No. 20-827

In The
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

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

Respondents.

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

BRIEF OF EVIDENCE LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

TIMOTHY K. FORD
Counsel of Record
MACDONALD, HOAGUE,
& BAYLESS
1500 Hoge Building
705 Second Avenue
Seattle, WA 98104
(206) 622-1604
timf@mhb.com

Counsel for Amici Curiae

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

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INTEREST OF *AMICI CURIAE*

Amici curiae teach, research, and write about the law of evidence.[1] *Amici* share the view that the United States Court of Appeals for the Ninth Circuit correctly remanded this case to the District Court for an *in camera* review of the Executive's claim of the state secrets privilege.

In alphabetical order, *amici* are the following evidence law professors:[2]

Ronald J. Allen, John Henry Wigmore Professor of Law, Northwestern University, Pritzker School of Law

Richard D. Friedman, Alene and Allan F. Smith Professor of Law, University of Michigan Law School

Kenneth W. Graham, Jr., Professor of Law Emeritus, UCLA School of Law

Colin Miller, Associate Dean and Professor, University of South Carolina School of Law

Jane Moriarty, Carol Los Mansmann Chair and Professor, Duquesne University School of Law

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[1] No counsel for any party authored this brief in whole or in part, and no one other than *amici curiae* or their counsel contributed money to fund the preparation or submission of this brief. Pursuant to this Court's Rule 37.3. all parties have separately consented to the filing of this brief.

[2] Institutional affiliations are provided for identification purposes only. This brief does not purport to present the institutional views, if any, of the named law schools.

Ann Murphy, Professor, Gonzaga University School of Law

Alex Nunn, Assistant Professor, University of Arkansas School of Law

Roger Park, Distinguished Professor of Law and James Edgar Hervey Chair in Litigation

Paul F. Rothstein, Carmack Waterhouse Professor of Law, Georgetown Law

Rebecca Wexler, Assistant Professor, Berkeley Law

SUMMARY OF ARGUMENT

The concept of "state secrets" is an evidentiary privilege. It is occasionally confused with other doctrines. Privileges are to be strictly construed and narrowly interpreted because they impede the search for truth. The state secrets privilege should not operate as a monarchal "Crown Privilege." When courts are confronted with state secrets claims, in camera review is necessary. Many factors should be considered when weighing government claims of state secrets privileges including the passage of time and the determination that secrets are already known. Only when there are no other remedies possible should cases be dismissed based on the state secrets privilege.

ARGUMENT

Privileges are to be strictly construed because they impede the search for truth. *Trammel v. United States*, 445 U.S. 40, 50-51 (1980). As Dean Wigmore observed, the public has a right to "every man's evidence." 3 John Henry Wigmore, *A Treatise on the System of Evidence in Trials at Common Law* § 2192, at 2968 (1904). Professor Edward Cleary testified at a House Subcommittee meeting on privileges that they "often operate[d] as 'blockades' to the quest for truth." Edward J. Imwinkelreid, *The New Wigmore: A Treatise on Evidence* § 4.2.1(b). As Justice Brandeis wrote, "sunlight is said to be the best of disinfectants." Louis D. Brandeis, *Other People's Money and How the Bankers Use It*, Chapter V, What Publicity Can Do, Frederick A. Stokes Co., 1913 (referring to James Bryce (1st Viscount Bryce), *The American Commonwealth*, Vol. 2, Chapter LXXXVII, The Macmillan Co., 1896, p. 355).

I. THE JUDICIARY SHOULD EXERCISE REVIEW OF THE EXECUTIVE STATE SECRETS CLAIMS TO AVOID THE EQUIVALENT OF THE ABSOLUTE CROWN PRIVILEGE

A. THE CROWN PRIVILEGE OPERATED AS AN ABSOLUTE EXCLUSION OF INFORMATION IN GREAT BRITAIN UNTIL 1968

Written evidence laws in the United States may be traced back to the year 1789. Charles Alan Wright, Kenneth W. Graham, Jr., and Ann M. Murphy, *Federal*

Practice and Procedure § 5001 (1977), at p. 504 (Wright, Graham, and Murphy). Our federal courts initially looked to English law when making evidentiary rulings in our country's early years. The English law was cited in the foundational case interpreting our state secrets privilege and is instructive here. See: *U.S. v. Reynolds*, 345 U.S. 1, 7 (1953). At that time, the English system was one of official secrecy with no exceptions. Wright, Graham, and Murphy, at § 5661, p. 452. This flowed from the belief that the King could do no wrong. Nevertheless, parties could proceed without the evidence, on the merits. *H.M.S. Bellerophon* (1875) 44 LJR 5, 6-7.

The "Crown Privilege" existed in England since at least the 18th century. Russell L. Weaver & James T.R. Jones*, The Deliberative Process Privilege*, 54 Mo. L. Rev. 279, 309 (1989). It refers to the protection afforded military reports and other papers of the English monarchy. At common law, the Crown could refuse to produce documents, and it was absolute and binding on the courts of England (until 1968). *Conway v. Rimmer*, [1968] A.C. 910. The exclusion of evidence was mandatory. Edward Koroway, *Confidentiality in the Law of Evidence*, Osgood Hall Law Journal 16.2 (1978). In *Beatson v. Skene*, the Courts of Exchequer and Exchequer Chamber held that the question of production of documents must be determined "not by the judge but by the head of the department having the custody of the paper." 157 E.R. 1415 (1860). The case was decided during the Second Opium War waged by the British and the French Empires against the Qing Dynasty. A

court presumably will be much more concerned with state secrets during an active war.

The *Beatson* holding was reiterated in a case decided during World War II. The House of Lords' Viscount Simon declared that the Admiralty Minister's determination on state secrets was conclusive. *Duncan v. Cammell, Laird & Co., Ltd*., [1942] A.C. 624. Disclosure was denied even to members of the Judiciary. Mauro Cappelletti and C.J. Golden, Jr., *Crown Privilege and Executive Privilege: A British Response to an American Controversy*, 25 Stan. L. Rev. 836, 840 (1973). The English law as it existed in 1953 partially formed the basis of the *Reynolds* case discussed below. *Reynolds*, at 7.

In 1968, the House of Lords overruled the line of English decisions that gave the Crown the unimpeded right to withhold documents. *Conway v. Rimmer.* Comparative law expert Professor Mauro Cappelletti found the reasoning in *Conway* to be like that of District Court Judge Sirica in his Nixon subpoena case Order. Cappelletti & Golden, at 836, citing to *In re Subpoena to Nixon*, 360 F. Supp. 1 (D.D.C. 1973) (*Subpoena to Nixon*); "Mauro Cappelletti (1927-2004) was one of the giants of 20th Century comparative law," See: NYU Law, at: https://www.law.nyu.edu/global/globalvisitorsprogram/globalresearchfellows/maurocappellettiglobalfellowincomparativelaw. The Lords held that finding a Minister's privilege claim conclusive was at odds with the prevailing wisdom of most common law countries, including the United States. The Lords announced that

judges must have the final decision, and Lord Upjohn stated the following:

> the claim of privilege by the Crown, while entitled to the greatest weight, is only a claim and the decision whether the court should accede to the claim lies within the discretion of the judge: and it is a real discretion. *Conway*, at 922.

In his concurring opinion, Lord Morris stated that one of the main court functions is to weigh competing interests, and due to its independence, courts are in a better position to weigh the public interest with the needs of a particular government department. *Conway*, at 956-57.

B. IN *U.S. v. REYNOLDS*, THIS COURT CITED TO THE ENGLISH *DUNCAN v. CAMMELL, LAIRD & CO., LTD.* CASE BUT DETERMINED THAT A "SOUND FORMULA OF COMPROMISE" WAS NEEDED IN STATE SECRETS CASES

The Founding Fathers were opposed to government secrets. Historian Henry Steele Commager stated the following:

> The generation that made the nation thought secrecy in government one of the instruments of Old-World tyranny and committed itself to the principle that a democracy cannot function unless the people are permitted to know what their government is up to.

Dorsen & Gillers, *None of Your Business*: *Government Secrecy in America*, at vi, Viking Press 1974.

The Former Attorney General and Chairman of the Committee on Federal Rules of Civil Procedure, William D. Mitchell, stated that "[i]t ought not to be necessary to resort to discovery against the Government * * * [for] the Government litigates with its citizens and ought to be frank and fair and disclose all the facts." William D. Mitchell, Federal Rules of Civil Procedure, Proceedings at the Institute at Washington, D.C. October 6-8, 1938. Despite these beliefs, the government has claimed the state secrets privilege frequently, and its use has grown significantly. See: William G. Weaver & Robert M. Pallitto, *State Secrets and Executive Power*, 120 Pol. Sci. Q. 85, 101 (2005).

The state secrets privilege has been recognized in the United States to some degree since the Aaron Burr trial. *United States v. Burr*, 25 F.Cas. 30, 37 (C.C.D. Va. 1807). It was rarely invoked prior to World War II. *Ellsberg v. Mitchell*, 709 F.2d 51, 56 (D.C. Cir. 1983). The state secrets privilege is separate and distinct from the executive privilege, which applies only to communications. *In re Sealed Case* (Espy), 121 F.3d 729 (D.C. Cir. 1997). Occasionally, courts conflate the "bundle of components" that are under the broad umbrella of privileges of the Executive. Norman L. Eisen and Andrew M. Wright, *Evidentiary Privileges Can Do Little to Block Trump-Related Investigations*, American Constitution Society and Citizens for Responsibility and Ethics in Washington, June 2018, and Ann M. Murphy, *All the President's Privileges*, 27 J.L. & Pol'y 1 (2018).

Indeed, the state secrets privilege is different from several other doctrines affecting the Executive. Wright, Graham, and Murphy, at § 5662, pp. 492-500. The privilege is very narrow, and the Executive's categorization of "top secret," "secret," or "confidential" is not binding on the Judiciary. *McGehee v. Casey*, 718 F.2d 1137, 1149 (D.C. Cir. 1983).

United States v. Reynolds, decided in 1953 at the height of the Korean War, is the leading case interpreting the law of state secrets. *U.S. v. Reynolds*, 345 U.S. 1 (1953). When a nation is at war, one would expect great deference to the decisions of the Executive. In *Reynolds*, widows of civilian passengers killed in a military B-29 plane crash sued the government under the Federal Tort Claims Act. In their lawsuit, they requested the production of the Air Force's official accident report. The government resisted providing it and claimed the privilege under Air Force regulations. After the District Court rejected that claim and sustained the families' motion for production of the report, it reheard the case. On rehearing, the District Court considered a new letter provided by the Secretary of the Air Force and decided the case based on an official claim of the state secrets privilege. Both the District Court on rehearing and the Third Circuit Court of Appeals ordered production of the report. This Court reversed and remanded the case because it found the report privileged. It noted that it was a time of "vigorous preparation for national defense" and sustained the government's claim. *Reynolds*, at 10.

This Court articulated that it disagreed with the "broad propositions" advocated by both the government and the plaintiffs in *Reynolds*. The government urged full exclusion without judicial review. The plaintiffs claimed the government waived the state secrets privilege by the Tort Claims Act itself. This Court instead found a "narrower ground" for decision. It noted that judicial experience with the state secrets privilege in the United States was limited and looked to the English practice. *Reynolds*, at 7. Ultimately, this Court settled on analyzing the state secrets privilege with the "analogous privilege" against self-incrimination. It was an unusual choice as the two are very different. This Court focused on the proposition that in both situations, disclosure could reveal the very thing the privileges were designed to protect. *Reynolds*, at 8.

This Court decided against the full English Crown privilege imposed by the British Court in *Duncan* and made a key determination that some type of compromise was needed. Accordingly, a balance between the need for the material and the danger resulting from such a disclosure was imperative. *Reynolds*, at 10-11. Regrettably, the opinion is somewhat confusing, because the Court also indicated that under certain circumstances no such balancing should take place. On the one hand, this Court stated that "judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." On the other hand, it proclaimed that "the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge

alone, in chambers." *Reynolds*, at 10. Notably, the Court found that the plaintiffs failed to pursue the alternative offered by the government to produce surviving crew members without cost for examination. *Reynolds*, at 11. The Court specifically found that the plaintiffs made a "dubious showing of necessity." *Id*.

Due to the somewhat confusing language of *Reynolds*, courts are reluctant to adequately review claims of state secrets. Courts are "profoundly deferential to executive invocations." Faaris Akremi, *Does Justice "Need to Know"?: Judging Classified State Secrets in the Face of Executive Obstruction*, 70 Stan. L. Rev. 973, 990 (2018). The Court recognized both sides of the issue in *Reynolds*, but the result since that landmark case is that courts "more frequently avoid ruling on state secrets assertions." Daniel R. Cassman, *Keep it Secret, Keep it Safe: An Empirical Analysis of the State Secrets Doctrine*, 67 Stan. L. Rev. 1173 (2015). The balancing called for in *Reynolds* has not in fact occurred. Instead of the confusing balancing test in *Reynolds*, this Court should transfer the finding of the *U.S. v. Nixon* case to state secrets privilege cases and rely on a similar presumption. *U.S. v. Nixon*, 418 U.S. 683, 713 (1974) (*Nixon*).

C. THIS COURT SHOULD IMPOSE A PRESUMPTION LIKE THAT IN *U.S. v. NIXON* TO ENSURE THAT COURTS DO NOT COMPLETELY DEFER TO THE CLAIMS OF THE EXECUTIVE ON THE STATE SECRETS PRIVILEGE

The *Reynolds* balancing test, though theoretically sound, is unworkable in practice. Courts have largely acquiesced in state secrets privilege cases. *Report of the Committee on the Judiciary Report to Accompany S. 2533*, The State Secrets Protection Act, citing to Robert M. Chesney, *State Secrets, and the Limits of National Security Litigation*, 75 Geo. Wash. L. Rev. 1249 (2007). Professor Chesney found that since the early 1970s, cases alleging government misconduct have "frequently been the occasion for abrupt dismissal of lawsuits." *Id*. In particular, criminal defendants have difficulty overcoming state secret privilege assertions by the government. Cassman, at 1203. Without judicial inquiry, the state secrets privilege "has proven a successful defensive litigation tactic." Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 Admin. L. Rev. 131, 135 (2006). This is exactly the problem outlined in *Nixon*. Courts must act as a bulwark against overzealous use of the state secrets privilege to ensure the rule of law. Extreme deference to the Executive is no judicial review at all. An absolute state secrets privilege encourages government abuse. Nicole Hallett, *Protecting National Security or Covering Up Malfeasance: The*

Modern State Secrets Privilege and its Alternatives, 117 Yale L.J. Pocket Part 82 (2007).

There has been a "drastic increase" in the government's use of the state secrets privilege since 9/11. Akremi, at 977. The Public Interest Declassification Board, which was established by Congress in 2004, found there is "widespread, bipartisan recognition that the Government classifies too much information for too long, at great and unnecessary cost to taxpayers." *A Vision for the Digital Age: Modernization of the U.S. National Security Classification System*, sent to then-President Trump on May 26, 2020, and available at: https://www.archives.gov/files/declassification/pidb/recommendations/pidb-vision-for-digital-age-may-2020.pdf, Intelligence Reform & Terrorism Prevention Act of 2004, Pub. L. 108-458, 118 Stat. 3640.

The number of classified documents has also skyrocketed. Fuchs, at 133. Courts are not bound by the classification system. *McGehee*, at 1149 (D.C. Cir. 1983). The classification itself may form the basis of the government's claim of the privilege, as it has in this case, but courts "must assure themselves that the reasons for classification are rational and plausible ones." *Id*. The government has used the state secrets privilege to dismiss cases over the extraordinary rendition program. Benjamin Bernstein, *Over Before it Even Began:* Mohamed v. Jeppesen Dataplan *and the Use of the State Secrets Privilege in Extraordinary Rendition Cases*, 34 Fordham Int'l L.J. 1400 (2011). An outright dismissal of a case is a draconian result. *In re United States*, 872 F.2d 472, 477 (D.C. Cir. 1989). Dismissal

deprives parties of justice; it should happen only as a last resort.

If the privilege is to have any meaning at all, the judicial branch must play a role. Courts are the final arbiter of the admission of evidence in every trial. In the *Reynolds* case, this Court provided for that role ("some like formula of compromise"). In practice, that inquiry is almost never performed. This leads to over-protection of information and impedes the search for truth. Courts must perform this compromise review. The balancing approach is "faithful to the formula of compromise" imposed by this Court in *Reynolds*. *Heine v. Raus*, 399 F.2d 785, 788 (4th Cir. 1968). Courts must review claims of privilege to determine whether the government's claim is valid. *Molerio v. F.B.I.*, 749 F.2d 815, 825 (D.C. Cir. 1984) ("we have satisfied ourselves as to the reason for the Bureau's failure to hire Molerio").

Remarkably, the *Reynolds* case itself proves the need for better judicial review. Had the District Court performed an in camera review, it would have discovered that the state secrets privilege was improperly asserted. Wright, Graham, and Murphy, at § 5663, pp. 134-35 (2021 supplement). Fifty years after *Reynolds*, the daughter of one of the engineers who died in the accident (Ms. Loether) checked on the internet to see whether she could discover any facts about her father's death. *Id*. She learned that the accident report had since been declassified and turned over to a private company (Accident-Report.com). Louis Fisher, *The State Secrets Privilege: Relying on* Reynolds, Political

Science Quarterly, Vol. 122, No. 3 (2007). She paid $63 for the report and found that there were no electronic secrets mentioned in it at all. When she attempted to undo the wrong, and her lawyers sought a Writ of Error from this Court, she was denied relief. Petition for a Writ of Error *Coram Nobis* to Remedy Fraud Upon This Court, Denied, *In re Herring*, 539 U.S. 940 (2003). Ms. Loether, another heir, as well as the sole remaining widow from *Reynolds* filed another action in the U.S. District Court for the Eastern District of Pennsylvania to set aside the 50-year-old settlement agreement reached between the parties. The Third Circuit Court of Appeals determined on review that the families did not prove perjury, which was required to set aside the agreement. *Herring v. U.S.*, 424 F.3d 384, 392 (2005), cert. den. 547 U.S. 1123 (2006). The original accident report is available at: https://fas.org/sgp/othergov/reynoldspetapp.pdf, pp. 10a-68a. Had the documents been made available to the District Court, it would have discovered "nothing that related to military secrets or confidential equipment." Fisher, at 396. On the other hand, it would have seen the numerous Air Force-documented mistakes made by the crew and equipment errors, most notably the absence of a heat shield.

Courts are quite capable of conducting in camera reviews without revealing secrets. They do so daily. Indeed, judges have been trusted with parsing through valuable company data (trade secrets) and personal medical information (psychotherapist privilege). The need for the protection of defense secrets is strong, but

judges are well suited to inquire into the bona fides of a privilege claim. Actual meaningful review is essential. The executive branch has a bias towards secrecy. The judicial branch has the independence to properly weigh the need for secrecy against the right of the people to know what their government is doing. In camera review is critical. In the absence of meaningful review, every case could potentially be dismissed. *In re Sealed Case*, 494 F.3d 139, 150 (D.C. Cir. 2007).

Judges have proved their ability to protect classified defense information throughout the course of Guantánamo habeas litigation by strictly enforcing rules that seek to "strike a careful balance between protecting classified information and ensuring that petitioners have enough information to challenge their detention." Rules provide for the use of protective orders and *in camera* review. See: *In re Guantanamo Bay Detainee Litigation*, U.S. District Judge Hogan, Case Management Order, Misc. No. 08-0442 (TFH), filed Nov. 6, 2008, and available at: https://www.scotusblog.com/wp-content/uploads/2008/11/hogan-case-mng-order-11-6-08.pdf; discussed in *Habeas Works: Federal Courts' Proven Capacity to Handle Guantánamo Cases*, 17-18 (Human Rights First, 2010). Court personnel with security clearances may be called upon to assist. *Halpern v. U.S.*, 258 F.2d 36, 43 (2d Cir. 1958).

Instead of a wholesale acceptance of a state secrets claim, a court must be allowed to disentangle privileged information from nonprivileged information, as the Ninth Circuit ordered in this case. The state secrets privilege "may not be used to shield any

material not strictly necessary to prevent injury to national security." *Ellsberg*, at 57. A court must "disentangle" sensitive from non-sensitive information whenever possible. *Id.* In the case of intermingling, privileged portions may be excised. *Subpoena to Nixon*, at 14. "Nothing so diminishes democracy as secrecy." United States Attorney General Ramsey Clark, in his forward remarks to the government publication, Attorney General's Memorandum on the Public Information Section of the Administrative Procedures Act, June, 1967.

The *Nixon* case did not involve the state secrets privilege but concerned the executive privilege. *Nixon*, at 686; and *Constitutional Law. Executive Privilege. D. C. Circuit Defines Scope of Presidential Communications Privilege*. In Re Sealed Case, 116 F.3d 550 (D. C. Cir. 1997), Harvard Law Review, vol. 111, no. 3, 1998, pp. 861-66. This Court cited to the *Reynolds* state secrets privilege case in its reasoning in *Nixon* and determined that Presidential communications are presumptively privileged but "must be considered in light of our historic commitment to the rule of law." *Id.*, at 708-09. However, the two privileges are distinct. The executive privilege protects communications, in keeping with all the other federally recognized privileges such as the attorney-client privilege and spousal privileges. On the other hand, the state secrets privilege is broader. It may be invoked for both communications and other evidence. Nevertheless, the privileges both exist to ensure that the executive branch may properly perform its functions.

There are of course extreme situations when the sensitivity of secrets is so high that special security measures are critical, for example when the Manhattan Project was underway. However, there are a range of special security measures that could be taken in certain highly sensitive cases. See, for example the Rules of Procedure for the Foreign Intelligence Surveillance Court (50 U.S.C. § 1803(g)) and The Classified Information Procedures Act (Title 18, U.S.C. App. III). The Federal Judicial Center published a guide for judges faced with sensitive information cases. Robert Timothy Reagan, *Keeping Government Secrets: A Pocket Guide for Judges on the State-Secrets Privilege, the Classified Information Procedures Act, and Court Security Officers*, Federal Judicial Center, available at: https://fas.org/sgp/jud/judges.pdf, and second edition published in 2017.

Much of the language and reasoning of the *Nixon* case can and should be applied to the state secret privilege. In practice, there has been a lack of meaningful court review of the executive branch claims. No ulterior motive need be ascribed to the government's use of it. The question is whether it should be as strong as the Crown privilege, or whether the courts should use what was called for in *Reynolds*, a formula of compromise, which courts have declined to use to date. If the *Nixon* analysis is used, courts will balance the interests of both the government and the public. The *Nixon* presumption works to protect executive decisions and should be applied to both privileges. The courts need to play their part. As Dean Wigmore stated, "[B]oth

principle and policy demand that the determination of the privilege shall be for the Court." Wigmore, *Evidence in Trials at Common Law*, §2379. The proper functioning of our government needs each branch to perform its individual function, and courts control trials.

II. COURTS MUST BE ALLOWED TO WEIGH CERTAIN FACTORS WHEN REVIEWING EXECUTIVE CLAIMS OF THE STATE SECRETS PRIVILEGE

A. THE PASSAGE OF TIME SHOULD BE A FACTOR COURTS USE IN WEIGHING CLAIMS OF THE STATE SECRETS PRIVILEGE

The case at bar illustrates a prime example of this need for courts to consider the passage of time. The passage of time has a "profound effect" on the need for secrecy. *U.S. v. Ahmad*, 499 F.2d 851, 855 (3d Cir. 1974). The information sought here is at least 18 years old. Time should be a factor for consideration. For example, the Korean conflict has never formally ended. The Korean War Armistice Agreement was signed in Panmunjom on July 27, 1953. See: https://www.usfk.mil/Portals/105/Documents/SOFA/G_Armistice_Agreement.pdf. Only hostilities have ceased, but the conflict continues. Should documents connected with a 68-year-old war be privileged? Common sense too should play a part when reviewing claims of state secrets privilege. We are in the age of "forever wars," as demonstrated by President Biden's recent use of this term to describe

the former war in Afghanistan. President Biden, speech in the Treaty Room on April 14, 2021. Courts do not currently consider the length of time that has passed since the origin of a secret, but they should. Wars in the past had a start date and an end date. This is no longer always the case. Consideration of a state secrets claim is made as of the date the privilege is claimed. Some recognition of the age of the information sought should be made. Certainly no one would expect a court to protect secrets of the Civil War if a claim of privilege were made today.

The passage of time formed the basis of the Automatic Declassification Program. Executive Order 13526, which, as amended, provides the following:

> Our democratic principles require that the American people be informed of the activities of their Government. Also, our Nation's progress depends on the free flow of information both within the Government and to the American people. Nevertheless, throughout our history, the national defense has required that certain information be maintained in confidence to protect our citizens, our democratic institutions, our homeland security, and our interactions with foreign nations. Protecting information critical to our Nation's security and demonstrating our commitment to open Government through accurate and accountable application of classification standards and routine, secure, and effective declassification are equally important priorities.

Encouraging courts to consider the passage of time as a factor motivates courts to assess the current environment relating to a specific national security issue when crafting an effective disentanglement plan.

B. PUBLIC KNOWLEDGE OF THE "SECRET" SHOULD BE A FACTOR COURTS USE IN WEIGHING EXECUTIVE CLAIMS OF THE STATE SECRETS PRIVILEGE

The government likely waived the privilege in this case by declassifying information on the torture. Indeed, in 2005, President George W. Bush stated "[W]e do not torture." Statement of then-President Bush, November 7, 2005. The government should not be able to use the state secrets privilege as both a sword and a shield. Political embarrassment is not an acceptable reason to shield state secrets.

The privilege should not be used to bury our past indiscretions or to conceal outright illegality. Certainly, there is a valid claim of privilege on much of the information in this case, but some of the information is already widely known. A quick google search revealed multiple pages of results for a "Poland black site" search. This information is known to the world.

A blanket privilege is neither reasonable nor advisable to guard past actions where information is widely available. Thus far, courts have sustained the privilege even when information is publicly known. The rationale is based on the argument that, although known to the public, the government has not officially

acknowledged the information. This theory disregards common sense.

Vast quantities of information on the torture of the Respondent are available in the Report of the Senate Select Committee on Intelligence that was declassified in 2014. *Report of the Senate Select Committee on Intelligence, Committee Study of the Central Intelligence Agency's Detention and Interrogation Program*, S. Report 113-288, available at https://www.intelligence.senate.gov/sites/default/files/publications/CRPT-113srpt288.pdf. Extensive information on the particulars of the "enhanced interrogation techniques" used on Respondent are detailed in pages 17 through 66 of the Report. These findings were relied upon by the European Court of Human Rights in its findings that Poland violated the European Convention for the Protection of Human Rights and Fundamental Freedoms. This violation resulted in the current investigation in Poland on which this case is based. *Abu Zubaydah v. Poland*, No. 7511/13 (2014). In *Roviaro v. U.S.*, this Court determined that when the identity of an informant is already known, there is no longer a need to protect his identity. 353 U.S. 53, 60 (1957). As in *Roviaro*, the purpose of the privilege is no longer applicable. The same was true in *Jabara v. Kelley*, where the District Court disentangled information that was already known (a publicly available Congressional report). 75 F.R.D. 475, 493 (D.C.E.D. Mich. 1977). Note that the *Jabara* case purports to examine the executive privilege, but it is a state secrets case.

The state secrets claim in this case may well be valid, but courts should not be expected to accept broad claims of the privilege without some investigation. The District Court should perform an *in camera* review and disentangle privileged from unprivileged information.

CONCLUSION

For the reasons stated above, the judgment of the Ninth Circuit Court of Appeals should be affirmed.

Dated: August 19, 2021

Respectfully submitted,

TIMOTHY K. FORD
MACDONALD, HOAGUE,
& BAYLESS
1500 Hoge Building
705 Second Avenue
Seattle, WA 98104
(206) 622-1604
timf@mhb.com

Counsel for Amici Curiae