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 THE FLOYD ABRAMS INSTITUTE FOR FREEDOM OF EXPRESSION, KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIVERSITY, CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, AND NATIONAL SECURITY ARCHIVE AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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## INTERESTS OF AMICI CURIAE[1]

Amici are four organizations devoted to promoting government transparency and public access to information. These amici all have an interest ensuring that government information is only hidden from the public in the most necessary of circumstances. Their work includes curtailing unnecessary secrecy and promoting government transparency. Access to information is particularly important in the national security and foreign relations spheres, where democratic accountability is often the only effective constraint on government overreach. The amici are:

Floyd Abrams Institute for Freedom of Expression;

Citizens for Responsibility and Ethics in Washington;

Knight First Amendment Institute at Columbia University; and

National Security Archive.

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and neither counsel for a party nor a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae made a monetary contribution to the preparation or submission of this brief.

## SUMMARY OF THE ARGUMENT

1. The Court of Appeals correctly recognized that "in order to be a 'state secret,' a fact must first be a 'secret.'" Pet. App. 18a. It is no secret that the CIA detained Abu Zubaydah in Poland.

The government asserts that deposing two former CIA contractors for use in a Polish criminal investigation would reveal the existence of a CIA black site in Poland and Abu Zubaydah's detention there, but these facts have all been publicly documented and widely reported for years. European committees and courts have made factual findings about the CIA site in Poland; human rights organizations have reported its existence; investigative news reports and academic publications have identified Poland as the host of a CIA site. This fact has even been acknowledged by the former President of Poland, who led the country at the time the CIA operated its detention center there.

Anyone with an internet connection can read myriad reports establishing that the CIA held Abu Zubaydah in Poland. A skeptical reader can even find corroborating facts online, such as flight records, eyewitness accounts, and other materials, many of which are identified and discussed in documents declassified and made public by the United States government itself. There is simply no secret at the heart of this case.

2. The state secrets privilege exists to protect "military and state secrets" that must not be divulged "in the interest of national security." *United*

*States v. Reynolds*, 345 U.S. 1, 7, 10 (1953). It is an extraordinary restriction on our justice system that should be limited to the specific circumstance for which it exists. This Court has never before upheld a claim of state secrecy to protect information that is not actually secret.

The government argues that the privilege should be extended in this case to prevent discussion in a judicial proceeding of a fact, whether or not that fact is secret, because the CIA promised an ally it would not acknowledge that fact. The government rests its argument on lower court caselaw construing the national security exemption to the Freedom of Information Act (FOIA Exemption 1), but even if those cases correctly construe Exemption 1, there are good reasons why the state secrets privilege should not coincide with the FOIA exemption. The state secrets privilege and Exemption 1 protect different interests and their assertions have different consequences. Invoking the FOIA exemption limits transparency; invoking the state secrets privilege seriously restricts the functioning of our courts. It deprives individuals of the ability to assert their rights and undermines public confidence in our system of justice.

Upholding the privilege to shield public information because of a government promise would cede a broad new power to the executive that could too easily be abused. An agency can promise to keep secret virtually any embarrassing or illegal operation. The very fact that a promise had been made would then allow the executive to limit judicial

proceedings concerning the activity. The expansion of the privilege sought by the government is perilous and should not be allowed.

The Court should instead reaffirm that the state secrets privilege can only be invoked where a court has first found two things: (a) the information at issue is actually secret, and (b) disclosing that secret information would seriously damage national security. While a court may give some deference to the government's reasonable assessment of national security harm arising from the disclosure of secret information, given the executive's greater expertise in that realm, there is no proper basis to defer on the threshold question of whether the information at issue is secret. That is a question of fact entirely within the competence of the court to determine.

## ARGUMENT

### I. It Is No Secret That the CIA Detained Abu Zubaydah in Poland

There comes a point when the government can no longer deny what it once kept secret. This point has long passed with respect to the CIA's detention of Abu Zubaydah in Poland.

That the CIA detained Abu Zubaydah at a black site in Poland from December 2002 to September 2003 has been widely reported across the world for over fifteen years. Dozens of Polish and American officials, including Poland's President during Abu Zubaydah's detention there, have confirmed the

existence of the CIA black site in Poland. Flight records show that known CIA rendition planes landed at and took off from the Szymany Airport in Poland on the same dates when, according to the CIA's own declassified records, Abu Zubaydah was being transferred. Szymany Airport officials witnessed the CIA planes on the dates cited in the flight records and have reported what they saw.

After examining the relevant public evidence, the Council of Europe unambiguously named Poland as hosting a CIA black site where Abu Zubaydah was held, and the European Court of Human Rights ("ECtHR") later held that the public evidence established beyond a reasonable doubt that Poland was complicit in the CIA's torture of Abu Zubaydah.

Such an established and widely known fact as the detention of Abu Zubaydah at a CIA black site in Poland is not a secret, under any meaning of that term. There can be no proper application of a narrow privilege designed solely to protect state secrets if there is no secret to protect.

### A. The CIA's detention of Abu Zubaydah in Poland has been widely reported around the world for years

Poland was first identified as a CIA black site host in a report by Human Rights Watch published in 2005. That report cited flight records of a Boeing 737 that landed at Szymany Airport in Poland on September 22, 2003, en route to Guantanamo Bay. It also noted that that same plane was used "to move

several prisoners to and from Europe, Afghanistan, and the Middle East in 2003 and 2004."[2]

One month later, an investigative report by *ABC News* identified Abu Zubaydah as one of the detainees held at the CIA black site in Poland.[3] *ABC*'s report cited "[c]urrent and former CIA officers" and "sources directly involved in setting up the CIA secret prison system." *Id*. *ABC* removed this story from its website shortly after its publication, apparently due to CIA pressure,[4] but the article's removal only amplified its reach. It is still easily accessible in multiple locations online and has been cited by several official European reports and court judgments, and in a European Parliament resolution.[5]

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[2] *Human Rights Watch Statement on U.S. Secret Detention Facilities in Europe*, HUMAN RIGHTS WATCH (Nov. 6, 2005), https://www.hrw.org/news/2005/11/06/human-rights-watch-statement-us-secret-detention-facilities-europe.

[3] Brian Ross and Richard Esposito, *EXCLUSIVE: Sources Tell ABC News Top Al Qaeda Figures Held in Secret CIA Prisons*, ABC NEWS (Dec. 5, 2005), http://web.archive.org/web/20051225105556/http:/abcnews.go.com:80/WNT/Investigation/story?id=1375123.

[4] *See* Dick Marty, *Alleged secret detentions in Council of Europe member states*, COUNCIL OF EUROPE PARLIAMENTARY ASSEMBLY COMMITTEE ON LEGAL AFFAIRS AND HUMAN RIGHTS ¶ 6 (Jan. 22, 2006), https://assembly.coe.int/CommitteeDocs/2006/20060124_Jdoc032006_E.pdf (noting that the pressure on ABC to remove the story was "apparently brought to bear directly by the CIA") ("2006 Council Report").

[5] *See e.g.*, *id*; Council Report, ¶ 7; *Husayn (Abu Zubaydah) v. Poland*, No. 7511/13, ¶ 224 (ECtHR July 24, 2014),

These reports were published more than 15 years ago. The following years brought a flurry of further investigations and reports based on a wide range of sources, all confirming the operation of the CIA's black site in Poland. For example:

- The International Committee of the Red Cross reported in 2007 that Khalid Sheikh Mohamed ("KSM") knew he was being detained in Poland after he was given a water bottle whose label contained an email address ending in ".pl."[6]
- A 2008 *New York Times* article reported that KSM was held with "other Qaeda prisoners at [a] Polish compound," more specifically identified as being located at a "secret base

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https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-146047%22]}; *Abu Zubaydah v. Lithuania*, No. 46454/11, ¶ 258 (ECtHR May 31, 2018), https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-183687%22]}; *Al Nashiri v. Romania*, No. 33234, ¶ 237 (ECtHR May 31, 2018); https://hudoc.echr.coe.int/eng#{%22appno%22:[%2233234/12%22],%22itemid%22:[%22001-183685%22]}; European Parliament Resolution P6_TA(2007)0032, ¶¶ 150-51 (Feb. 14, 2007), https://www.europarl.europa.eu/doceo/document/TA-6-2007-0032_EN.html.

[6] *ICRC Report on the Treatment of the Fourteen "High Value Detainees" in CIA Custody*, INT'L COMM. OF THE RED CROSS, 35 (Feb. 14, 2007), http://www.nybooks.com/media/doc/2010/04/22/icrc-report.pdf.

near Szymany Airport, about 100 miles north of Warsaw."[7]

- News organizations around the world have reported KSM's account of his time in CIA detention in Poland.[8]

### B. An in-depth investigation by the Council of Europe confirmed the public reports

A 2007 governmental inquiry in Europe confirmed that the CIA held Abu Zubaydah at a black site in Poland. The Council of Europe undertook a comprehensive investigation, and its

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[7] Scott Shane, *Inside a 9/11 Mastermind's Interrogation*, N.Y. TIMES (June 22, 2008), https://www.nytimes.com/2008/06/22/washington/22ksm.html.

[8] *See, e.g.*, Von John Goetz and Britta Sandberg, *New Evidence of Torture Prison in Poland*, SPIEGEL INTL. (Apr. 27, 2009), https://www.spiegel.de/international/world/europe-s-special-interrogations-new-evidence-of-torture-prison-in-poland-a-621450.html; Steve Swann, *What happened in Europe's secret CIA prisons?* BBC NEWS (Oct. 6, 2010), https://www.bbc.com/news/world-11469369; Adam Goldman, *The hidden history of the CIA's prison in Poland*, WASH. POST (Jan. 23, 2014), https://www.washingtonpost.com/world/national-security/the-hidden-history-of-the-cias-prison-in-poland/2014/01/23/b77f6ea2-7c6f-11e3-95c6-0a7aa80874bc_story.html; Terry Mcdermott, *Psychologist who waterboarded self-proclaimed 9/11 plotter says, 'I would do it again'*, L.A. TIMES (Jan 21, 2020), https://www.latimes.com/world-nation/story/2020-01-21/ksm-guantanamo-911-psychologist; Carol Rosenberg, *Chains, Shackles and Threats: Testimony on Torture Takes a Dramatic Turn*, N.Y. TIMES (Jan. 28, 2020), https://www.nytimes.com/2020/01/28/us/politics/khalid-shaikh-mohammed-threat-torture.html.

report (the "Council Report") unambiguously concluded that "secret detention facilities run by the CIA did exist in Europe from 2003 to 2005, in particular in Poland and Romania."[9] The Council Report named "Poland as the 'black site' where both Abu Zubaydah and Khalid Sheikh Mohamed (KSM) were held and questioned using 'enhanced interrogation techniques.'" *Id.* ¶ 127. It also described a "complete consensus on the part of our key senior sources that [then-]President [Aleksander] Kwasniewski was the foremost national authority on the [high-value detainee] programme. One military intelligence source told us: 'Listen, Poland agreed from the top down . . . . From the President — yes . . . to provide the CIA all it needed.'" *Id.* ¶ 176.

The research underlying the Council Report was diligent, and all of its conclusions "rely upon multiple sources, which validate and corroborate one another," including "over 30 one-time members . . . of intelligence services in the United States and Europe." *Id.* ¶ 46. The report analyzed numerous flight records from Eurocontrol, the "supranational air safety agency," *id.* at 184, showing CIA rendition flights to and from Szymany Airport in Poland,

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[9] Dick Marty, *Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report*, COUNCIL OF EUROPE PARLIAMENTARY ASSEMBLY COMMITTEE ON LEGAL AFFAIRS AND HUMAN RIGHTS ¶ 7 (June 7, 2007), http://assembly.coe.int/committeedocs/2007/emarty_20070608_noembargo.pdf.

which were corroborated by eyewitness accounts of Szymany Airport officials. *See id.* ¶¶ 167-200.[10]

The Council Report was adopted in a 2007 resolution by the Parliamentary Assembly of the Council of Europe, which "consider[ed] as established with a high degree of probability that such secret detention centres operated by the CIA have existed for some years in [Poland and Romania]."[11] Both the Council Report and the ensuing resolution generated significant public attention.[12]

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[10] This eyewitness testimony is consistent with on-the-record accounts of two former directors of the Szymany Airport reported in the media. *See* Nicholas Watt, *Deep in Le Carré country, the remote Polish airport at heart of CIA flights row*, THE GUARDIAN (Jan. 3, 2007), https://www.theguardian.com/uk/2007/jan/04/politics.usa.

[11] Council of Europe Parliamentary Assembly Resolution 1562, ¶ 2 (June 27 2007), https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17559&lang=en.

[12] *See, e.g.*, *Council of Europe: Secret CIA Prisons Confirmed*, HUMAN RIGHTS WATCH (June 6, 2007), https://www.hrw.org/news/2007/06/06/council-europe-secret-cia-prisons-confirmed#; Sebastian Rotella, *CIA accused of holding terror suspects in E. Europe*, BALTIMORE SUN (June 9, 2007), https://www.baltimoresun.com/news/bs-xpm-2007-06-09-0706090338-story.html; *Report says Poland, Romania hosted secret CIA prisons*, THE IRISH TIMES (June 9, 2007), https://www.irishtimes.com/news/report-says-poland-romania-hosted-secret-cia-prisons-1.1209623; Suzanne Goldenberg, *Rendition inquiry reveals rift in CIA ranks*, THE GUARDIAN (July 7, 2007), https://www.theguardian.com/world/2007/jul/17/usa.ciarenditio n.

### C. Poland's former President confirmed the public reports

Following multiple investigative reports concluding that the CIA had operated a detention facility in Poland, its existence was confirmed in 2012 by Aleksander Kwasniewski, President of Poland from 1995-2005, who acknowledged that he had personally authorized the CIA black site: "Of course, everything took place with my knowledge. The President and the Prime Minister agreed to the intelligence co-operation with the Americans, because this was what was required by national interest." *Husayn (Abu Zubaydah) v. Poland*, No. 7511/13, ¶ 234 (ECtHR July 24, 2014), https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-146047%22]} (citation omitted) ("*Abu Zubaydah v. Poland*"). This acknowledgement was reported around the world.[13]

In a 2014 interview with Polish radio, President Kwasniewski provided additional detail about the CIA site, making clear that "Poland took steps to end the activity at this site and the activity was stopped

[13] *See, e.g.*, Crofton Black, *Charging Poland for complicity in alleged US crimes*, ALJAZEERA AMERICA (Dec. 10, 2013), http://america.aljazeera.com/opinions/2013/12/poland-cia-renditionshumanrights.html; Nina H.B. Jorgensen, *Complicity in Torture in a Time of Terror: Interpreting the European Court of Human Rights Extraordinary Rendition Cases*, 16 CHINESE J. INT'L L. 11, 30 (2017).

at some point."[14] This interview, too, was reported all over the world.[15]

### D. The European Court of Human Rights made factual findings that confirm the public reports

The European Court of Human Rights (ECtHR) in 2015 issued a 215-page decision analyzing the evidence of a CIA black site in Poland and Abu Zubaydah's detention there.[16] It concludes "beyond a reasonable doubt that . . . from 5 December 2002 to 22 September 2003 [Abu Zubaydah] was detained in the CIA detention facility in Poland."[17]

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[14] *Poland's secret CIA prisons: Kwasniewski admits he knew*, BBC NEWS (Dec. 10, 2014), https://www.bbc.com/news/world-us-canada-30418405.

[15] *See, e.g.*, Patryk Wasilewski and Martin M. Sobczyk, *Former Polish President Allowed CIA to Operate Secret Detention Center*, WALL ST. J. (Dec. 10, 2014), https://www.wsj.com/articles/former-polish-president-allowed-cia-to-operate-secret-detention-center-1418225963; Reid Standish, *Poland finally comes clean about secret CIA dungeon on its territory*, SYDNEY MORNING HERALD (Dec. 12, 2014), https://www.smh.com.au/world/poland-finally-comes-clean-about-secret-cia-dungeon-on-its-territory-20141212-125g64.html; *US hampering probe into secret CIA prison, says Polish prosecutor*, DNA INDIA (June 13, 2015), https://www.dnaindia.com/world/report-us-hampering-probe-into-secret-cia-prison-says-polish-prosecutor-2095349.

[16] *See generally Abu Zubaydah v. Poland*. The judgment was issued on July 24, 2014, and the decision does not consider evidence that became public between that date and the publication of the decision.

[17] *Abu Zubaydah v. Poland*, ¶ 419.

In making this finding the ECtHR reviewed a long list of public documents, including the Council Report, two further reports by the Council of Europe,[18] two investigations by the European Parliament,[19] a study by the United Nations,[20] reports of independent investigations by multiple NGOs (including, for example, Amnesty International, the International Committee of the Red Cross, and Human Rights Watch), and a 2012 interview of President Kwasniewski.[21]

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[18] *See* 2006 Council Report; Dick Marty, *Abuse of state secrecy and national security: obstacles to parliamentary and judicial scrutiny of human rights violations*, COUNCIL OF EUROPE PARLIAMENTARY ASSEMBLY (Sept. 7, 2011), http://assembly.coe.int/CommitteeDocs/2011/State%20secrecy_MartyE.pdf.

[19] *See* Claudio Fava, *Interim Report on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners*, EUROPEAN PARLIAMENT TEMPORARY COMMITTEE ON THE ALLEGED USE OF EUROPEAN COUNTRIES BY THE CIA FOR THE TRANSPORTATION AND ILLEGAL DETENTION OF PRISONERS (June 16, 2006), https://www.europarl.europa.eu/doceo/document/A-6-2006-0213_EN.pdf; Hélène Flautre, *Report on alleged transportation and illegal detention of prisoners in European countries by the CIA: follow-up of the European Parliament TDIP Committee report*, EUROPEAN PARLIAMENT COMMITTEE ON CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS (Feb. 8, 2012), https://www.europarl.europa.eu/doceo/document/A-7-2012-0266_EN.pdf.

[20] *See* Martin Scheinin et al., *Joint study on global practices in relation to secret detention in the context of countering terrorism*, UNITED NATIONS HUMAN RIGHTS COUNCIL (May 20, 2010), https://digitallibrary.un.org/record/677500?ln=en#record-files-collapse-header.

[21] *See Abu Zubaydah v. Poland*, ¶ 234.

The ECtHR considered far more evidence than had been available at the time the Council of Europe prepared its report, and it was all consistent with the conclusion of the Council Report. For instance, President Kwasniewski made his first public acknowledgment of the CIA site in Poland five years after the Council Report tied him to its approval. Similarly, flight records obtained through a Polish freedom of information request in 2010 bolstered the Eurocontrol records on which the Council Report relied. *Id*. ¶ 286.

The ECtHR also considered new types of evidence. For instance, it cited declassified records from the CIA and the Department of Justice showing that Abu Zubaydah was transferred between black sites on the very same dates as the rendition flights noted in the flight records and observed by the Szymany Airport witnesses. *See id.*, ¶¶ 402-408. The ECtHR also considered the sworn testimony of a Polish senator, Jozef Pinior, who testified on December 2, 2013 about a document purporting to regulate the U.S.-Poland relationship with respect to the black site, which "the American side did not sign." *Id*., ¶¶ 298, 328.

Considering the massive amount of consistent evidence, the ECtHR found "beyond a reasonable doubt" that:

> (1) on 5 December 2002 [Abu Zubaydah] arrived in Szymany on board the CIA rendition aircraft N63MU;

(2) from 5 December 2002 to 22 September 2003 [Abu Zubaydah] was detained in the CIA detention facility in Poland . . .

(3) during his detention in Poland under the HVD Programme he was 'debriefed' by the CIA interrogation team and subjected to the standard procedures and treatment routinely applied to High-Value Detainees in the CIA custody, as defined in the relevant CIA documents;

(4) on 22 September 2003 [Abu Zubaydah] was transferred by the CIA from Poland to another CIA secret detention facility elsewhere on board the rendition aircraft N313P.

*Id.*, ¶ 419.

The government offers three reasons this Court should disregard the ECtHR's judgment. None is persuasive.

*First*, the government argues that the ECtHR's use of the "reasonable doubt" standard is "not similar" to the reasonable doubt standard under our Constitution, but gives no reason why a standard required for a criminal conviction should control the government's claim of state secrecy, as opposed to other standards used by courts in assessing doubt. G. Br. 35. Nor is it clear that the ECtHR's standard is materially different from our reasonable doubt standard. The government notes that the ECtHR drew "such inferences as may flow from the facts and the parties' submissions" and weighed Poland's failure to "contest the admissibility, accuracy or

credibility of the relevant materials and testimonies." *Abu Zubaydah v. Poland*, §§ 372, 394. But, as this Court noted in a criminal case, "[i]nferences and presumptions are a staple of our adversary system of factfinding." *Cty. Ct. of Ulster Cty., N. Y. v. Allen*, 442 U.S. 140, 156 (1979).

The government also assails the "adverse inferences" the ECtHR drew from Poland's refusal to submit evidence. G. Br. 36. But the ECtHR makes plain it did not rely on any such inferences in concluding that "the Polish authorities knew that the CIA used its airport in Szymany and the Stare Kiejkuty military base for the purposes of detaining secretly terrorist suspects captured within the 'war on terror' operation by the U.S. authorities." *Abu Zubaydah v. Poland*, ¶ 443.

Further, any inferences the ECtHR did draw from Poland's refusal to produce documents are common-sense: "The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse. Silence then becomes evidence of the most convincing character." *Interstate Circuit v. U.S.*, 306 U.S. 208, 226 (1939). As this Court has held, restricting the use of such adverse inferences in criminal cases "derogates rather than improves the chances for accurate decisions," and those restrictions that do exist are justified solely by the privilege against self-incrimination. *Baxter v. Palmigiano*, 425 U.S. 308, 319 (1976). The ECtHR's limited use of adverse inferences does not in any way undermine its holding

beyond a reasonable doubt that the CIA detained Abu Zubaydah at a black site in Poland.

*Second*, the government argues that this Court should disregard the ECtHR's findings because Poland refused to submit certain documents to that court, and it "cannot be the law" that refusing to confirm allegations "to protect U.S. state secrets" can convert the allegations into public knowledge and thereby "destroy the U.S. state secrets privilege by trying to protect it." G. Br. 35-36 (citation omitted). Apart from this argument's circularity,[22] it misstates the facts. Poland's refusal to cooperate with the ECtHR had nothing to do with protecting U.S. state secrets. As the ECtHR explained, Poland invoked "no national-security related arguments . . . in response to the Court's evidential requests." *Abu Zubaydah v. Poland*, ¶ 361. Rather, Poland refused to produce evidence to protect an "investigation into [Abu Zubaydah's] allegations of torture and secret detention in Poland." *Id.*

*Third*, the government seizes on the ECtHR's acknowledgment that it relied on some circumstantial evidence. G. Br. 36. But this Court has "never questioned the sufficiency of circumstantial evidence in support of a criminal conviction, even though proof beyond a reasonable doubt is required." *Desert Palace, Inc. v. Costa*, 539

[22] The government simultaneously argues that the location of its base must be kept secret to protect its promise to Poland, and that Poland refused to disclose records to the ECtHR to protect a secret for the CIA.

U.S. 90, 100 (2003). Moreover, no evidence could be *less* circumstantial than President Kwasniewski's admission that he personally oversaw the black site.

None of the government's objections, individually or collectively, undermines the ECtHR's findings. This Court should acknowledge the European court's decision for what it is: a factual finding beyond a reasonable doubt that the CIA detained Abu Zubaydah in a black site in Poland. To pretend that this fact remains secret would be little more than Orwellian double-speak.

### E. Readily available records and U.S. government disclosures further corroborate the public reports

Mounds of documentary evidence, much of it declassified by the U.S. government, independently supports the fact of Abu Zubaydah's detention in Poland. The ECtHR analyzed much of this evidence, and additional evidence made public after its decision only confirms the court's conclusions.

*Flight records.*

Multiple sources confirm the timing of CIA flights bringing detainees in and out of Poland, and align those flights with the movement of Abu Zubaydah and other detainees as officially acknowledged by the CIA.

Records released by the Polish Border Guard and Eurocontrol show that a U.S.-registered plane, N63MU, traveled from Bangkok, Thailand to

Szymany Airport in Poland from December 4 to December 5, 2002. *Abu Zubaydah v. Poland*, ¶ 94.[23]

A report by the Senate Select Committee on Intelligence[24] and a declassified report from the CIA's Office of Inspector General,[25] both made public after the ECtHR's judgment, confirm that Abu Zubaydah was transferred from one CIA site to another on December 4-5, 2002—the dates of the Thailand-to-Poland rendition as found by the ECtHR.

Similar evidence documents the CIA flight that transported Abu Zubaydah out of Poland. Flight records from the Polish Border Guard and

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[23] Thailand has been widely reported as housing a CIA black site from August to December 2002. *See, e.g.*, Joby Warrick and Walter Pincus, *Station Chief Made Appeal To Destroy CIA Tapes*, WASH. POST (Jan. 16, 2008), https://www.washingtonpost.com/wp-dyn/content/article/2008/01/15/AR2008011504090.html (relying on "interviews with more than two dozen current and former U.S. officials familiar with the debate").

[24] Senate Select Committee on Intelligence, Committee Study of the Central Intelligence Agency's Detention and Interrogation Program, 67 n.338 (Dec. 9, 2014), https://fas.org/irp/congress/2014_rpt/ssci-rdi.pdf ("SSCI Report") (noting that Abd al-Rahim al-Nashiri received his first enhanced interrogation at Detention Site Blue on December 5, 2002); *id*. at 74 (noting that al-Nashiri and Abu Zubaydah were transferred together in December 2002).

[25] *Counterterrorism Detention and Interrogation Activities (September 2001 – October 2003)*, CIA OFFICE OF INSPECTOR GENERAL, 41 (May 7, 2004), https://fas.org/irp/cia/product/ig-interrog.pdf (noting that al-Nashiri was subjected to enhanced interrogation on December 4, 2002).

Eurocontrol show that a Boeing 737 registered as N313P landed in Szymany Airport on September 22, 2003, destined for Guantanamo Bay. *Abu Zubaydah v. Poland*, ¶ 109. This flight, plus several others out of Szymany Airport, was organized by Jeppesen International Trip Planning, *see* Council Report ¶¶ 182-89, whose managing director admitted, "We do all of the extraordinary rendition flights—you know, the torture flights."[26]

The SSCI Report again confirms that this flight transported Abu Zubaydah out of Poland. It also describes the site to which Abu Zubaydah had been transported in December 2002 as closing in "[the fall of] 2003," SSCI Report at 74 (alteration in original), and notes that the CIA began detaining people in Guantanamo Bay, the flight's destination, "[b]eginning in September 2003," *id*. at 140.

*Poland's agreement to the CIA black site.*

The SSCI Report also reinforces President Kwasniewski's acknowledgement that he approved the site and the sworn testimony by Polish Senator Pinior concerning the existence of a written document purporting to regulate the U.S.-Poland black-site relationship. *See* Section I.D, *supra*. The SSCI Report describes just such a document—identified as a "Memorandum of Understanding" that "the CIA ultimately refused to sign"—and states that this agreement was proposed by the country to

[26] Jane Meyer, *The C.I.A.'s Travel Agent*, NEW YORKER (Oct. 22, 2006), https://www.newyorker.com/magazine/2006/10/30/the-c-i-a-s-travel-agent.

which Abu Zubaydah was transferred in December 2002. SSCI Report at 74.

The SSCI Report in multiple ways thus corroborates through officially acknowledged facts the ECtHR's finding that Abu Zubaydah was detained by the CIA at a black site in Poland.[27]

* * * * *

That Abu Zubaydah was held at a CIA black site in Poland has been widely known throughout the world for more than 15 years. A multitude of corroborating evidence backs up the public reports, leaving no "important element of doubt about the veracity of the information." G. Br. 36 (citation omitted). The public documentation makes Abu Zubaydah's detention in Poland undeniably a matter "of public knowledge." *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 475 (1974). The state secrets privilege—with its extraordinary constraints on our system of justice— cannot properly be invoked to

[27] The government points to only a single purported inconsistency between the 525-page SSCI Report and the 215-page ECtHR judgment. *See* G. Br. 7. According to the government, the ECtHR's conclusion that Abu Zubaydah was tortured in Poland conflicts with the SSCI Report, which says that "the use of the CIA's enhanced interrogation techniques ceased on August 30, 2002, when Abu Zubaydah received clothing." SSCI Report at 231 n.1,316. Read in context, though, the SSCI Report states only that a particular sequence of enhanced interrogations ended on that date. It is silent on whether the CIA resumed them later. In any event, the government's argument does not alter the public's knowledge of Abu Zubaydah's presence at the Polish site.

prevent depositions that may, in part, concern such public facts.

## II. The State Secrets Privilege Cannot Properly Be Invoked to Block Discussion in a Judicial Proceeding of Publicly Established Facts

The state secrets privilege exists to keep secret, sensitive information from enemy hands. This Court has never before held that widely reported information, corroborated by U.S. government disclosures, can support an assertion of the privilege. Expanding the privilege here as the government urges would provide an open-ended tool for the executive to prevent individuals from vindicating their rights in cases touching on foreign activities that it would prefer were not explored in a judicial proceeding.

Instead, this Court should affirm that the state secrets privilege exists to protect information that (1) is actually secret, and (2) would harm national security if disclosed. While it may be appropriate for courts to give some deference to the executive's reasonable assessments of national security harm, the *threshold* question of whether the information at issue is secret is one that courts are entirely suited to determine for themselves.

### A. The Court should not expand the state secrets privilege to shield discussion of publicly established facts

The purpose of the state secrets privilege is to shield information whose disclosure could harm national security by revealing an unknown fact.

*Reynolds*, 345 U.S. at 10. This is evident from the facts of every decision of this Court upholding an assertion of the state secrets privilege. In each instance, the information at issue was not publicly known, and the government convinced the Court that disclosure would gravely harm national security.[28] Asserting the privilege does not serve its purpose if the information the government seeks to shield is widely known—such information cannot be a state secret because it is not secret.

Dictionary definitions agree. A secret is "[s]omething that is kept from the knowledge of others," Black's Law Dictionary (11th ed. 2019), "[s]omething unknown or unrevealed," Oxford

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[28] *See, e.g.*, *Gen. Dynamics Corp. v. United States*, 563 U.S. 478, 481-82 (2011) ("The design, materials, and manufacturing process for two prior stealth aircraft operated by the Air Force—the B-2 and the F-117A—are some of the Government's most closely guarded military secrets."); *Tenet v. Doe*, 544 U.S. 1, 11 (2005) ("The possibility that a suit may proceed and an espionage relationship may be revealed, if the state secrets privilege is found not to apply, is unacceptable: Even a small chance that some court will order disclosure of a source's identity could well impair intelligence gathering and cause sources to close up like a clam.") (internal quotation marks omitted); *Reynolds*, 345 U.S. at 10 ("It is equally apparent that these electronic devices must be kept secret if their full military advantage is to be exploited in the national interests."); *Totten v. United States*, 92 U.S. 105, 106-07 (1875) ("If upon [espionage contracts] an action against the government could be maintained in the Court of Claims, whenever an agent should deem himself entitled to greater or different compensation than that awarded to him, the whole service in any case, and the manner of its discharge, with the details of dealings with individuals and officers, might be exposed, to the serious detriment of the public.").

English Dictionary (June 2021), https://www.oed.com/view/Entry/174537; something "kept from knowledge," Merriam Webster (Aug. 2021), https://www.merriam-webster.com/dictionary/secret. Once something becomes widely known, any continuing effort to maintain its confidentiality does not transform it back into a secret. It is no longer "hidden from knowledge of others." It is thus not surprising that this Court has never applied the state secrets privilege to shield publicly known facts.

This Court's trade secrets jurisprudence similarly makes clear that something cannot be a trade secret if it is not a secret. *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 475 (1974). ("The subject of a trade secret must be secret."); *see also* 26 Wright & Miller, FED. PRAC. & PROC. EVID. § 5665 (1st ed) (observing that state secret doctrine is more analogous to trade secrets than to other evidentiary privileges because both state and trade secrets protect the substance of the secret, not only the fact that the secret was communicated to another party). In the trade secrets realm, information is not a secret if it is "of public knowledge." *Kewanee Oil Co.*, 416 U.S. at 475; *see also, e.g.*, Restatement (Third) of Unfair Competition § 39 cmt. f (1995) ("Information that is generally known . . . is not protectable as a trade secret.").

So too here. Information cannot be a state secret if it is not secret.

The government seeks a different and novel application of the privilege. It urges the Court to

extend the privilege to the disclosure of any information that would result in "a breach of the trust on which the CIA's clandestine relationships with foreign governments are based." G. Br. at 27 (internal quotation marks omitted). The CIA does not just insist on its right to refuse to confirm or deny a fact it has promised to keep secret, but the right to shut down depositions that would explore facts the CIA does not want to acknowledge, and to do so notwithstanding that the "secret" facts are widely and publicly known.

To support its proposed expansion of the privilege, the government relies on lower court cases interpreting Exemption 1 of the Freedom of Information Act (FOIA), which exempts information that has been "properly classified." *See* 5 U.S.C. § 552(b)(1)(B). The cases cited by the government hold that public availability of information can defeat an agency's claim that the information remains properly classified and thus properly withheld under Exemption 1 only if that information has been "officially acknowledged" by the agency that classified the information. *See, e.g.*, *Frugone v. CIA*, 169 F.3d 772, 774-75 (D.C. Cir. 1999); *Military Audit Project v. Casey*, 656 F.2d 724, 741-45 (D.C. Cir. 1981). Under this reading, Exemption 1 preserves an agency's "options of deniability" of publicly reported facts. *Wilson v. CIA*, 586 F.3d 171, 195 (2d Cir. 2009).

Just as this Court has never before upheld an invocation of the state secrets privilege to protect an agency's options of deniability, it has never approved the broad construction of Exemption 1 as doing so.

And even if this interpretation of FOIA is sound, there are good reasons why the state secrets privilege should not coincide with the FOIA exemption. The state secrets privilege and Exemption 1 protect different interests and their assertions have different consequences.

FOIA's purpose is to promote government transparency, and in crafting its exemptions Congress "balance[d] the public's need for access to official information with the Government's need for confidentiality." *Weinberger v. Catholic Action of Haw./Peace Educ. Project*, 454 U.S. 139, 144 (1981). The common-law state secrets doctrine, on the other hand, balances the government's need for confidentiality with different interests: the search for truth in adversarial litigation, parties' abilities to properly assert or defend their rights and, in some circumstances, access to the courts.[29] The consequences of asserting the state secrets privilege are thus very different and far more threatening to our constitutional system than those of asserting Exemption 1.

[29] The government assumes that the state secrets privilege could justify dismissal of an action, but this Court has never allowed dismissal on state secrets grounds outside cases involving government contracts. *Compare, e.g.*, *Tenet*, 544 U.S. at 8 (dismissing action where "success depends upon the existence of [a] secret espionage relationship with the government") *with Reynolds*, 345 U.S. at 11 (precluding discovery of accident investigation report in tort suit).

While acknowledging[30] a fact promised to be kept secret might frustrate an ally, such indirect "national-security concerns must not become a talisman used to ward off inconvenient claims." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1862 (2017). The costs to our justice system are too high to extend the state secrets privilege to information that is publicly known, confirmed by multiple governmental and non-governmental actors, and readily corroborated by public records. The harsh consequences of invoking the state secrets doctrine can only be justified to protect information that *is* secret and national security requires to remain secret.

Moreover, upholding an invocation of the state secrets privilege over information that has become fully public simply to uphold a decades'-old government promise of secrecy would cede to the executive broad new authority to hamstring judicial proceedings that could too easily be abused. A government agency can promise an ally to keep secret virtually any embarrassing or potentially illegal operation; the fact that the promise was made would then justify the executive to prevent any

[30] Under FOIA precedent, testimony from *former* CIA consultants would not necessarily even be considered an official acknowledgement. *See, e.g., Afshar v. Dep't of State*, 702 F.2d 1125, 1133 (D.C. Cir. 1983) (holding that a book written by the former head of the CIA's Middle East Department was not "an official and documented disclosure"); *Am. Ctr. for Law & Justice v. United States NSA*, 474 F. Supp. 3d 109, 122 (D.D.C. 2020) ("Courts have consistently found that statements by former agency officials are not official agency disclosures.") (collecting cases).

judicial proceeding that would disclose information about the embarrassing or illegal activity.

Indeed, pretextual invocation of the privilege has marred the state secrets doctrine since its modern inception in *Reynolds*. In that seminal case, three widows sued the government for negligence after their husbands died in an Air Force plane crash. *Reynolds*, 345 U.S. at 3. The plaintiffs sought the Air Force's accident investigation report, but the government refused to produce it, even *in camera*, claiming that it contained information about secret electronic equipment that was being tested on the flight. *Id.* at 5. The Court in *Reynolds* agreed that the government could withhold the information because its disclosure would reveal secrets that could harm national security. Fifty years later, declassification of the report revealed that it actually contained "no military secrets," but did draw highly embarrassing conclusions about government negligence that invocation of the privilege effectively kept secret. Hon. Shira A. Scheindlin & Matthew L. Schwartz, *With All Due Deference: Judicial Responsibility in A Time of Crisis*, 32 HOFSTRA L. REV. 1605, 1662 n.103 (2004); Louis Fisher, *Sources and Limits for Presidential Power: Perspectives of Robert H. Jackson*, 83 ALB. L. REV. 441, 493 (2020).

The risk of such a pretextual claim of privilege is especially great in this case, as the CIA has repeatedly misled the public about its high-value detainee program. The Senate Select Committee on Intelligence found, for example, that "[t]he interrogations of CIA detainees were brutal and far

worse than the CIA represented to policymakers and others," "[t]he conditions of confinement for CIA detainees were harsher than the CIA had represented," "[t]he CIA coordinated the release of classified information to the media, including inaccurate information concerning the effectiveness of the CIA's enhanced interrogation techniques," and "[t]he CIA's claims about the number of detainees held and subjected to its enhanced interrogation techniques were inaccurate."[31] In these circumstances, invocation of the privilege may well be nothing more than an excuse to prevent further inquiry into activities of questionable legality that the CIA would prefer to keep from public attention.

The expanded privilege the government asks this Court to authorize is particularly dangerous because, in the realm of national security, "the absence of the governmental checks and balances present in other areas of our national life" makes an informed citizenry "the only effective restraint upon executive policy and power." *N.Y. Times Co. v. United States*, 403 U.S. 713, 728 (1971) (Stewart, J., concurring).

Finally, even if the government's expansion of the privilege could be justified in some contexts, it is not justified on the facts of this case. Given the overwhelming public evidence, the findings of committees and courts in Europe, the acknowledgement by Polish authorities, and the corroborating facts declassified by the U.S.

[31] SSCI Report, Findings and Conclusions at 2-17.

government, upholding a claim of privilege here would serve no proper purpose.

### B. Courts should not defer to the executive in deciding whether a fact is secret

Given the important interests at stake when the state secrets privilege is asserted, "[t]he court itself must determine whether the circumstances are appropriate for the claim of privilege." *Reynolds*, 345 U.S. at 8. This requires it to determine first that the information at issue is actually secret, and second, that disclosing the unknown information will seriously harm national security. *See id.* at 10 (holding that the privilege applies only when disclosure "will expose military matters" that "in the interest of national security, should not be divulged.").

While some deference to the executive's reasonable assessment of harm is appropriate, complete deference to its assertion of privilege is not. The courts must maintain their independence and perform their constitutional function as a check on the executive. On the initial question of whether information is secret, the judiciary owes no deference to the executive, as courts are fully able to determine for themselves whether a fact is a secret.

#### 1. *Courts do not owe, and should not grant, complete deference to the executive's claims of state secrecy.*

The government is off base in claiming that Article III courts must defer to the executive

branch's views on secrecy in this context. G. Br. at 22-26. As the Court made clear in *Reynolds*, it is for a court to decide whether the privilege applies because "[i]t is the judge who is in control of the trial, not the executive," and therefore "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." *Reynolds*, 345 U.S. at 8 n.21, 9-10 (internal quotation marks and citations omitted). *Reynolds* also made clear that the government must "satisfy the court" that the contested information would "expose military matters which, in the interest of national security, should not be divulged." *Id.* at 10. This requirement to "satisfy the court" is a far cry from the government's claim that courts must show the executive the "utmost deference."[32]

*Reynolds*'s approach maintains a proper separation of powers. Deferring on both the substantive questions of whether the information is secret and whether its disclosure could cause harm would cede to the executive branch far too much authority to control what information goes before the court and what matters may even be heard, abandoning key components of judicial independence. LOUIS FISHER, IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL

[32] The "utmost deference" language is from *United States v. Nixon*, which had nothing to do with the state secrets privilege. *See United States v. Nixon*, 418 U.S. 683, 712 n.19 (1974) ("We are not here concerned with . . . the President's interest in preserving state secrets.").

POWER AND THE *REYNOLDS* CASE 212, 245 (2006). Indeed, *Reynolds* considered such a scheme and rejected it: "The court *itself* must determine whether the circumstances are appropriate for the claim of privilege." *Reynolds*, 345 U.S. at 8 (emphasis added); *see also* 85 WIGMORE ON EVIDENCE § 2379(g) (4th ed. 2021) (favorably comparing the more limited deference under *Reynolds* to the deference accorded the invocation of the state secrets privilege in England, where "the political minister determines the existence of the privilege; the court passes only on the question whether the claim has been made by the proper person and in the proper form").

Excessive deference would also imperil the rights of litigants and encourage needless secrecy by the executive. By foreclosing litigants from obtaining information necessary to their claims, greater deference would "undermine[] the judiciary's duty to assure fairness in the courtroom and to decide what evidence may be introduced." Fisher, *supra*, at 245. Moreover, an executive branch that knows its secrecy claims will not be critically evaluated would have an "incentive . . . to use the privilege to avoid embarrassment, to handicap political enemies, and to prevent criminal investigation of administrative action." William G. Weaver & Robert M. Pallitto, *State Secrets and Executive Power*, 120 POL. SCI. Q. 85, 90 (2005).

Abuse of the privilege can take place even without mischief. Commentators widely agree that officials within the executive branch have little incentive to permit disclosure; from the perspective

of a government official, it is always a safer choice to keep the information secret.[33] With the absence of internal incentives for disclosure, "[a] court which abdicates its inherent function of determining the facts upon which the admissibility of evidence depends will furnish to bureaucratic officials too ample opportunities for abusing the privilege." 85 WIGMORE ON EVIDENCE § 2379(g) (4th ed. 2021). Thus, while some deference to the executive's claims about possible national security harm from the exposure of a secret may be justified, complete submission to the executive is not.

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[33] "The head of an executive department['s] . . . official habit and leaning tend to sway him toward a minimizing of the interest of the individual. Under the normal administrative routine the question will come to him with recommendations from cautious subordinates against disclosure and in the press of business the chief is likely to approve the recommendation about such a seemingly minor matter without much independent consideration." *Ellsberg v. Mitchell*, 709 F.2d 51, 58 (D.C. Cir. 1983) (quoting MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE 235 (E. Cleary ed. 1972); *see also* Erwin Griswold, *Secrets Not Worth Keeping: The Courts and Classified Information*, WASH. POST (Feb. 15, 1989), https://www.washingtonpost.com/archive/opinions/1989/02/15/secrets-not-worth-keeping/a115a154-4c6f-41fd-816a-112dd9908115/ ("It quickly becomes apparent to any person who has considerable experience with classified material that there is massive overclassification and that the principal concern of the classifiers is not with national security, but rather with governmental embarrassment of one sort or another.").

*2. Courts are competent to determine without deference whether information is secret.*

Whatever deference courts should show the executive on whether disclosing a secret would harm national security, they owe no deference to the government's claim that information is secret in the first place. Whether a fact is widely known does not require national security expertise. Courts are fully capable of determining whether a fact is widely known.

Courts are no strangers to determining the state of public knowledge without deferring to the government. They do so regularly in trade secrets cases, *see, e.g.*, *ECIMOS, LLC v. Carrier Corp.*, 971 F.3d 616, 643 (6th Cir. 2020), and in Freedom of Information Act cases. For instance, in *ACLU v. CIA*, a unanimous D.C. Circuit panel rejected the CIA's Glomar response, refusing to confirm or deny the existence of documents reflecting the CIA's interest in drone strikes, because that interest was public knowledge. After examining the state of the public record, the court concluded that "it is neither logical nor plausible for the CIA to maintain that it would reveal anything not already in the public domain to say that the [CIA] at least has an intelligence interest in such strikes." *ACLU v. CIA*, 710 F.3d 422, 430 (D.C. Cir. 2013) (internal quotation marks omitted). The court did not defer to the CIA on this point. *See id*. at 428-32; *see also, e.g.*, *Wolf v. CIA*, 473 F.3d 370, 379 (D.C. Cir. 2007) (holding, without deferring to the government, that the existence of

CIA records on a foreign national was public knowledge).

The Court owes no deference to the government as to whether the information is a secret.

## CONCLUSION

For the foregoing reasons, this Court should hold that the fact Abu Zubaydah was held at a CIA black site in Poland is not secret and therefore cannot be a state secret.

Respectfully submitted,

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[34] This brief does not purport to express the views of Yale Law School, if any.