No. 20-827

In The
Supreme Court of the United States

UNITED STATES,
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 COALITION OF HUMAN RIGHTS SCHOLARS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

International Cases

Statutes, Regulations, and Treaties

Other Authorities

INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[1]

This case concerns the U.S. Government's decision to invoke the state secrets privilege in this case and the circumstances giving rise to that decision. Those circumstances include the Government's well-known torture of Respondent Zayn al-Abidin Muhammad Husayn, aka Abu Zubaydah ("Respondent").

Amicus Curiae Coalition of Human Rights Scholars ("Coalition") is an ad hoc coalition of scholars who teach, research, and write about human rights and torture. A complete list of the members of the Coalition, including their names, titles, and affiliations, is set forth in the appendix to this brief.

In this brief, the Coalition provides important context to the U.S. Government's long-standing commitment to fighting torture, its legal obligations in preventing and prosecuting torture, its departure from those obligations and the resulting consequences (including the undermining of U.S. military and intelligence efforts), and how all of these factors should shape the Court's analysis in this case.

SUMMARY OF ARGUMENT

The state secrets privilege derived from Executive Order 13526 and its predecessors explicitly forbids classification of information as a secret when it

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[1] Counsel of record for all parties consent to the filing of this brief. S. CT. R. 37.3(a). No counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. S. CT. R. 37.6.

conceals violations of law. The application of the state secrets privilege in this appeal would do just that.

Since the Republic's founding, the United States has viewed torture as anathema. The Crown's barbaric treatment of our nation's patriots during the Revolutionary War laid the groundwork for the Eighth Amendment and its prohibition of cruel and unusual punishment, including torture. In the decades that followed, the Government confirmed that torture has no place under U.S. law.

That tradition continued through the Civil War and the Second World War, shortly after which the United States ratified a series of treaties that prohibit torture. Other treaties that the United States ratified require it to prosecute torture and otherwise hold torturers accountable. Nations across the globe joined these treaties, reflecting international consensus that torture is inconsistent with settled legal norms. Indeed, the U.S. Government made several of these commitments during the Reagan Administration in the 1980s against the backdrop of the Cold War and the threat of nuclear war – equally or more serious threats to those the United States faces today.

The United States departed from these long-standing norms in the wake of September 11, 2001, one of the darkest moments in the nation's history. Shortly after September 11, 2001, the Government established a state-sanctioned program, pursuant to which it tortured Respondent. Its actions alienated allies and undermined U.S. military and intelligence efforts.

The Government's claim of secrecy is not supported by the law or the facts. The Court should reject the Government's claim of secrecy as an illegal attempt to shield unlawful conduct. It should also be rejected as a futile and counterproductive effort to conceal what is already cemented in the public sphere; the Government's unlawful actions at the center of this dispute are widely known and detailed in numerous public sources. Whatever damage the revelation of these facts could do to U.S. national security has in fact already transpired. The Court need not resolve the scope of the state secrets privilege to reach that conclusion. But if the Court decides to address the scope of that privilege, countless reasons militate against its application in cases involving torture.

ARGUMENT

I. THE U.S. GOVERNMENT HAS BEEN A LEADER HISTORICALLY ON THE INTERNATIONAL PROHIBITION OF TORTURE

The United States has long accepted the prohibition of torture and cruel and unusual punishment, both under domestic law and in its international commitments. Indeed, the United States has been a leader in establishing this prohibition. *See The Center for Justice & Accountability, United States*, https://cja.org/where-we-work/usa/ (last visited Aug. 16, 2021).

A. Commitment To The Laws Of War And A Revulsion To Torture Existed At The Founding Of The Republic

U.S. opposition to torture can be traced back to the founding of the nation. During the Revolutionary War, leaders in Congress and the army believed that humane treatment of enemy combatants was of central strategic importance in the quest for independence:

> In 1776, American leaders believed it was not enough to win the war. They also had to win in a way that was consistent with the values of their society and the principles of their cause. One of their greatest achievements . . . was to manage the war in a manner that was true to the expanding humanitarian ideals of the American Revolution.

David Hackett Fischer, *Washington's Crossing* 375 (2004). Whereas American soldiers and civilians were subject to atrocities at the hands of the British army, leaders in the Continental Congress and Continental Army resolved to conduct the War of Independence with a respect for the human rights of their opponents. *Id.* at 176-79, 375-79. For example, in an order covering prisoners taken in the Battle of Princeton, Washington wrote: "Treat them with humanity, and let them have no reason to complain of our copying the brutal example of the British Army in their treatment of our unfortunate brethren . . . . Provide everything necessary for them on the road." *Id.* at 379; *see also* Orders to Lieutenant Colonel Samuel Blachley Webb,

Jan. 8, 1777, 8 *The Papers of George Washington, Revolutionary War Series* 16 (W. W. Abbot et al. eds., 1985).

The prohibition against inhumane treatment at the hands of the Government was so essential to the fabric of the Republic that it was enshrined in the Bill of Rights. The Eighth Amendment to the Constitution prohibits the Government from inflicting "cruel and unusual punishment." U.S. Const. amend. VIII. Although there are debates about what specifically constitutes cruel and unusual punishment, it has never been in doubt that torture is prohibited.

For example, in 1879, the Court unequivocally confirmed that "punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden by" the Eighth Amendment. *Wilkerson v. Utah*, 99 U.S. 130, 136 (1878). In the decades that followed, the Court underscored that torture is out of bounds under the Constitution. *See, e.g.*, *Weems v. United States*, 217 U.S. 349, 368-71 (1910) (discussing prior opinions identifying torture as unconstitutional under the Eighth Amendment); *In re Kemmler*, 136 U.S. 436, 447 (1890) ("Punishments are cruel when they involve torture or a lingering death[.]"); *cf. Gregg v. Georgia*, 428 U.S. 153, 169-70 (1976) ("The American draftsmen, who adopted the English phrasing in drafting the Eighth Amendment, were primarily concerned . . . with proscribing 'tortures' and other 'barbarous' methods of punishment." (citation and footnote omitted)).

B. The Union's Lieber Code And The U.S. Government's Post-World War II Recommitments Confirmed That Torture Has No Place In The Republic

During the Civil War, commanding Union General Henry Wager Halleck authorized Francis Lieber to prepare "Instructions for the Government of Armies of the United States in the Field." General Orders No. 100: The Lieber Code, The Avalon Project, Yale Law School, https://avalon.law.yale.edu/19th_century/lieber.asp. Promulgated as General Orders No. 100, "The Lieber Code" was issued by President Lincoln on April 24, 1863. *Id.* It was the first modern codification of the laws of war. Arthur Eyffinger, *The 1899 Hague Peace Conference: The Parliament of Man, the Federation of the World* 259 (1999). In relevant part, Article 16 of the Lieber Code provides that "[m]ilitary necessity does not admit of cruelty - that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions."[2] The Lieber Code is widely considered the "undisputed basis for the so-called Law of the Hague," the first of the international treaties governing warfare. Eyffinger, *supra*, at 259.

Following World War II, President Truman took a leading role in creating the Nuremberg Tribunal for the prosecution of war crimes and crimes against humanity, which included the notion of "ill-treatment"

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[2] For the entire Lieber Code, see https://avalon.law.yale.edu/19th_century/lieber.asp.

and "inhuman acts," respectively. President Truman appointed Supreme Court Associate Justice Robert H. Jackson as Chief of Counsel, reflecting the seriousness of the U.S. Government's commitment to bringing the perpetrators of war crimes and crimes against humanity to justice. Exec. Order No. 9547, 10 Fed. Reg. 4961 (May 4, 1945). Torture was considered a crime against humanity under Allied Control Council Law No. 10, the governing law of occupied Germany, which was drafted by the American legal division based on Justice Jackson's interim report. Allied Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace & Against Humanity art. 2, § l(c), Dec. 20, 1945, 3 Official Gazette Control Council for Germany 50-55 (1946). Secretary of War Henry Stimson and Justice Jackson believed that war crimes trials, not vengeance, were in keeping with American domestic traditions; in short, "the American thing to do." Gary Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* 181 (2000).

The United Nations Security Council, with U.S. leadership, later drew upon the enumeration of acts of crimes against humanity, including torture, found in Control Council Law No. 10, when it adopted the Statute of the International Criminal Tribunal for the former Yugoslavia, and later, the Statute of the International Criminal Tribunal for Rwanda. William A. Schabas, *The Crime of Torture and the International Criminal Tribunals*, 37 Case W. Res. J. Int'l L. 349, 351-52 (2006).

II. THE UNITED STATES IS OBLIGATED UNDER INTERNATIONAL AND DOMESTIC LAW TO REFRAIN FROM AND PROHIBIT TORTURE

The prohibition against torture is one of the most essential and recognized components of international humanitarian and human rights law. The United States has consistently upheld the prohibition against torture through the Constitution, legislation, executive statements, and judicial decisions. Many of these actions affirm and codify the U.S. Government's binding obligations to uphold the prohibition against torture contained in the Geneva Conventions of 1949,[3] the International Covenant on Civil and Political Rights of 1966 ("ICCPR"), [4] and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 ("Convention Against Torture" or "CAT").[5] The United

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[3] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 ("First Geneva Convention"); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 ("Second Geneva Convention"); Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 ("Third Geneva Convention"); Geneva Convention Relative to the Protection of Civilian Persons in Times of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 ("Fourth Geneva Convention").

[4] ICCPR, S. Treaty Doc. 95-20, 999 U.N.T.S. 171.

[5] CAT, G.A. Res. 39/46, Annex. 39 U.N. GAOR Supp. No. 51, U.N. Doc. A/39/51 (1984).

States has ratified each of these treaties. The right to be free from torture that is enshrined in these treaties is non-derogable and applies to persons in U.S. custody in times of peace, armed conflict, or state of emergency. The U.S. Government's duty under international and domestic law to not only prohibit torture, but to actively prosecute such actions, is undeniable and absolute.

A. The Geneva Conventions Bind The United States

After World War II, the International Red Cross held a conference that resulted in the creation of four conventions that were adopted in Geneva in 1949 and are now known as the Geneva Conventions. These four treaties, in relevant part, prohibit states from engaging in torture during times of war toward: (i) wounded and sick soldiers in the field; (ii) wounded, sick, and shipwrecked soldiers at sea; (iii) prisoners of war; and (iv) civilians. *See generally* First Geneva Convention; Second Geneva Convention; Third Geneva Convention; Fourth Geneva Convention. The Geneva Conventions and their additional protocols are the primary treaties that make up international humanitarian law and form the foundation for the prohibition against torture during times of war. *See* Scott Goldner, *Torture: Prohibition and Accountability in Public International Law*, McCain Institute (June 30,2020), https://www.mccaininstitute.org/blog/torture-prohibition-and-accountability-in-public-international-law/#:~:text=Torture%3A%20Prohibition%20and%20Accountability%20in%20Public%20International%20Law,-Scott%20Goldner&text=%E2%80%9CTort

ure%20and%20other%20forms%20of,Committee%20of%20the%20Red%20Cross.

The United States participated actively in the drafting of the Geneva Conventions. These treaties entered into force on October 21, 1950. *See* Geneva Conventions of 1949 and Their Additional Protocols, International Committee of the Red Cross, https://www.icrc.org/en/document/geneva-conventions-1949-additional-protocols (last visited Aug. 16, 2021). The Senate ratified the Geneva Conventions in 1955. First Geneva Convention, 6 U.S.T. 3114, 75 U.N.T.S. 31; Second Geneva Convention, 6 U.S.T. 3217, 75 U.N.T.S. 85; Third Geneva Convention, 6 U.S.T. 3316, 75 U.N.T.S. 135; Fourth Geneva Convention, 6 U.S.T. 3516, 75 U.N.T.S. 287. Today, the Geneva Conventions have been ratified by 196 States in total. *See* International Committee of the Red Cross, *State Parties to the Following International Humanitarian Law and Other Related Treaties as of 12 August 2021*, http://ihl-databases.icrc.org/applic/ihl/ihl.nsf/xsp/.ibmmodres/domino/OpenAttachment/applic/ihl/ihl.nsf/40BAD58D71673B1CC125861400334BC4/%24File/IHL_and_other_related_Treaties.pdf?Open.

The Geneva Conventions establish fundamental rules from which member States may not derogate. For example, States are prohibited from committing acts of torture, as well as cruel, inhumane, and degrading treatment or punishment towards certain protected groups, such as prisoners of war. In non-international armed conflicts, "Common Article 3" of the Third Geneva Convention imposes a minimum standard of treatment that prohibits the use of torture

during wartime to persons taking no active part in hostilities, including armed forces who laid down their arms and those in detention. Third Geneva Convention art. 3, 6 U.S.T. 3316, 75 U.N.T.S. 135. Common Article 3 clearly states that detained prisoners "shall in all circumstances be treated humanely," and it prohibits "at any time and in any place whatsoever" certain acts, including "cruel treatment and torture," as well as "outrages upon personal dignity, in particularly humiliating and degrading treatment." *Id.* Common Article 3 applies to armed conflict with al-Qaeda and associated forces because it is a non-international armed conflict. *Hamdan v. Rumsfeld*, 548 U.S. 557, 642 (2006). Article 17 of the Third Geneva Convention further extends the prohibition on torture to prisoners of war, as well as expressly prohibits physical or mental torture and any other coercive action against prisoners of war, including to extract information. Third Geneva Convention art. 17, 6 U.S.T. 3316, 75 U.N.T.S. 135. Article 32 of the Fourth Geneva Convention additionally prohibits member states from "taking any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands." Fourth Geneva Convention art. 32, 6 U.S.T. 3516, 75 U.N.T.S. 287. A violation of this Article is classified as a "grave breach" under Article 130 of the Third Geneva Convention. *See* Third Geneva Convention art. 130, 6 U.S.T. 3316, 75 U.N.T.S. 135; *see also* First Geneva Convention art. 50, 6 U.S.T. 3114, 75 U.N.T.S. 31; Second Geneva Convention art. 51, 6 U.S.T. 3217, 75 U.N.T.S. 85; Fourth Geneva Convention art. 147, 6 U.S.T. 3516, 75

U.N.T.S. 287. Grave breaches of the Geneva Conventions are war crimes.

The Geneva Conventions impose obligations on member States to search for and prosecute those suspected of committing grave breaches in international armed conflicts. First Geneva Convention art. 49, 6 U.S.T. 3114, 75 U.N.T.S. 31; Second Geneva Convention art. 50, 6 U.S.T. 3217, 75 U.N.T.S. 85; Third Geneva Convention art. 129, 6 U.S.T. 3316, 75 U.N.T.S. 135; Fourth Geneva Convention art. 146, 6 U.S.T. 3516, 75 U.N.T.S. 287. Member States must enact legislation prohibiting acts of torture and criminalizing such behavior in order to punish these war crimes. First Geneva Convention art. 49, 6 U.S.T. 3114, 75 U.N.T.S. 31; Second Geneva Convention art. 50, 6 U.S.T. 3217, 75 U.N.T.S. 85; Third Geneva Convention art. 129, 6 U.S.T. 3316, 75 U.N.T.S. 135; Fourth Geneva Convention art. 146, 6 U.S.T. 3516, 75 U.N.T.S. 287. In addition, Member states must exercise universal jurisdiction over those suspected of committing acts of torture, and enact legislation allowing universal jurisdiction if not already available under domestic law. First Geneva Convention art. 49, 6 U.S.T. 3114, 75 U.N.T.S. 31; Second Geneva Convention art. 50, 6 U.S.T. 3217, 75 U.N.T.S. 85; Third Geneva Convention art. 129, 6 U.S.T. 3316, 75 U.N.T.S. 135; Fourth Geneva Convention art. 146, 6 U.S.T. 3516, 75 U.N.T.S. 287.

The United States has incorporated and codified the prohibitions and obligations of the Geneva Conventions into law through several acts of Congress, including the War Crimes Act of 1996 and

the Military Commissions Act. The War Crimes Act criminalizes war crimes and expressly defines war crimes to include any conduct defined as a grave breach of the Geneva Conventions (as amended in 1997). 18 U.S.C. § 2441. Moreover, in 2006, Congress passed the Military Commissions Act, which provides that anyone subject to the Act who uses torture during interrogations will be subject to punishment. 10 U.S.C. § 950v(b)(11)(A).

Most recently, President Obama issued Executive Order 13491, "Ensuring Lawful Interrogations." The Order makes Article 3 of the Third Geneva Convention the baseline for the treatment and interrogation of detainees during international armed conflict, and requires all interrogation techniques to comply with the Army Field Manual 2-22.3, which prohibits the use of torture. Exec. Order No. 13491, § 3(b), 3 C.F.R. § 13491 (Jan. 22, 2009). Executive Order 13491 also required the Central Intelligence Agency ("CIA") to close all secret detention facilities or black sites. *Id.* at § 4(a). In 2015, Congress passed the McCain-Feinstein Anti-Torture Act, which codified key provisions in Executive Order 13491, including the requirement to comply with the Army Field Manual. Pub. L. No. 114–92, § 1045, 129 Stat. 726, 977-79 (2015).

The U.S. Government's binding commitment to uphold the ban on torture contained in the Geneva Conventions is therefore undeniable. The Court has long recognized these treaties as imposing binding obligations. *See, e.g.*, *Hamdan*, 548 U.S. at 642.

Ignoring the U.S. commitment under these treaties to not only prohibit torture, but search for and prosecute those who commit suspected grave breach violations in international armed conflict, would unquestionably breach its international obligations and domestic law.

B. The United States Has Obligations To Refrain From And Prohibit Torture Under The CAT

As the Vietnam War escalated, nations around the world negotiated the ICCPR in 1966. Article 7 of the ICCPR provides in relevant part that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[6] Although the United States did not ratify the ICCPR until 1992,[7] and even then ratified on a non-executing basis, the ICCPR augured the CAT.

The United States has mandatory obligations to refrain from committing acts of torture under the CAT.[8] Negotiated during the Reagan Administration against the backdrop of the Cold War, the CAT codified the prohibitions against torture in international law into specific rules. Notably, the CAT defined torture broadly as

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[6] ICCPR art. 7, S. Treaty Doc. 95-20, 999 U.N.T.S. 171.

[7] S. Treaty Doc. No. 95–20, 999 U.N.T.S. 176.

[8] Poland is also a party to the CAT. UN Treaty Body Database, Human Rights Bodies, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT/C/POL/CO/7&Lang=En (last visited Aug. 16, 2021).

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

CAT art. 1, 1465 U.N.T.S. 85, [1989] ATS 21, UN Doc. A/RES/39/46.

The CAT's prohibition of torture is absolute: "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture." *Id*. at art. 2. The blanket prohibition on torture was viewed by the drafters of the CAT as "necessary if the Convention is to have significant effect, as public emergencies are commonly invoked as a source of extraordinary powers or as a justification for limiting fundamental rights and freedoms." President Reagan's Message to Congress Transmitting the CAT and Other Cruel, Inhuman, or Degrading Treatment or Punishment,

Summary and Analysis of the CAT and Other Cruel, Inhuman, or Degrading Treatment or Punishment, at 5 (May 23, 1988); S. Treaty Doc. No. 100-20, *reprinted in* 13857 U.S. Cong. Serial Set at 3 (1990).

During the drafting of the CAT, the U.S. delegation clearly supported treaty provisions on universal jurisdiction with regard to torture. J. Herman Burgers & Hans Danelius, *The United Nations Convention against Torture: A Handbook on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* 58, 62-63, 78-79 (1988). During negotiations, Argentina objected to the provision on universal jurisdiction. The U.S. delegate responded to Argentine objections, saying:

> Such jurisdiction was intended primarily to deal with situations where torture is a State policy and, therefore, the State in question does not, by definition, prosecute its officials who conduct torture. For the international community to leave enforcement of the convention to such a State would be essentially a formula for doing nothing. Therefore in such cases universal jurisdiction would be the most effective weapon against torture which could be brought to bear.

Id. at 78-79. The U.S. delegate added that "it could be utilized against official torturers who travel to other States, a situation which was not at all hypothetical." *Id.* The final text of the CAT included provisions

establishing universal jurisdiction to prosecute torturers. CAT arts. 5(2), 7(1), 1465 U.N.T.S. 85, [1989] ATS 21, UN Doc. A/RES/39/46. The CAT also requires member States to assist other member States in connection with the prosecution of torturers, including by the supplying of evidence at their disposal. CAT art. 9, 1465 U.N.T.S. 85, [1989] ATS 21, UN Doc. A/RES/39/46.

At the same time that nations negotiated the CAT in the early 1980s, the idea that torture was a violation of international law that could be prosecuted anywhere in the world was expressly recognized in the United States in *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980). In this landmark opinion, the Second Circuit recognized that there was a customary international legal prohibition against torture and held that "the torturer has become - like the pirate and slave trader before him - *hostis humani generis*, an enemy of all mankind." *Id.* at 890.

The administration of George H.W. Bush submitted the CAT to the Senate in 1990 and supported ratification. S. Treaty Doc. No. 100-20. A bipartisan coalition in the Senate, including Republican Senator Jesse Helms, worked to ensure that the Senate gave its advice and consent for ratification. 136 Cong. Rec. 36007, 36192-36199 (Oct. 27, 1990). The Senate Foreign Relations Committee voted 10-0 to report the Convention favorably to the full Senate. S. Exec. Rep. No. 101-30, at 3 (1990). When she spoke in support of ratification, Kansas Republican Senator Nancy Kassebaum said, "I believe we have nothing to fear about our compliance with the

terms of the treaty. Torture is simply not accepted in this country, and never will be." 136 Cong. Rec. at 36198.

When the United States ratified the CAT in 1994, it reserved against selected provisions. The United States also expressed its own understanding of the definition of torture under the CAT:

> In order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from: (i) [t]he intentional infliction or threatened infliction of severe physical pain or suffering; (ii) [t]he administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (iii) [t]he threat of imminent death; or (iv) [t]he threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

22 C.F.R. § 95.1(b).

Tellingly, the United States did not make any reservation regarding the provision establishing universal jurisdiction for torture. The United States thus agreed that torture should be prohibited as a notorious crime, and that acts of torture should be investigated and punished through universal jurisdiction, to the extent that the treaty required implementing legislation to be enforced.

After the Senate ratified the CAT in 1994, Congress enacted a new federal anti-torture statute to implement the requirements of the CAT. The statute criminalizes torture committed outside the United States. 18. U.S.C. §§ 2340-2340A. The statute largely tracks the language of the CAT and criminalizes acts of torture or conspiracy to commit torture "by a person acting under the color of law" while outside the United States, regardless of whether during war or peace time. *Id.* §§ 2340(1), 2340A. It makes torture a felony and permits the criminal prosecution of alleged torturers in federal courts in specified circumstances. *Id.* § 2340A. A person found guilty under the Act can be incarcerated for up to 20 years or receive the death penalty if the torture results in the victim's death. *Id.* § 2340A(a).

Congress also subsequently enacted the Torture Victim Protection Act of 1991 to implement the CAT. This Act provides a cause of action for those victims of official torture and extrajudicial killing committed by agents of a foreign government. 28 U.S.C. § 1350. By incorporating the CAT into domestic law, the United States has further demonstrated its commitment to uphold the ban on torture.

As further indication of U.S. concern about acts of torture, Congress adopted the Torture Victims Relief Act of 1998. Pub. L. No. 105–320, 112 Stat. 3016 (1998). In its findings, Congress noted that

> The American people abhor torture by any government or person. The existence of torture creates a climate of fear and international insecurity that affects all people. . . . There is a need for a comprehensive strategy to protect and support torture victims and their treatment providers, together with overall efforts to eliminate torture.

Id. § 2(1), (7), 112 Stat. at 3016. With this Act, the United States stepped into a leadership role to support the right to rehabilitation for torture survivors by stimulating the development and sustainability of specialized rehabilitation programs for torture survivors around the world.

* * *

In sum, the United States, through its treaty obligations and its domestic laws, has proscribed torture and committed itself to prosecuting any such torturous acts, and undertaken to assist other countries in connection with criminal proceedings with respect to acts of torture. Accordingly, torture, and the protection of those who engage in it, is not a legitimate state interest. As a result, the mere assertion of the state secrets privilege in this appeal subverts U.S. legal obligations.

III. THE STATE SECRETS DOCTRINE DOES NOT PROHIBIT DISCOVERY IN THIS CASE

From September 2001 until January 2009, the CIA ran the Rendition, Detention, and Interrogation ("RDI") program, which involved the disappearance, extrajudicial detention, and torture of suspects in the so-called war on terror.[9] Respondent was tortured pursuant to the RDI program.

The Government claims that continuing formal ambiguity regarding the relationship, if any, between the CIA's black site and torture program and the Government of Poland furthers the national security of the United States by increasing the chances that the CIA will be able to obtain such cooperation in the future. Pet'r's Br. 21-29. The Government claims that the law is on its side because courts previously have resisted forcing the Government to reveal the truth

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[9] The program officially started when President George W. Bush issued a covert action Memorandum of Notification six days after the attacks of September 11, 2001, but the program did not apprehend its first suspected terrorists until Respondent's capture in March 2002. S. Rep. No. 288, 113th Cong., 2d Sess. 11 at 9 (2014) ("SSCI Report"). According to the SSCI Report, the CIA stopped using coercive interrogation tactics, known euphemistically as enhanced interrogation techniques, on November 8, 2007 and held no detainees after April 2008. *Id.* at 16. On January 22, 2009, President Obama issued Executive Order 13491 forbidding interrogation techniques not included in the Army Field Manual, officially bringing the program to a conclusion. *Id.* at 171, 568.

about matters of interest to the public. *Id.* at 29-42. This case is different.

It is incumbent on this Court to question the self-serving and unproven assertions of national security harm put forward to prevent discovery in this case. Shielding those who engage in torture, and thereby tacitly condoning the degradation of human dignity, is inconsistent with the principles upon which the United States was founded and upon which the United States has actively worked to establish global norms.

A. The RDI Program Represented A Significant Break From The Past

During the Reagan Administration, the United States worked outside the traditional law enforcement and extradition process to apprehend individuals wanted for acts of terrorism against U.S. citizens and to transport them to the United States for prosecution in federal courts. Association of the Bar of the City of New York & Center for Human Rights and Global Justice, *Torture by Proxy: International and Domestic Law Applicable to "Extraordinary Renditions"* (New York: ABCNY & NYU School of Law 2004), at 15. The Clinton Administration built on this process by rendering terror suspects to third countries for prosecution. *Id.* at 9. The vast majority of the prisoners rendered by the Clinton Administration were sent to Egypt, and several of these prisoners were tortured and/or executed after the United States delivered them into Egyptian custody. *Id.*

There are, however, important differences between the 1980s and the 1990s rendition processes

and the policies that underlie the RDI program. Critically, the United States was not involved in the interrogations of those that they extraordinarily rendered prior to 2001, and the detainees were sent to countries where they were wanted for criminal prosecution. Mark J. Murray, *Extraordinary Rendition and U.S. Counterterrorism Policy*, 4.3 J. of Strategic Security 15, 16-17 (2011). Further, the goal of the United States in performing a rendition or extraordinary rendition in the 1980s and 1990s was not to interrogate suspects for intelligence gathering purposes. *Id.* The RDI program was altogether different.

The RDI program involved the cooperation of foreign governments spread across the globe. For example, Respondent was the first individual captured in a joint raid by U.S. and Pakistani officials when he was seized in Faisalabad, Pakistan, in 2002. SSCI Report at 21; U.S. Department of Justice, Office of the Inspector General, *A Review of the FBI's Involvement and Observations of Detainee Interrogations in Guantanamo Bay, Afghanistan, and Iraq* 67 (2008). The program involved the participation or cooperation of at least 53 foreign governments plus Hong Kong. Amrit Singh, *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition* 6, 61-118 (David Berry ed., Open Society Foundations 2013). The CIA held at least 119 prisoners in its network of black sites and torture houses. SSCI Report, Executive Summary at 8.

U.S. Government officials, however, held strongly to the claim that the United States did not torture and was in full compliance with applicable law. In 2005, for instance, Secretary of State Condoleezza Rice contended publicly the United States did not torture as "a matter of policy." Glenn Kessler & Josh White, *Rice Seeks To Clarify Policy on Prisoners Cruel, Inhuman Tactics By U.S. Personnel Barred Overseas and at Home*, Wash. Post, Dec. 8, 2005, at A01. In early 2006, the U.S. Government had to create a group of inter-agency experts to travel globally defending U.S. "detainee policies" at public events using prepared talking points. "US Government (USG) Experts Available to Brief on and to Discuss Detainee-Related Matters," Jan. 26, 2006, https://foia.state.gov (last visited Aug. 16, 2021); "US Criticized at OSCE Meeting on Human Rights and Terrorism," https://foia.state.gov (last visited Aug. 16, 2021). In spite of these claims and efforts to distract the international community from its interest in the U.S. torture program, many official reports and secondary studies document the widespread practices of torture and cruel, inhuman, or degrading treatment directly by the CIA.[10]

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[10] *See generally* SSCI Report; *see also* Maj. Gen. Antonio M. Taguba, *Article 15-6 Investigation of the 800th Military Police Brigade*, (U.S. Army) Mar. 4, 2004; Memorandum for Alberto Gonzalez, Counsel to the President, "Standards of Conduct for Interrogations under 18 U.S.C. §§ 2340-2340A" (Aug. 1, 2002), https://nsarchive2.gwu.edu/torturingdemocracy/documents/20020801-1.pdf; International Committee of the Red Cross, *Report on the Treatment of Fourteen "High Value Detainees" in CIA Custo*

Perhaps never before in the history of debates over torture and cruel, inhuman, or degrading treatment has so much information been available about the different techniques used by specific individuals and units. Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* 197 (W. W. Norton & Company 2011). Although the U.S. Government initially treated the RDI program as clandestine, sufficient information about the program is available from credible public sources, including the unclassified 700-page summary of the still classified report of the Senate Select Committee on Intelligence. *See generally* SSCI Report. Even one of the former CIA contractors whose testimony the Government is trying to block has already written a book about his involvement with interrogation. *See generally* James E. Mitchell with Bill Harlow, *Enhanced Interrogation: Inside the Minds and Motives of the Islamic Terrorists Trying to Destroy America* (Crown Forum 2016). And in recent years, the European Court of Human Rights has extensively cited these public documents about U.S. torture in its decisions. *See, e.g.*, Zubaydah v. Lithuania, no. 46454/11 at Annex I (2018), http://hudoc.echr.coe.int/fre?i=001-183687 (listing numerous public sources concerning general knowledge of

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dy (Feb. 2007), http://www.nybooks.com/media/doc/2010/04/22/icrc-report.pdf. All of these reports are already available in public documents in the National Security Archive's Torture Archive (https://nsarchive.gwu.edu/project/torture-archive), as well as in the appendices to Mark Danner, *Torture and Truth: America, Abu Ghraib, and the War on Terror* (New York, New York Review Books 2004).

violations allegedly occurring at detention facilities run by the United States).

B. The RDI Program Alienated Allies And Undermined The Global Human Rights Regime

As the details of the RDI program have become public, it has been condemned globally as violating not only international law, but also the domestic law of the countries involved. UN Committee against Torture, *Consideration of Reports Submitted by States Parties under Article 19 of the Convention, Conclusions and Recommendations of the Committee against Torture: United States of America* at ¶¶ 17-22 CAT/C/USA/CO/2 (May 18, 2006). Indeed, the RDI program has already resulted in very real damage to the image and standing of the United States as a global leader and negatively impacted U.S. military and intelligence operations.

1. The United States Faced Significant Blowback from Allies

Once allies learned of the RDI program, they leveled immediate and significant criticisms against the United States and its legal positions. Douglas A. Johnson, Alberto Mora & Averell Schmidt, *The Strategic Costs of Torture: How 'Enhanced Interrogations' Hurt America*, 95.5 Foreign Affairs 121-32 (2016). For instance, from at least August 2002 through August 2003, Dutch officials raised the status of noncombatants and due process at Guantanamo Bay at every discussion of human rights. Averell Schmidt & Kathryn Sikkink, *Breaking the Ban? The*

Heterogeneous Impact of US Contestation of the Torture Norm, 4.1 J. of Global Security Studies 105, 109 (2019). However, these efforts appear to have had little impact on U.S. policies, and European officials quickly grew tired of broaching the topic. *Id.* By 2004, many foreign diplomats were so frustrated by U.S. non-compliance that they avoided raising the topic with U.S. officials in formal settings. *Id*.

A sea change occurred following the Abu Ghraib controversy, the leaking of the infamous torture memos, and news reports of secret U.S.-run detention facilities in Eastern Europe. *Id.* International institutions began to play a critical role by coordinating state and non-government organization ("NGO") efforts to pressure the United States on its torture policies. *Id.* For instance, during the first Organization for Security and Co-Operation in Europe meeting dedicated to human rights and the fight against terrorism in Vienna in 2005, European delegates and American NGOs focused discussion on U.S. behavior. *Id*. When confronted, however, the United States stuck with its strategy of denying that it violated the torture prohibition, claiming that its actions were lawful under the Geneva Conventions. *Id*. Similar confrontations with similar outcomes happened during human rights consultations in Brussels that same year. *Id*.

By late 2005 and early 2006, the international momentum against the RDI program crystalized in investigations by the Parliamentary Assembly of the Council of Europe and the EU Parliament into the secret detention and illegal transfer of detainees by

the United States in Europe. Both investigations resulted in a series of reports that document the involvement of European states in the U.S. rendition and torture program. [11] These investigations uncovered evidence that Poland, Lithuania, and Romania hosted secret detention sites, and that a number of other European states were complicit in the RDI program.[12] *See European Parliament Report on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners* (Jan. 30, 2007), https://www.europarl.europa.eu/doceo/document/A-6-2007-0020_EN.html. And those investigations laid the groundwork for subsequent investigations by human rights activists and appeals before the European Court of Human Rights, including by Respondent. The European Court of Human Rights has ruled that five European countries violated multiple rights in the European Convention on Human Rights (including the prohibition on torture and ill-treatment, as well as the right to liberty and security) through their cooperation in the RDI program, and ordered those nations to pay damages to their victims. El-Masri v. Former Yugoslav Republic of Macedonia (App. No. 39630/09), [2012]; Al Nashiri v. Poland (App. No. 28761/11), [2014]; Husayn (Abu Zubaydah) v. Poland (App. No. 7511/13), [2014]; Nasr

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[11] The investigations, known respectively as the Fava and Marty Investigations, are available for download through the Rendition Project, http://www.therenditionproject.org.uk/documents/eur-complicity.html.

[12] These states included Germany, the United Kingdom, Spain, Ireland, Greece, Cyprus, and Italy, among others.

and Ghali v. Italy (App. No. 44883/09), [2016]; Al Nashiri v. Romania (App. No. 33234/12), [2018]; Abu Zubaydah v. Lithuania (App. No. 46454/11), [2018].

2. The RDI Program Undermined U.S. Military and Intelligence Efforts

Several states went beyond verbal condemnations and actually adopted policies that negatively impacted U.S. military and intelligence operations. For example, the Dutch Ministries of Foreign Affairs and Defense were so concerned about the potential domestic political consequences of a member of the Taliban or al-Qaeda being captured by Dutch Special Forces and sent to Guantanamo Bay that they held up the deployment of Dutch troops to Afghanistan for nearly two and a half years, until early 2005, damaging coalition efforts there. Johnson, Mora & Schmidt, *supra*, at 125; Schmidt & Sikkink, *supra*, at 111.

Even after the Dutch government deployed troops to Afghanistan, the Dutch Parliament sought to ensure that any prisoners caught in Afghanistan were covered by the Geneva Conventions and not turned over to U.S. forces. Schmidt & Sikkink, *supra*, at 111. Dutch officials went so far as to seek a joint statement with the U.S. Department of Defense to restate what should have been a basic tenet of the laws of war – i.e., that both countries believe detainees should be granted humane treatment in accordance with the Geneva Conventions. Schmidt & Sikkink, *supra*, at 111. Unfortunately, these efforts failed, and the Dutch and other U.S. allies were forced to work around the United States and enter into agreements with

Afghanistan in order to ensure the humane treatment of detainees and access by the International Committee of the Red Cross. *Id.*

Outside of Afghanistan, countries sought to distance themselves from the United States. The Finnish parliament, for example, delayed ratifying the 2004 U.S.-EU Extradition Treaty and a Mutual Legal Assistance Treaty until 2007 because of concerns that U.S. policies might violate Finnish constitutional guarantees. Johnson, Mora & Schmidt, *supra*, at 125. Swiss officials similarly explained limits to counterterrorism cooperation with the United States in 2006 by saying that U.S. detainee policies were unpopular with the Swiss public. Schmidt & Sikkink, *supra*, at 112. The United Kingdom also required the U.S. Embassy in London to begin requesting permission for intelligence flights transiting the United Kingdom so that the British government could "fully consider whether sensitive missions might put the UK at risk of being complicit in unlawful acts." *Id.*

Other foreign governments took more aggressive steps to counter the RDI program. The Irish government implemented a new legal interpretation that allowed them to search U.S. military aircraft transiting Shannon International Airport. *Id.* And, as late as 2009, long after the conclusion of the torture program and even the end of the George W. Bush Administration, the U.S. Embassy in Nairobi reported that the U.S. Government's prior use of torture still had "a severe effect on what counterterrorism tools are available[.]" *Id.*

C. The Government's Claim For Secrecy Is Not Supported By The Facts

The Government claims that confirming or denying the existence of a black site in Poland and the participation of the Polish government in the operation of that site and the torture of its detainees, including Respondent, could reasonably be expected to result in significant national security harm to the United States. Pet'r's Br. 18-19. It further claims that the only way to protect from this harm is to prevent any discussion with former CIA contractors (Mr. Mitchell and Mr. Jessen) about their interaction with Respondent, including their extensive efforts to torture him. *Id.* at 26. The Government makes this argument despite the fact that the torture committed by Mitchell and Jessen on behalf of the CIA is well documented, including by the United States Senate Select Committee on Intelligence, as well as Mitchell's own book about his involvement in torture. *See generally* SSCI Report; Mitchell & Harlow, *supra*.

The Government's arguments are unpersuasive. If Respondent was never taken to Poland, or if he was taken to Poland but Mitchell and Jessen never tortured him there, then allowing the discovery would not reveal any information on such matters, and the Government does not assert that any other sensitive information is at issue. Therefore, discovery surely will not lead to any damage to the relationship between the United States and Poland or the willingness of future partnership with the CIA, because there will have been no disclosure of any such partnership.

The Government hints at this outcome when it cites the SSCI Report for the proposition that Mitchell and Jessen stopped torturing Respondent in August 2002, several months before he was moved to Poland in December 2002. Pet'r's Br. 6-7. However, the Government does not take the next logical step to describe any other work that Mitchell and Jessen performed for the CIA that would explain how they could give testimony about things that may have occurred, in a place where they were purportedly not located, to a person with whom they were purportedly not interacting. *Id.* The Government does not explain how, if this were true, it can possibly be a state secret that will cause significant national security harm to the United States for Mitchell and Jessen to testify that they did nothing with Respondent in Poland on or after December 2002. Therefore, the facts, as the Government alludes to them, undercut the assertions of the current and former CIA directors and eviscerate any claim of state secrets privilege in this case.

However, if Mitchell and Jessen did torture Respondent at a CIA black site in Poland, then the secret this Court is being asked to help keep is that Poland allowed the United States to operate a torture program on its territory and may have assisted in that torture. Both the United States and Poland have committed to the international community and their own people that they would not engage in torture, and that no exceptional circumstances will justify breaching this legal obligation, not even "a state of war or a threat of war, internal political instability or any

other public emergency." CAT art. 2.2, 1465 U.N.T.S. 85, [1989] ATS 21, UN Doc. A/RES/39/46.

The purported harm that the Government faces is that countries will not work with the CIA in the future. But as explained above, the fact that the United States allowed the CIA to run the RDI program is already public knowledge and has already clearly damaged U.S. national security. *See supra* Section III.B.

D. The Court Need Not Rule On The Scope Of The State Secrets Doctrine In General, As It Is Unlawful To Rely On It To Prevent Disclosure Of Evidence Of Torture

The Court does not need to curtail the state secrets privilege, and it need not be distracted by the Government's stories about alleged efforts during the Cold War to recover a sunken Soviet submarine. Pet'r's Br. 32-34 (discussing *Military Audit Project v. Casey*, 656 F.2d 724 (D.C. Cir. 1981)). It only needs to conclude that the state secrets privilege does not and cannot apply to protect information related to the RDI program.

The outcome here is mandated by the CAT and the classification authority on which the state secrets privilege relies. The authority of the CIA Director to classify information derives from Executive Order 13526 and its predecessors. Executive Order 13526 provides that

> [i]n no case shall information be classified, continue to be maintained as

> classified, or fail to be declassified in order to:
>
> > (1) conceal violations of law, inefficiency, or administrative error;
> >
> > (2) prevent embarrassment to a person, organization, or agency;
> >
> > (3) restrain competition; or
> >
> > (4) prevent or delay the release of information that does not require protection in the interest of the national security.

Exec. Order No. 13526, 75 Fed. Reg. 707 (Dec. 29, 2009) (quoting Section 1.7(a)).

In 2009, Attorney General Holder stated that the U.S. Department of Justice "will not defend an invocation of the [state secrets] privilege in order to: (i) conceal violations of the law . . . [or] (ii) prevent embarrassment to a person, organization, or agency of the United States government." Off. of the Att'y Gen., Memorandum for Heads of Executive Departments & Agencies; Memorandum for the Heads of Department Components (Sept. 23, 2009), https://www.justice.gov/sites/default/files/opa/legacy/2009/09/23/state-secret-privileges.pdf. That is exactly what the Government is doing when it invokes the state secrets privilege in this case to prevent testimony by Mitchell and Jessen.

The Government does not dispute that Respondent was subject to torture by the CIA. *See generally* Pet'r's Br. Instead, the only unanswered question in this case is whether those acts were done

in Poland. But as explained above, regardless of where the torture occurred, these acts amount to crimes under both U.S. and international law. *See supra* Section II. As a result, and in view of Executive Order 13526, the Court should conclude that the Government may not invoke state secrets privilege in these circumstances.

E. If The Court Decides To Address The Scope Of The State Secrets Privilege, It Should Bar The Privilege's Application In Cases Involving Torture

If the Court determines that it must address the scope of the state secrets privilege, it should hold that the privilege may not apply in cases involving torture.

In its legitimate defense of the nation, the Government has two objectives: first, saving lives; and second, protecting rights and liberties. Among the rights the Government protects is the individual's inalienable right to be free from cruel and unusual punishment, including torture. *See Wilkerson*, 99 U.S. at 136. This right is foundational to America's constitutional order and laws.

Since at least World War II, the United States has relied on its example, leadership, and diplomacy to help build a world that promotes the protection of human dignity. U.S. advocacy of human rights has met with considerable success: around the world today and in no small measure because of those efforts, a web of norms, national laws, regional accords, international treaties, customary international law, institutions, and courts has created an international

architecture of human rights that has served to benefit innumerable persons and humankind in general. A keystone in this architecture of human rights is the prohibition against torture—categorical, non-derogable, *jus cogens*.

However, the United States will once again have its example and leadership undermined if it is allowed to prevent disclosure of torture based on a claim of state secrets privilege. The obligations of the United States under domestic and international law with respect to torture are clear: the Government must prohibit, investigate, and punish torture; prosecute those who commit torture; and make restitution. *See supra* Section II. Thus, as a matter of law, the application of the state secrets privilege to block the discovery and disclosure of all facts pertinent to the authorization and use of torture would frustrate compliance with each of these obligations and must not be countenanced.

Moreover, as a matter of foreign and national security policy, the calculus against authorizing the application of the privilege is even more pronounced. At its best, the United States stands for human dignity and the rule of law, even when the law requires the Government's agents to face consequences. When a case involves torture, a decision by the Government to rely on the state secrets privilege is a choice to dehumanize, and it is a choice to disregard the rule of law. Such a choice is antithetical to the history, laws, and values of the United States.

CONCLUSION

The United States has committed itself as a matter of law to refrain from torture and to punish those who subject others to torture. The Court should hold the Government to its commitment. If the Government is not held to its word, the law is not worth the paper on which it is printed.

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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August 20, 2021

APPENDIX

APPENDIX

AMICUS CURIAE COALITION OF HUMAN RIGHTS SCHOLARS

This Appendix provides in alphabetical order the names of the sixty-one Coalition members, along with their respective titles and institutional affiliations. The listing of these affiliations does not imply any endorsement of the views expressed herein by the institutions to which Coalition members belong.

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HOBART AND WILLIAM SMITH COLLEGES

Matthew Evangelista
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CORNELL UNIVERSITY

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