. See U.S. Br. in Opp. at 13-17, *Herring* v. *United States*, 547 U.S. 1123 (2006) (No. 05-821), https://go.usa.gov/xMrcn.

a statement made by 'one in a position to know' is given unique meaning and weight." *Knight First Amdt. Inst.* v. *CIA*, No. 20-5045, 2021 WL 3821864, at *3 (D.C. Cir. Aug. 27, 2021) (quoting *Fitzgibbon* v. *CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990)).

Whereas a "stranger['s]" public reassertion of previously published material "lends no additional credence to it," a former insider's confirmation or denial of the accuracy of such material is "quite different" because, having obtained access to this information through prior government service, he would be "in a position to know of what he spoke." *Alfred A. Knopf, Inc.* v. *Colby*, 509 F.2d 1362, 1370 (4th Cir.), cert. denied, 421 U.S. 908, and 421 U.S. 992 (1975). Former government personnel like Mitchell and Jessen, "unlike strangers referring to earlier unattributed reports," are also "bound by formal agreements not to disclose [classified] information." *Ibid.* Compelling Mitchell and Jessen under oath to divulge information they obtained while performing official duties thus could, as Director Pompeo explained, reasonably be expected to significantly harm the national security. U.S. Br. 12-13.

Respondents correctly note (Br. 37) that unauthorized disclosures by former officials and contractors are not in every respect equivalent to an authorized official acknowledgement by a current official.[5] But like the Ninth Circuit's focus on whether Mitchell and Jessen

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[5] Such disclosures, for example, would not vitiate the government's ability later to withhold the same information under the Freedom of Information Act's national-security exception. *Mobley* v. *CIA*, 806 F.3d 568, 583 (D.C. Cir. 2015) (explaining that unofficial disclosures do not "waive" the government's ability to assert an "'otherwise valid'" basis for withholding) (citation omitted); see, *e.g.*, *New York Times* v. *CIA*, 965 F.3d 109, 115-116 (2d Cir. 2020).

are "agents of the government" for jurisdictional purposes, Pet. App. 18a, that misses the point. Under *Reynolds*, the dispositive question is whether compelled disclosure could jeopardize national security. 345 U.S. at 10. And neither the Ninth Circuit nor respondents have offered any sound reason to question the CIA Director's considered judgment that, under the circumstances here, confirmation or denial by Mitchell and Jessen would harm national security because it could be viewed by our partners abroad as tantamount to an official confirmation or denial from the CIA itself. Pet. App. 134a-135a; see *id.* at 102a-103a (dissent from denial of rehearing en banc). That by itself is sufficient reason to reverse the Ninth Circuit's decision.

3. Purported "public knowledge" does not undermine the national-security harm from discovery

Respondents argue at length (Br. 29-36) that Poland's purported role in the CIA's former detention and interrogation program is public knowledge. But that argument ignores the distinct and significant national-security harms that would result from an official confirmation or denial of Poland's alleged involvement. And even taken on its own terms, respondents' argument is deeply flawed on multiple levels.

a. As the government's brief explained (at 29-34 & n.4), courts have long "recognized that the fact that information resides in the public domain does not eliminate the possibility that further disclosures can cause [national-security] harm." *Fitzgibbon*, 911 F.2d at 766; cf. *Phillippi* v. *CIA*, 655 F.2d 1325, 1331 (D.C. Cir. 1981) ("There may be much left to hide, and if there is not, that itself may be worth hiding."). The state-secrets privilege accordingly applies in such contexts to protect against such harm. See, *e.g.*, *Halkin* v. *Helms*, 690 F.2d

977, 992-993 & nn.56-58 (D.C. Cir. 1982) (applying state-secrets privilege, notwithstanding "widespread public disclosures about the conduct of [CIA's] Operation CHAOS," which "relied upon the cooperation of foreign intelligence services," because discovery would indirectly disclose the role of "particular" governments and "'breach'" the "'understanding of confidentiality'" that is "'the *sine qua non* of liaison arrangements,'" posing a "self-evident" danger of national-security harm) (citation omitted).

The existence of media and other public reporting on clandestine intelligence matters generally does not undermine relevant national-security risks identified by the Executive Branch. U.S. Br. 30-31. Such reporting about clandestine activity necessarily depends on information conveyed or developed by (often unidentified) sources that may or may not be correct. The resulting speculation in the public sphere may accurately identify some aspects of a clandestine operation. But the speculation might also be inaccurate. Or it might have elements of truth while still missing the mark. Reports might, for instance, identify discrete actions as suggesting an intelligence operation while wrongly identifying the nature of that operation, or conflating it with other, distinct intelligence activities. The potential for such error is particularly acute when dealing with clandestine intelligence activities, which often employ tradecraft designed to mislead outside observers. *Id.* at 32, 34 n.5 (noting past errors in public speculation).[6]

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[6] See, *e.g.*, 1 CIA, *Official History of the Bay of Pigs Operation* 189-190, 200 (1979) (describing CIA's past deceptive use of identical tail numbers on multiple aircraft and false tail numbers copied from adversary's aircraft), https://go.usa.gov/xMCYq; Antonio J. Mendez, *A Classic Case of Deception*, Studies in Intelligence 1-3, 14-17,

b. This case illustrates the hazards of such speculation. Respondents have consistently asserted that the CIA used "so-called 'enhanced interrogation techniques' —torture"—against Abu Zubaydah while he was purportedly detained "in a black site in Stare Kiejkuty, Poland" "[f]rom December 2002 until September 2003." Pet. App. 112a-114a. Respondents therefore seek discovery to hold "Polish officials accountable for their complicity in [his] unlawful detention and torture." *Id.* at 114a; accord Resp. C.A. Br. 4-6, 18. And the Ninth Circuit confidently declared that it is a "basic fact" that Abu Zubaydah "was subjected to torture" in Poland. Pet. App. 19a.

But the *SSCI Report*'s comprehensive review—based on over six million pages of CIA records (*SSCI Report* 9)—contradicts that speculation. The report determined that those records show that "the use of the CIA's enhanced interrogation techniques [on Abu Zubaydah] ceased on August 30, 2002," many months before respondents assert he was transferred to Poland. *SSCI Report* 231 n.1316; see *id.* at 42-43, 45 & n.214 (citing August 2002 email sent "[a]fter the use of the CIA's [EITs] ended"); Office of the Inspector General, CIA, *Counterterrorism Detention and Interrogation Activities (September 2001-October 2003)*, at 84-85 (May 7, 2004), https://go.usa.gov/xMj6q; U.S. Br. 36.

The government, of course, cannot comment on any classified location information at issue in this case. And whether public speculation is accurate or inaccurate,

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24 (Winter 1999-2000 Unclassified Ed.) (online version) (discussing past CIA use of false or modified foreign-government documents as "fundamental deception tradecraft in clandestine operations"), https://go.usa.gov/xMb2r.

the government cannot confirm or deny public commentary about such matters without breaching the CIA's assurances of confidentiality to its foreign partners. That dilemma illustrates the fundamental problem with respondents' approach: Often, the government cannot respond to public speculation about classified matters without confirming or denying the very secrets it is trying to protect. Compelling such a confirmation or denial would improperly allow the extraction of national-security information from those in a position to know the actual facts based on public speculation—which could result from, for example, individuals unlawfully leaking (perhaps inaccurate) information; from hostile intelligence services disseminating (mis)information; or from media and other organizations attempting to identify and publicize the clandestine activities taken to protect the United States.

c. The Court thus need not and should not engage with respondents' effort to establish that the CIA operated a detention facility in Poland. But even taken on their own terms, respondents' arguments on that issue are seriously flawed.

First, respondents assert (Br. 34) that "the district court and the court of appeals found as a matter of fact that a black site existed in Poland" and that those purported "factual findings" are reviewable only for "clear error." Respondents have never previously made that argument, and with good reason: Neither court could have properly made a factual finding about the alleged existence of a CIA detention facility in Poland because that fact is what the government asserted the state-secrets privilege to prevent Mitchell and Jessen from being compelled to confirm or deny. And neither court purported to do so. Courts of appeals, of course, do not

make factual findings. And the district court merely noted respondents' "alleg[ation]" that Abu Zubaydah was detained in Poland and deemed the government's privilege assertion over evidence confirming or denying that allegation "[un]convincing" in light of the "widely reported" information on the subject. Pet. App. 36a, 52a-53a, 59a.

Second, no proceedings were held from which the district court might have made a factual finding about an alleged CIA detention facility in Poland. Indeed, the record in this case about respondents' allegation is sparse. The government attached to its motion to quash one news story (D. Ct. Doc. 30-8) and one Amnesty International report (D. Ct. Doc. 30-9) to illustrate the "public speculation about which foreign countries and intelligence services" assisted the CIA's former detention and interrogation program. C.A. E.R. 198 & n.6. Those documents were not submitted as proof that the speculation was correct. Respondents, in turn, proffered two news stories discussing the locations of CIA detention sites (C.A. E.R. 97-104) without attesting to the truth of the matters they assert (*id.* at 94). Indeed, respondents have provided no basis on which to assess the accuracy of the statements in those four documents, which also include speculation identifying by name at least six other countries as purportedly connected to the former clandestine CIA Program. See U.S. Br. 36-37.[7]

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[7] The CIA has informed this Office that, since this case has come to this Court, one or more foreign intelligence partners have expressed serious concerns about the U.S. Government confirming or denying whether the CIA operated a detention facility in their territory. The CIA continues to conclude that such confirmations or denials could reasonably be expected to harm its ongoing intelligence relationships.

In addition to those four documents, the government filed a copy of a European Court of Human Rights (ECHR) judgment to accompany its statement of interest and provide background for the origin of respondents' Section 1782 application, to describe Poland's filings before the ECHR, and describe the ECHR's decision against Poland. C.A. E.R. 380, 649-651. But nothing in that filing suggested that the United States agreed with or would be bound by the ECHR's purported factual findings. The ECHR is a tribunal created by a treaty to which the United States is not a party, and its judgment binds parties to the treaty only if they were also parties to the particular case.[8] Even if a federal court had issued a judgment identical to the ECHR's, no "'issue of fact'" resolved by that judgment would have preclusive effect on a private "person who was not a party to [the] suit," *Taylor* v. *Sturgell*, 553 U.S. 880, 892-893 (2008) (citation omitted); *id.* at 893-895 (inapplicable exceptions), much less the United States as a nonparty sovereign.

Third, respondents err in treating (Br. 30-33) the ECHR's factual discussion as authoritative. The ECHR's judgment was the product of a one-sided factual presentation, C.A. E.R. 548, and its relevant findings rest heavily on adverse inferences. U.S. Br. 35-36. Such litigation might suffice to support the resulting judgment against a party, but it cannot properly be accepted as a definitive resolution of factual matters here.

The ECHR's analysis reinforces that conclusion. The court relied on two European politicians and one

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[8] See Convention for the Protection of Human Rights and Fundamental Freedoms, arts. 19, 46, Nov. 4, 1950, 213 U.N.T.S. 221, as amended, https://www.echr.coe.int/Documents/Convention_ENG.pdf; cf. *Medellin* v. *Texas*, 552 U.S. 491, 520-523 (2008).

political advisor it deemed to be experts, C.A. E.R. 511, 521, 523, including Swedish Senator Dick Marty, who had prepared reports for the Council of Europe that, the ECHR explained, relied on unidentified individuals as anonymous "sources" and documentary materials like flight records, but did not obtain actual classified source materials. See, *e.g.*, *id.* at 477-479.

Based on that testimony (and adverse inferences), the ECHR concluded that actions, including false flight-plan filings, were taken to disguise flights by aircraft bearing particular tail numbers that landed in Poland and purportedly were used in the former CIA Program. C.A. E.R. 553, 559-560. The ECHR acknowledged that "no direct evidence" showed that Abu Zubaydah was transferred to Poland on one of those flights. *Id.* at 554. But it nevertheless concluded that he was transferred to Poland on such a flight (*id.* at 553-556) by "draw[ing] [adverse] inferences" from Poland's "lack of any explanation" and "refusal to disclose [necessary] documents" (*id.* at 556; see *id.* at 549-550) and because it deemed "[un]contest[ed]" and "unrebutted" (*id.* 548, 556) a circumstantial factual presentation comprised of material from Senator Marty's and his advisor's testimony, Senator Marty's 2007 report and similar reports, and flight and landing documents. *Id.* at 553 ¶ 407, 556 ¶ 414 (citing *id.* at 429, 481-482, 488-489, 501-505, 518-521). Such an assessment based on materials never submitted in this case does not "definitively establish[]" (Br. 30) anything beyond the fact that the ECHR made such findings, and it provides no proper basis for disregarding the Executive Branch's privilege assertion in this case.

C. Section 1782 Does Not Authorize Respondents' Extraordinary Discovery Request

The Ninth Circuit's erroneous rejection of the state-secrets privilege requires reversal. But if the Court prefers not to reach that issue, the government's opening brief also provides a straightforward independent ground for reversal: Section 1782 does not authorize respondents' extraordinary attempt to obtain evidence on sensitive national-security matters so that they can turn it over to Polish prosecutors investigating alleged CIA clandestine intelligence activities abroad. Respondents assert (Br. 47-54) that the Section 1782 issue is not properly presented and was correctly resolved below. They are wrong on both counts.

1. The question presented expressly encompasses two distinct issues: (1) the rejection of the government's privilege assertion "and" (2) the requirement that discovery "proceed further under 28 U.S.C. 1782(a)." Pet. I. The petition accordingly argued that reversal was warranted "quite aside from the state-secrets privilege," Pet. 29, on the "independent" ground that granting respondents' discovery request would exceed the permissible scope of Section 1782(a)'s "discretion[ary]" authority, Pet. 30-31 (discussing factors in *Intel Corp.* v. *Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004)). The Section 1782 issue is thus squarely before the Court. See Sup. Ct. R. 14.1(a).

The government also properly presented its Section 1782 argument below. The government raised that argument in its statement of interest. C.A. E.R. 653-663. Respondents identify no basis for concluding that the government needed to *reassert* the same contentions in its motion to quash. Nor do they explain their assertion that the government needed to appeal the district

court's preliminary order granting their Section 1782(a) application. The court later changed course and "dismiss[ed] the Application." Pet. App. 60a. Having raised its Section 1782(a) argument at the outset, the government was entitled to rely on that argument as an alternative ground for affirmance. See *Rivero* v. *City & Cnty. of S.F.*, 316 F.3d 857, 862 (9th Cir. 2002) (an appellee "may urge affirmance on any ground appearing in the record").

2. Respondents contend (Br. 50-54) that the district court permissibly exercised its discretion when it initially granted their Section 1782(a) application. But the district court emphasized that its initial assessment of those factors was preliminary because it would have been "premature" to consider the burden on the United States and other privilege-related matters before the government asserted the privilege. Pet. App. 68a. Now that the privilege has been asserted and the record further developed, a proper application of the *Intel* factors compels dismissal.

In arguing otherwise, respondents assert (Br. 50-51) that the district court did not err in ruling that the Polish Government was "receptiv[e]" to evidentiary assistance because, they argue, the United States did not inform the court that Poland's president had refused to release Poland's former president of his secrecy duty, which was necessary to allow the former president to submit information to Polish prosecutors. But the district court's more fundamental error—which respondents do not defend—was deciding the Polish Government's receptivity to assistance based only on the views of regional prosecutors. U.S. Br. 44.

Respondents also resist (Br. 51-52) the conclusion that their discovery request should be denied as a circumvention of the United States–Poland MLAT because, they contend, the MLAT does not govern private parties. That misses the point. Respondents sought discovery *at the invitation of Polish prosecutors* after the United States repeatedly denied the prosecutors' MLAT requests on national-security grounds. U.S. Br. 8-9, 45-56. Although the MLAT does not bind private parties, respondents' attempted use of Section 1782 to provide the Polish prosecutors with discovery from individuals whose knowledge derives from their official work for the United States is a transparent attempt to circumvent the policies embodied in the MLAT. *Id.* at 46. The conclusion that these circumstances required dismissal is reinforced by the government's protection of national security in its official denials of the MLAT requests in addition to its state-secrets-privilege assertion here.

Finally, respondents note (Br. 53) that the district court did not resolve whether discovery was unduly intrusive or burdensome. The government agrees. U.S. Br. 10. But that does not preclude the government from arguing undue intrusion and burden to defend the district court's judgment on review. Like the other relevant *Intel* factors, the resolution of that issue is particularly straightforward. *Id.* at 47-48. Discovery regarding the CIA's foreign-intelligence activities is unquestionably "intrusive." And the Ninth Circuit itself recognized that discovery would "no doubt impose[] a burden on the government," Pet. App. 26a, which would be compelled to monitor and police a discovery process pervaded by state secrets. Given the clarity of those issues, the Court may appropriately resolve them directly in

light of the extraordinary circumstances presented by respondents' discovery request.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

BRIAN H. FLETCHER
Acting Solicitor General

SEPTEMBER 2021

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

Case No. 2:17-cv-00171-JLQ

IN RE APPLICATION OF ZAYN AL-ABIDIN MUHAMMAD HUSAYN (ABU ZUBAYDAH) AND JOSEPH MARGULIES, PETITIONERS

Filed: Oct. 5, 2017

PROOF OF SERVICE OF SUBPOENAS

Pursuant to Rule 45 of the Federal Rules of Civil Procedure and the Court's September 7, 2017 order granting leave to serve subpoenas (ECF No. 23), I state as follows:

1. My name is John Chamberlain. I am counsel for Petitioners Abu Zubaydah and Joseph Margulies and am admitted *pro hac vice* in this matter.

2. On October 4, 2017, I served the subpoenas attached hereto upon Brian Paszamant, who is counsel for Respondents John "Bruce" Jessen and James Elmer Mitchell. Mr. Paszamant accepted service by electronic mail and waived personal service on behalf of Respondents. I served with the subpoenas a copy of the Court's September 7, 2017 order. Fees were tendered in the amount of $50.70 for each witness, representing the witnesses' fees for attendance and travel.

3. I have served a copy of this proof of service on the United States Department of Justice by filing it through the Court's ECF system, which will send notification to Andrew Irvin Warden, attorney for the United States.

4. I have served a copy of this proof of service on counsel for Respondents Mitchell and Jessen by serving it upon their counsel via electronic mail. Counsel for Respondents Mitchell and Jessen in advance agreed to accept service of this proof of service by electronic mail.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: Oct. 5, 2017

Respectfully submitted,

/s/JOHN CHAMBERLAIN
JOHN CHAMBERLAIN
john.chamberlain@pillsburylaw.com
PILLSBURY WINTHROP SHAW PITTMAN LLP
1200 Seventeenth Street, NW
Washington, DC 20036
(202) 663-8000

Jerry Moberg
jmoberg@jmlawps.com
JERRY MOBERG & ASSOCIATES
124 Third Avenue, SW
Ephrata, WA 98823
(509) 754-2356

AO 88A (Rev. 02/14) Subpoena to Testify at a Deposition in a Civil Action

UNITED STATES DISTRICT COURT

for the

Eastern District of Washington

Zayn al-Abidin Muhammad and Joseph Margulies
Plaintiff
v.

Defendant

Civil Action No. 2:17-cv-171-JLQ

SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To: John "Bruce" Jessen

(Name of person to whom this subpoena is directed)

☑ *Testimony:* **YOU ARE COMMANDED** to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action. If you are an organization, you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about the following matters, or those set forth in an attachment:

Place:	Date and Time:
Law Offices of Evans, Craven & Lackie, PS 818 West Riverside Avenue, Suite 250 Spokane, WA 92201	November 8, 2017 at 9:00 a m.

The deposition will be recorded by this method: Stenographically

☐ *Production:* You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and must permit inspection, copying, testing, or sampling of the material:

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 10/4/2017

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

/s/ David Klein
Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing *(name of party)* Messrs. Muhammad and Margulies, who issues or requests this subpoena, are:

Jerry Moberg; jmoberg@jmlawps.com; 509-754-2356

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

* * * * *

AO 88B (Rev. 02/14) Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Civil Action

UNITED STATES DISTRICT COURT

for the

Eastern District of Washington

Zayn al-Abidin Muhammad and Joseph Margulies
Plaintiff
v.

Defendant

Civil Action No. 2:17-cv-171-JLQ

SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS OR TO PERMIT INSPECTION OF PREMISES IN A CIVIL ACTION

To: John "Bruce" Jessen

(Name of person to whom this subpoena is directed)

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Law Offices of Evans, Craven & Lackie, PS 818 West Riverside Avenue, Suite 250 Spokane, WA 92201	November 8, 2017 at 9:00 a m.

☐ *Inspection of Premises:* **YOU ARE COMMANDED** to permit entry onto the designated premises, land, or other property possessed or controlled by you at the time, date, and location set forth below, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

Place:	Date and Time:

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Date: 10/4/2017

CLERK OF COURT

OR

/s/ David Klein

Signature of Clerk or Deputy Clerk *Attorney's signature*

The name, address, e-mail address, and telephone number of the attorney representing *(name of party)* Messrs. Muhammad and Margulies, who issues or requests this subpoena, are:

Jerry Moberg; jmoberg@jmlawps.com; 509-754-2356

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* * * * *

INSTRUCTIONS: SUBPOENA TO PRODUCE DOCUMENTS

The following instructions shall govern your response and production of documents:

1. Respondent shall furnish all requested documents in Respondent's possession, care, custody, or control at the time of production.

2. In answering each discovery request, Respondent shall make a diligent search of Respondent's records and other papers and materials in Respondent's possession, custody, or control.

3. If any document requested existed at one time, but is no longer in your possession, custody or control or no longer exists, for each such document: (a) identify the document, including, without limitation, the following information: author(s); addressee(s); indicated or blind copy recipient(s); date; and subject matter; (b) provide a summary of the document's contents; (c) state whether it is missing or lost, was destroyed, was transferred voluntarily or involuntarily to others, or was otherwise disposed of; and (d) provide all available information concerning the circumstances of such disposition, including date of disposal; reason for disposal; person authorizing the disposal; the person disposing of the document; and the last known location of the document.

4. In the event that any document called for by this document request is withheld on the basis of a claim of privilege, that document is to be identified in a privilege log as follows: author(s); addressee(s); indicated or blind copy recipient(s); date; subject matter; number of pages; attachments or appendices; all persons to whom distributed, shown, or explained; the present custodian(s); the

nature of the privilege asserted; and the circumstances that give rise to the privilege.

5. In the event that any information is redacted from a document produced pursuant to this document request, that information is to be identified and the basis upon which such information is redacted should be fully stated.

6. In the event that multiple copies or versions of a document exist, produce all non-identical copies of the document, including any and all drafts of the document.

7. All documents existing in electronic form shall be produced in electronic form in a manner to preserve, without alteration or modification, all meta-data associated with the electronic document, including without limitation extracted text.

8. Documents not otherwise responsive to this request shall be produced if such documents concern or are attached to documents that are called for by these requests, including but not limited to routing slips, transmittal memoranda, and cover letters.

9. At the time and place of production of the documents requested herein, the documents requested are to be produced in the same order as maintained in the ordinary course of business.

10. For each document produced, identify the specific document request category to which it is responsive.

11. All documents shall be produced in the file folder, envelope or other container in which the documents were kept or maintained. If for any reason the container cannot be produced, copies of all labels or other identifying marks shall be produced.

12. As used herein, the singular form of a word shall be interpreted to include the plural form and the plural form shall be interpreted to include the singular whenever appropriate in order to bring within the scope of this request any documents which might otherwise be considered to be beyond its scope.

13. Except as otherwise specified, the relevant time period for these requests is from January 2001 through December 2005, and shall include all documents that relate in whole or in part to such period, or to events or circumstances during such period, even though dated, prepared, generated, used or received prior to or subsequent to that period.

SCHEDULE OF DOCUMENTS TO BE PRODUCED

1. All documents, memoranda and correspondence concerning the establishment of the detention facility in Stare Kiejkuty, Poland.

2. All documents, memoranda and correspondence concerning the operation, purpose, and use of the detention facility in Stare Kiejkuty, Poland.

3. All documents, memoranda and correspondence concerning the identity of (present or former) Polish officials involved in the establishment or operation of the detention facility in Stare Kiejkuty, Poland.

4. All documents, memoranda and correspondence generated by (present or former) Polish officials between 2001 and 2005.

5. All documents, memoranda and correspondence generated by Respondent between 2001 and 2005 concerning the detention facility in Stare Kiejkuty, Poland.

6. All documents, memoranda and correspondence generated by Respondent when in Poland, between 2001 and 2005, concerning the detention facility in Stare Kiejkuty, Poland.

7. All documents, memoranda and correspondence concerning Petitioner Abu Zubaydah.

8. All documents, memoranda and correspondence between Polish officials and U.S. personnel concerning the detention facility at Stare Kiejkuty, Poland.

9. All documents, memoranda and correspondence concerning the detention facility at Stare Kiejkuty's access to Polish amenities such as water and electricity.

10. All documents, memoranda and correspondence concerning the use of interrogation techniques, conditions of confinement, and torture of those being held in Stare Kiejkuty, Poland.

11. All documents, memoranda and correspondence concerning any contracts made between Polish government officials or private persons residing in Poland and U.S. personnel for the use of the property upon which the detention facility at Stare Kiejkuty sat.

12. All documents, memoranda and correspondence concerning any exchange of money between Polish officials and those operating the detention facility in Stare Kiejkuty, Poland.

13. All documents, memoranda and correspondence concerning flights in and out of Stare Kiejkuty, Poland between 2001 and 2005.

AO 88A (Rev. 02/14) Subpoena to Testify at a Deposition in a Civil Action

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for the

Eastern District of Washington

Zayn al-Abidin Muhammad and Joseph Margulies
Plaintiff
v.

Defendant

Civil Action No. 2:17-cv-171-JLQ

SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To: James Elmer Mitchell

(Name of person to whom this subpoena is directed)

☑ *Testimony:* **YOU ARE COMMANDED** to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action. If you are an organization, you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about the following matters, or those set forth in an attachment:

Place:	Date and Time:
Law Offices of Burr & Forman, LLP 201 North Franklin Street, Suite 3200 Tampa, FL 33602	November 1, 2017, 9:00 a m.

The deposition will be recorded by this method: Stenographically

☐ *Production:* You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and must permit inspection, copying, testing, or sampling of the material:

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Date: October 4, 2017

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

/s/ David Klein
Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing *(name of party)* Messrs. Muhammad and Margulies, who issues or requests this subpoena, are:

Jerry Moberg; jmoberg@jmlawps.com; 509-754-2356

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* * * * *

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for the

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Zayn al-Abidin Muhammad and Joseph Margulies
Plaintiff
v.

Defendant

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