PRIVILEGE IN PERIL: *U.S. V. ZUBAYDAH* AND THE STATE SECRETS PRIVILEGE

ALANA MATTEI*

INTRODUCTION

U.S. v. Zubaydah presents an opportunity for the Court to settle the scope of the state secrets privilege and the role of the judiciary when the government invokes a claim of privilege.[1] The state secrets privilege, invoked by the executive, gives courts the power to prevent the disclosure of information that could pose a threat to national security by excluding the particular evidence or dismissing the case. The Court will decide whether the Ninth Circuit erred by rejecting the Government's assertion of the state secrets privilege over the depositions of former CIA contractors requested by Abu Zubaydah.[2] The Ninth Circuit held the depositions could proceed because not all of the requested information was privileged, and the district court must attempt to separate privileged from nonprivileged information in the disputed discovery before it may permissibly dismiss the claim.[3]

The Court should affirm the Ninth Circuit's limited holding. Privileged and nonprivileged information should be separated when possible so that individuals can access nonprivileged information in the interest of justice while still preserving national security.[4] Allowing the executive to make a blanket assertion of the state secrets privilege and demand that this assertion be given nearly absolute deference

Copyright @ 2022 Alana Mattei
* J.D. Candidate, Duke University School of Law, 2023, B.A., University of Pennsylvania, 2020.
I would like to thank my parents for their unwavering love and support. I would also like to thank my editorial team for their hard work and invaluable feedback.

1. 210 L. Ed. 2d 831 (2021).
2. Husayn v. Mitchell, 938 F.3d 1123, 1126 (9th Cir. 2019).
3. *Id.* at 1137.
4. *See id.* at 1137-38 (explaining that because courts must honor principles of justice while also balancing national security concerns, the court must try to extricate privileged information from discovery before dismissing a case).

would establish a dangerous precedent. A standard of absolute deference would open the door to abuse of power. If an assertion of the state secrets privilege is incontestable, there is no limit to what can be kept from the public at any given time without reason.[5] This is especially worrisome if it is permissible for the executive to be selective in its assertion of the privilege over similar information. Most importantly, affirming the Ninth Circuit's rejection of the state secrets privilege is in line with precedent and ultimately beneficial for the public good.

I. FACTS

In early 2002, Zayn al-Abidin Muhammad Husayn ("Abu Zubaydah") was captured by Pakistani authorities who believed he was a high-level member of Al-Qaida.[6] From December 2002 to September 2003, Abu Zubaydah was detained at a CIA site, allegedly in Poland, where he was subject to "enhanced interrogation" techniques, colloquially understood to mean torture.[7] It is not disputed that while at the site, Abu Zubaydah was subject to torture, including waterboarding, confinement, and sleep deprivation.[8] Two independent contractors working for the CIA, James Elmer Mitchell and John Jessen, allegedly proposed, developed, and twice supervised the torture techniques used on Abu Zubaydah during his time at the site.[9] It is alleged that because of his treatment, Abu Zubaydah has sustained brain damage and lost his left eye, in addition to other physical impairments.[10] Eventually, Abu Zubaydah was transferred from the CIA site to Guantanamo Bay, where he remains to this day.[11]

II. PROCEDURAL BACKGROUND

This case stems from an ongoing Polish criminal investigation into the torture of Abu Zubaydah, which allegedly occurred at a CIA facility in Poland.[12] The Polish investigation was initially opened in 2010 at Abu Zubaydah's request. The investigation, however, was

5. *See id.* at 1134 (raising the possibility that the executive might use the privilege to protect itself from embarrassing information).
6. *Id.* at 1126.
7. *Id.* at 1127.
8. *Husayn*, 938 F.3d at 1127 (9th Cir. 2019).
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* at 1126.

quickly closed without prosecution when the United States refused Poland's request for information pursuant to the mutual legal assistance treaty (MLAT) that the countries had previously agreed to.[13] In 2014, the European Court of Human Rights (ECHR) found that Abu Zubaydah had been held by the CIA in Poland from December 2002 to September 2003 with Poland's cooperation.[14] The ECHR also concluded that Poland's earlier investigation into the criminal complaint had been deficient.[15] Polish prosecutors subsequently reopened the investigation.[16] The United States once again, pursuant to the MLAT, denied Poland's requests for helpful information, including requests for Abu Zubaydah to provide testimony.[17]

Given the United States' lack of cooperation, Polish prosecutors instead invited Abu Zubaydah's counsel to provide evidence.[18] Accordingly, Abu Zubaydah filed an application for discovery in the district court under 28 U.S.C. 1782(a), which authorizes district courts to order discovery for use in litigation outside the United States.[19] The application sought subpoenas for discovery from James Mitchell and John Jessen, former CIA contractors who allegedly played a major role in Abu Zubaydah's torture.[20] The district court granted the application and subpoenas were served on Mitchell and Jessen.[21] At this point, the United States government ("the Government") intervened and filed a motion to quash the subpoenas based in part on an assertion of state secrets privilege, supported by a declaration by CIA Director Michael Pompeo.[22] The district court found that some, but not all, of the information requested was covered by the state secrets privilege and quashed the subpoenas entirely.[23]

Abu Zubaydah appealed, and a split Ninth Circuit "reject[ed] the government's blanket assertion of state secrets privilege over

13. Petition for a Writ of Certiorari at 4, United States v. Husayn, No. 20-827 (Dec. 17, 2020).
14. Brief on the Merits for Respondents Abu Zubaydah and Joseph Margulies at 12, United States. v. Husayn, (Dec. 17, 2020) (No. 20-827) [hereinafter Brief for Respondents].
15. *Id.* at 13.
16. *Id.*
17. *Id.*
18. Petition for Writ of Certiorari, *supra* note 13, at 8.
19. *Id.*
20. *Id.*
21. Husayn v. Mitchell, 938 F.3d 1123, 1129 (9th Cir. 2019).
22. *Id.*
23. *Id.* at 1129–30.

everything in Petitioners' discovery request."[24] The court applied its three-step *Reynolds* analysis for application of the state secrets privilege.[25] First, the court must confirm that there has been a formal claim of privilege.[26] In step two, the court must independently determine whether the information in question is privileged.[27] In the final step, the court must decide "how the matter should proceed in the light of a successful claim of privilege."[28]

It is the Ninth Circuit's analysis under steps two and three that gives rise to the issues of this case.[29] In its step two analysis, the court determined that some of the disputed discovery was not privileged—such as the fact that the CIA operated in Poland.[30] Nevertheless, the court recognized that other information, like the identities of the foreign individuals who worked with the CIA, would be classified as privileged.[31] The court provided several bases for this determination. First, the court emphasized that "in order to be a 'state secret,' a fact must first be a 'secret'," and some of the information the Government claimed to be privileged was already public knowledge.[32] Next, the court took issue with the Government's concern about being compelled to provide official confirmation to information that is already in the public sphere.[33] The Government argued that "the absence of official confirmation from the CIA is the key to preserving" uncertainty about whether already public information is true.[34] Even if it were to accept the Government's apprehension about official confirmation, the court reasoned that Mitchell and Jessen are now private parties whose disclosures would technically not amount to an official statement on behalf of the United States.[35] Additionally, the court reasoned that Poland's role in spearheading the investigation undercut Pompeo's concern that disclosure would breach trust with countries who work with the CIA because it is a

24. *Id.* at 1134.
25. *See id.* at 1131 (identifying the steps from *Reynolds* and then applying them to the current case).
26. United States v. Reynolds, 345 U.S. 1, 7–8 (1953).
27. Husayn, 938 F.3d at 1131 (quoting Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1081 (9th Cir. 2010)).
28. *Id.* at 1134 (quoting *Mohamed*, 614 F.3d at 1082).
29. *See id.* at 1130.
30. *Id.* at 1134.
31. *Id.* at 1133–34.
32. *Id.* at 1133.
33. *Id.* at 1132.
34. *Husayn*, 938 F.3d at 1133 (9th Cir. 2019).
35. *Id.*

country that worked with the CIA that is seeking the information.[36] Finally, the court underscored the necessity of balance between executive and judicial power. The court reasoned that although the judiciary should not undermine legitimate assertions of executive power, it also should not permit the abuse of such power when it determines that national security concerns are not legitimate.[37]

In step three of the analysis, a court confronted with a mix of privileged and nonprivileged information must first determine whether it is possible to disentangle the privileged information from the nonprivileged information before dismissing a case.[38] The court held that because the district court failed to make a meaningful attempt to separate the information, dismissal was inappropriate.[39] The court emphasized that Mitchell and Jessen have already provided similar nonprivileged information in another case before the district court, using code names and pseudonyms with the blessing of the government, to suggest that the separation attempt is likely to be successful.[40] In its limited holding, the Ninth Circuit allowed discovery to proceed, instructing the district court to make a meaningful attempt to separate privileged and nonprivileged information in the disputed discovery and permitting the district court to dismiss if it ultimately found this task impossible.[41]

In his dissent, Judge Gould took issue with the majority's analysis under step three of the test and argued that the court should defer entirely to Pompeo's declaration.[42] He stated that dismissal is warranted "if at step three of the *Reynolds'* test it appears that walking close to the line of actual state secrets may result in someone overstepping that line to the detriment of the United States."[43] Gould rejected the notion that codewords and pseudonyms could be used to protect sensitive information in the depositions.[44] He asserted that this

36. *Id.* at 1134.

37. *See id.* at 1134 (drawing a distinction between the Government's valid use of privilege to hide a legitimate secret and the impermissible use of trying to shield the Government from embarrassment).

38. *Id.* at 1135 (quoting Kasza v. Browner, 133 F.3d 1159, 1166 (9th Cir. 1998) (quoting Ellsberg v. Mitchell, F.2d 51, 57 (D.C. Cir. 1983)).

39. *Id.* at 1137.

40. *Husayn*, 938 F.3d at 1137 (9th Cir. 2019).

41. *Id.* at 1137–38.

42. *Id.* at 1138.

43. *Id.* at 1138. The majority responds that a concern about "walking close to the line" has no basis in the Ninth Circuit's test which requires that nonsensitive information is released "whenever possible." *Id.* at 1134 n. 17.

44. *See id.* at 1139 (asserting that those measures would be ineffective in this case even

would offer little protection because the information provided would be viewed in the larger context of the Polish investigation into CIA activity on its soil, thereby "risking the exposure of a broader picture of national security material."[45] Last, the dissent took issue with the fact that the information would ultimately be sent to another country without the supervision of the United States court system, arguing that this should be factored into the *Reynolds* analysis.[46]

The Government filed a petition for writ of certiorari on December 17, 2020.[47] On April 26, 2021, the Petition was granted.[48]

III. LEGAL HISTORY

A. The State Secrets Privilege

In *United States v. Reynolds*, the Court was asked to determine whether certain evidence could be excluded from a tort claim against the government based on the government's assertion that the material was privileged and that its disclosure would negatively impact national security.[49] The Court found that to assert privilege, the government must first lodge a formal claim.[50] Once this has been done, the deciding "court itself must determine whether the circumstances are appropriate for the claim of privilege."[51] The Court specified that there must be compromise between judicial and executive power, urging that "judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers."[52]

The Court also indicated that the need for the evidence in adjudicating the dispute bears on how much weight the deciding court should give to the claim of privilege.[53] Specifically, "where there is a strong showing of necessity, the claim of privilege should not be lightly accepted."[54] On the other hand, "even the most compelling

---

though they had been used previously).

45. *Id.* at 1140.

46. *Husayn*, 938 F.3d at 1140 (9th Cir. 2019).

47. Petition for a Writ of Certiorari at 2, United States v. Husayn, No. 20-827 (Dec. 17, 2020).

48. United States v. Husayn, 938 F.3d 1123, *cert. granted,* 141 S.Ct. 2564 (2021).

49. *See* United States v. Reynolds, 345 U.S. 1, 4–6 (1953) (noting the government's position that production would not be in the "public interest.")

50. *Id.* at 7–8.

51. *Id.* at 8.

52. *Id.* at 9–10.

53. *Id.* at 11.

54. *Id.*

necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake."[55] In *Reynolds*, for example, the Court found that necessity was minimized by the availability of alternative sources of evidence and consequently held that the requested evidence was privileged.[56] In the face of a valid privilege claim, the court can either dismiss the case entirely or exclude the privileged evidence from the case, which might also result in dismissal if the case cannot proceed without the evidence.[57]

B. Section 1782 Application

Under 28 U.S.C.S. § 1782, the "district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal…"[58] Section 1782 applications for discovery are evaluated under a four-factor test established in *Intel Corp. v. Advanced Micro Devices, Inc.*[59]

The four *Intel* factors are: (1) whether the person from whom discovery is sought is a participant in the foreign proceeding; (2) the nature of the foreign tribunal, the character of the proceedings underway abroad and the receptivity of the foreign government to U.S. federal-court assistance; (3) whether the discovery request is an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States; and, (4) whether the discovery request is unduly intrusive or burdensome.[60]

Section 1782 contains a provision precluding the compulsion of disclosures that would violate "any legally applicable privilege."[61]

IV. PETITIONER'S ARGUMENT

The Government challenges the Ninth Circuit's holding on two independent grounds. First, it contends that the state secrets privilege applies to the requested information, thus bringing the discovery request under Section 1782's privilege exception.[62] Second, even

55. *See* Reynolds, 345 U.S at 4–6.
56. *Id.*
57. Husayn v. Mitchell, 938 F.3d 1123, 1126 (9th Cir. 2019).
58. 28 U.S.C.S. §1782(a).
59. 542 U.S. 241, 246–47 (2004).
60. Husayn v. Mitchell, 938 F.3d 1123, 1129 n. 9 (9th Cir. 2019) (citing *Intel,* 542 U.S. at 264–65).
61. §1782(a).
62. Brief for the United States, United States v. Husayn, (Dec. 17, 2020) (No. 20-827)

assuming the information is not privileged, the Government asserts that this request to assist foreign prosecutors falls outside the scope of Section 1782.[63]

A. State Secrets Privilege

The significant error underlying the Ninth Circuit's holding, according to the Government, is its failure to afford appropriate deference to Director Pompeo's judgment regarding the risks to national security posed by deposing Mitchell and Jessen.[64] The Government asserts that precedent requires courts to afford "the utmost deference" to executive branch determinations regarding national security risks when considering an assertion of the state secrets privilege.[65] Thus, the Government argues, the Ninth Circuit's requirement of "skeptical" review contradicts this precedent and "erroneously invites courts to substitute their own views" for those of executive officials.[66] Furthermore, the Government views the fact that the information is ultimately destined to be sent to a foreign tribunal as a factor that mandates enhanced deference.[67] Under *Reynolds*, the Government alleges, where the destination is foreign and necessity is purportedly not great, the Government should only need to show "that the discovery poses a facially plausible risk to the national security" to establish a successful privilege claim.[68]

The Government also takes issue with the Ninth Circuit's assertion that the privilege does not apply to Mitchell and Jessen because they were CIA contractors at the time and are now private citizens who do not speak on behalf of the United States.[69] As the Government's argument goes, viewing Mitchell and Jessen as private parties neglects the fact that they obtained the information while working for the CIA. Disclosure of this information, therefore, would be a breach of trust with the CIA's secret international partners.[70] Moreover, the Government argues that precedent has long applied this privilege to government contractors.[71] If contractors were not

[hereinafter Brief for the United States].

63. *Id.* at 21.
64. *Id.* at 19.
65. *Id.* at 24.
66. *Id.* at 25.
67. Brief for the United States, *supra* note 62, at 40.
68. *Id.*
69. *Id.* at 26.
70. *Id.* at 27.
71. *Id.* at 28–29.

covered, according to the Government, the consequences would be dire.[72] Since the United States government often uses contractors, excluding them from protection would create a giant loophole that could be exploited by compelling contractors to disclose information that would otherwise be privileged.[73]

The Government further rebukes the Ninth Circuit's reasoning that the information in question is not secret, and accordingly not privileged, because it is essentially public knowledge.[74] The Government asserts that public speculation does not "undermine the government's ability to invoke the privilege to prevent its *own* employees and contractors with first-hand knowledge from being compelled by a court to confirm or deny that information."[75] The Government argues that this is based in precedent which recognizes that, without official confirmation, public speculation retains a level of doubt necessary to preserve national security.[76] Further, the Ninth Circuit's claim of public knowledge is based in part on the ECHR's findings and public news stories, sources which the Government deems questionable.[77] The Government takes issue with the ECHR findings because they were based in part on the "adverse inferences it chose to draw against Poland, because Poland declined to confirm or deny the allegations…"[78]

The Government argues that a foreign partner's refusal to respond to allegations about the United States should not turn those allegations into public knowledge and consequently destroy the Government's right to assert the state secrets privilege.[79] This would mean that regardless of whether the foreign partner substantiates or denies the allegations, it has essentially destroyed the state secrets privilege for the United States.

Last, the Government disagrees with the majority that Poland's role in seeking the information diminishes national security concerns.[80] According to the Government, the agreement to keep

72. *See id.* at 28 (stressing that contractors are entrusted with classified information, the disclosure of which could harm national security).
73. Brief for the United States, *supra* note 62 at 29.
74. *Id.* at 30.
75. *Id.* (emphasis in original).
76. *Id.* at 31.
77. Brief for the United States, *supra* note 62, at 35.
78. *Id.*
79. *Id.*
80. *Id.* at 38.

cooperation with the CIA secret is limited in scope, meaning that the CIA can owe secrecy to one part or particular administration of the foreign government.[81] Thus, the fact that current Polish authorities are seeking information on this matter does not vitiate the CIA's existing promise of secrecy to other parts of the government or the previous administration.[82]

B. Section 1782

The Government presents an alternative, independent reason to reverse the Ninth Circuit decision: the *Intel* factors that courts must use in their exercise of discretion under Section 1782 weigh strongly against compelling discovery here.[83] The Government claims that because of its analysis under these factors, the district court "ultimately refused to issue an order" compelling discovery.[84] The Government appears to concede that the first *Intel* factor weighs in favor of discovery because Mitchell and Jessen are not participants in the Polish proceeding.[85] The remaining three factors, however, weigh against discovery.[86] According to the Government, the second factor, which deals with the nature of the foreign proceedings and the receptivity of the foreign government "counsel great caution here."[87] The Government asserts that the Polish proceedings are "highly atypical,"[88] and Poland's government is not necessarily receptive to the Section 1782 request, as evidenced by Poland's refusal to allow its former President to provide information to prosecutors.[89] The Government also contends, echoing the language of the fourth *Intel* factor, that the requested discovery would be "unduly intrusive or burdensome" because the Government would have to police the

81. *See id.* at 38 (explaining that the CIA's promise of secrecy applies even in the face of actions by other elements of the foreign government or new politicians seeking information about their predecessors).

82. *See id.* (asserting that the role of Polish prosecutors in seeking information does not diminish the potential harm of compelling discovery from Mitchell and Jessen).

83. Brief for the United States, *supra* note 62, at 21.

84. *Id.* at 42–43.

85. *Id. at 43.*

86. *Id.*

87. *Id.*

88. *Id.*

89. Brief for the United States, *supra* note 62, at 44 (further noting that "Poland's executive leadership has therefore done precisely what the United States is attempting to do here: ensure that those who may have information obtained during their past government service uphold their duty of secrecy in the face of a Polish investigation into Abu Zubaydah's charges.").

discovery to prevent the disclosure of state secrets.[90] Most importantly, per the third *Intel* factor, the Government argues that Respondent's Section 1782 request is a blatant attempt to circumvent the policies of the United States and its MLAT with Poland, and this alone should be dispositive.[91]

V. RESPONDENT'S ARGUMENT

A. State Secrets Privilege

Respondents, Abu Zubaydah and his attorney, assert that the Court should uphold the Ninth Circuit's decision.[92] Respondents first establish, using the Government's own admission as evidence, that not all of the information sought is privileged because some of it has already been declassified by the Government.[93] Further supporting this assertion is the fact that Mitchell and Jessen have twice testified without Government intervention about the same type of unclassified information that the Government now contends is privileged.[94] "This prior testimony included some of what they observed at the site at issue here and what they did to Abu Zubaydah elsewhere."[95] Likewise, Respondents contend that the nonprivileged information can be easily disentangled from the privileged information because codenames and other methods can be used to protect against disclosure of sensitive information, such as geographic location.[96] Respondents further argue that Mitchell and Jessen cannot provide "official" confirmation or denial of any information because they are private citizens, not agents of the Government.[97]

Respondents next assert that Abu Zubaydah has made a strong showing of necessity, as required by the second step of *Reynolds*, thus weakening the Government's privilege claim.[98] Poland has repeatedly requested Abu Zubaydah's testimony, but the United States government has prohibited him from testifying on his own behalf.[99] Furthermore, his attorneys are likewise prohibited from providing

---

90. *Id.* at 47.
91. *Id.* at 44.
92. Brief for Respondents, *supra* note 14, at 55.
93. *Id.* at 27.
94. *Id.*
95. *Id.*
96. *Id.* at 28.
97. Brief for Respondents, *supra* note 14, at 37.
98. *Id.* at 39.
99. *Id.*

information on his behalf without CIA approval.[100] Thus, according to Respondents, Abu Zubaydah has no avenue to gather evidence other than Mitchell and Jessen's testimony and "a greater showing of necessity can scarcely be imagined."[101]

Respondents further assert that the overseas destination of the information is essentially irrelevant in a determination of its privilege.[102] They argue that information is privileged regardless of its planned use or destination. Instead, what matters is only whether the evidence will expose national security secrets. Accordingly, Respondents see minimal difference between domestic and foreign tribunals in this context. Furthermore, because court proceedings are public and available online, anyone in the world can access them regardless of whether they took place on foreign or domestic soil.[103] Here, however, the domestic court will supervise the requested testimony before anything is sent overseas, providing an added level of domestic control. Thus, an overseas destination alone does not warrant an expansion of the state secrets privilege through enhanced deference to the executive.[104]

Last, Respondents claim the Government is trying to replace the established *Reynolds* doctrine with a "standard of blind deference."[105] Respondents argue that this contradicts longstanding Supreme Court precedent and also violates the separation of powers established in the Constitution.[106] According to Respondents, precedent mandates that the Court *not* blindly accept the executive's assertion of privilege.[107] Judicial oversight, they argue, protects against the abuse of executive power.[108] Moreover, there is no need for deference on the "antecedent question of whether a secret actually exists, or on the subsequent question of how the case should proceed when the court finds that some, but not all, of the information at issue is privileged."[109] Answering these questions is squarely within the judiciary's role, and it is not the executive branch's responsibility.[110]

---

100. *Id.*
101. *Id.*
102. Brief for Respondents, *supra* note 14, at 39.
103. *Id.* at 41.
104. *Id.*
105. *Id.*
106. *Id.*
107. Brief for Respondents, *supra* note 14, at 42.
108. *Id.* at 44.
109. *Id.* at 43.
110. *Id.*

Driving their point home, Respondents establish that the Government has already explicitly approved the test applied by the Ninth Circuit, including the "skeptical" review requirement at issue here.[111] The Government opposed certiorari in the test's foundational case and endorsed the Ninth Circuit's application of precedent in its judicial review process.[112]

B. Section 1782

Respondents argue that the Government did not properly establish its abuse-of-discretion argument before the Court because it was not presented in the petition or motion to quash.[113] If the Court decides to consider this argument anyway, Respondents deny it has any merit because contrary to what the Government claims, the district court initially granted the Section 1782 application per the *Intel* factors and permitted respondents to serve the subpoenas.[114] The Government concedes that the first *Intel* factor weighs in favor of discovery, so this factor is no longer an issue.[115] The district court also held the second factor favors discovery, finding that Poland's attempts to obtain information through the MLAT process demonstrated the Polish government's receptivity to the information.[116] The district court found that the third factor, which deals with whether the Section 1782 application is an attempt to circumvent the MLAT, is a close call.[117] Respondents assert that as a private individual, Abu Zubaydah's attempt to obtain discovery is independent from Poland's attempt to obtain the same discovery through the MLAT.[118] Thus, even though the third factor could help either side, discovery should still not be precluded because Abu Zubaydah's attempt to obtain discovery is distinct from Poland's attempt.[119] Regarding the fourth factor, the district court found that discovery would not be "unduly intrusive or burdensome."[120] Finally, Respondents argue that in the event the Court found the Government's abuse-of-discretion argument convincing, the proper remedy would be to remand to the

111. *Id.* at 45.
112. *Id.*
113. Brief for Respondents, *supra* note 14, at 47.
114. *Id.* at 49.
115. *Id.* at 50.
116. *Id.*
117. *Id.* at 51.
118. Brief for Respondents, *supra* note 14, at 52.
119. *Id.*
120. *Id.* at 53.

district court, which the Ninth Circuit has already done.[121]

VI. ANALYSIS

The Court should affirm the Ninth Circuit's decision. In affirming, the Court would preserve precedent, deny selective enforcement of the privilege against the same information in different contexts, and reject a new standard of increased deference that weakens the judiciary and dangerously empowers the executive. Beyond affirming the Ninth Circuit's decision, the Court should use this case as an opportunity to decisively resolve the issue of governmental contractors. The Court should confirm that once contractors become private citizens, they no longer speak for the government, and their statements do not amount to official confirmation or denial.

A. Preserving Good Precedent

The test applied by the Ninth Circuit is in line with precedent and should be affirmed. By asking for nearly unlimited deference, the Government is essentially asking the Court to overturn the Ninth Circuit's requirement that an independent judicial judgment be made regarding the appropriateness of the privilege claim. The Ninth Circuit derived this requirement directly from the Supreme Court's decision in *Reynolds*,[122] which explicitly instructs the deciding court to make an independent determination about national security risks.[123] Moreover, the Government itself has already considered and explicitly approved the Ninth Circuit's test for the state secrets privilege.[124] When the Government opposed certiorari in the Ninth Circuit's foundational case for this test, it explicitly sanctioned the test as a correct application of "established legal principles" and "not [in] conflict with any decision of this Court or any other court of appeals."[125] In light of this, there is no reason for the Court mandate absolute deference to the executive simply because the Government appears to have changed its mind.

The precedent requiring an independent judicial judgment should

121. *Id.*
122. Husayn v. Mitchell, 938 F.3d 1123, 1131 (9th Cir. 2019).
123. *Reynolds*, 345 U.S. at 8.
124. Brief for the United States, *supra* note 62, in Opposition at 11, Mohamed v. Jeppesen Dataplan Inc., (April 2011) (No. 10-778).
125. *Id.*

be upheld because its underlying rationales are strong. First, overturning precedent by requiring increased deference would permit selective enforcement of the privilege against the same information in different contexts. Allowing the Government to selectively apply the state secrets privilege allows it to act as a gatekeeper of justice, deciding which individuals have access to identical information in the pursuit of justice. For example, here, the Government asserts the privilege over information from Mitchell and Jessen despite the fact that they have already provided the exact same information in another case.[126] Mitchell and Jessen were deposed in another case brought against them by the ACLU on behalf of three individuals who were subjected to torture while in United States custody.[127] The depositions occurred in the presence of attorneys from various government entities including the Department of Justice, CIA, and the Department of Defense.[128] The Government provided Mitchell and Jessen with guidance that identified certain information as classified and instructed them not to reference that information in their answers.[129] During the depositions, the Government further protected its interests by objecting and privately consulting with deponents about the permissible scope of their answers.[130] These depositions are now available to the public.[131] Here, much of the information surrounding Abu Zubaydah's detention has already been declassified by the Government.[132] Accordingly, Mitchell and Jessen should be permitted to give depositions for Abu Zubaydah on declassified, nonprivileged information with the same government guidance and oversight.

Second, overturning precedent would result in a new standard that weakens the judiciary and dangerously empowers the executive. The Court established the principles in *Reynolds* to strike a balance between executive and judicial power.[133] Without the requirement for an independent judicial determination, the deciding court would be bound to take the Government's assertion of privilege at face value, even when it is blatantly erroneous. This leaves the door open for

---

126. Brief for the United States, *supra* note 62, at 10.
127. *Id.*
128. *Id.* at 12.
129. *Id.*
130. *Id.* at 13.
131. *Id.* at 12.
132. Brief for the United States, *supra* note 62, at 3.
133. *Reynolds*, 345 U.S. at 9.

abuses of executive power. As the Ninth Circuit recognized, the state secrets privilege exists to protect secret information that poses a national security risk, not information that the Government would rather keep concealed to avoid embarrassment.[134] The increased, essentially absolute, deference standard proposed here would essentially eliminate the court's prescribed role in the state secrets privilege, instead allowing the executive branch to withhold information from the public on a whim.

Last, the Government argues that increased deference is particularly appropriate when the information is destined for a foreign tribunal.[135] This argument largely ignores several important considerations. First, U.S. courts will play a gatekeeping role in deciding what information is released to the foreign forum.[136] Second, even when information is destined for a domestic forum, "court proceedings are presumptively public" and the internet makes information internationally available.[137] Thus, this argument for increased deference is unconvincing.

B. Government Contractors

Petitioner and Respondent hold diametrically opposed views on the impact of statements made by former government contractors who are now private citizens. The Government believes that their status as private citizens is essentially irrelevant because they obtained the information in question while employed by the government.[138] Respondent, on the other hand, asserts that because they are now private citizens, they cannot confirm or deny anything on behalf of the United States.[139]

Respondent's argument is more convincing for two reasons. First, as the Government stressed, the United States utilizes contractors often, and for a variety of defense-related fields.[140] If the Court were to hold that statements made by Mitchell and Jessen would amount to official confirmation of state secrets, it would create a blanket protection over a considerable number of people. This would amount

134. *Husayn*, 938 F.3d at 1134.
135. Brief for the United States, *supra* note 62, at 39.
136. Brief for Respondents, *supra* note 14, at 41.
137. *See id.* (explaining that testimony that was published online is out of the control of the U.S. court system and can be accessed by anyone in the world).
138. Brief for the United States, *supra* note 62, at 26.
139. Brief for Respondents, *supra* note 14, at 37.
140. Brief for the United States, *supra* note 62, at 29.

to a great expansion of the state secrets privilege by giving the Government the power to successfully, but unnecessarily, make a comprehensive assertion of privilege over all former contractors. On the other hand, an explicit ruling that former contractors do not speak for the United States is ultimately beneficial for the public good. Those who need nonprivileged information from contractors would be able to access it in pursuit of justice. The Government would also benefit because there would still be a seed of doubt about the truthfulness of the information shared in the absence of an official government statement. Accordingly, the Supreme Court should establish that contractors are not protected by the state secrets privilege.

VII. ORAL ARGUMENT

The Government began its oral argument by emphasizing the importance of trust with the United States' covert intelligence partners and alleging that further discovery would breach this trust.[141] Justice Thomas expressed concern about the implications of the "utmost deference" standard, pressing the Government to point to a situation in which the Government would fail the test.[142] The Government responded that it should fail only in "relatively unusual" circumstances.[143] Later, the Government clarified that "predictive national security judgments… deserve deference no matter how great the showing of necessity is."[144]

Justice Sotomayor took interest in the Government's alternative abuse-of-discretion argument, particularly the United States' denial when Poland sought assistance through the MLAT.[145] When asked, the Government essentially conceded that denial of assistance pursuant to an MLAT should always defeat a Section 1782 claim, as it was unable to identify a single example where denial should not be sufficient to defeat a claim.[146]

Chief Justice Roberts suggested that Mitchell and Jessen could provide information that had nothing to do with the location where

141. Transcript of Oral Argument at 4, United States v. Husayn (Oct. 6, 2021) (No. 20-827) [Transcript of Oral Argument].
142. *Id.* at 6.
143. *Id.* at 7.
144. *Id.* at 10.
145. *Id.* at 13.
146. Transcript of Oral Argument, *supra* note 141, at 14.

the events took place.[147] The Government pushed back on this, asserting that the location would still be relevant because the information would be revealed in the larger context of a Polish proceeding.[148] Justice Barrett intimated that this meant the information itself is not privileged, but rather that the Government is trying to make the context create a privilege.[149] The Government ostensibly confirmed that the context of the foreign forum lies at the root of its problems, admitting that if the information was destined for a domestic proceeding, it is doubtful that the Government would be asserting privilege.[150]

Respondents began their argument by asserting that they have no plan to ask in discovery whether the events took place in Poland and instead plan to ask about "what happened in Abu Zubaydah's cell between December 2002 and September 2003."[151] Unfortunately for Respondents, several justices challenged this assertion, seemingly confused about what exactly Respondents were hoping to uncover in the depositions and why this discovery was necessary.[152]

Justice Sotomayor reiterated her interest in the Section 1782 argument, expressing concern that further discovery would effectively ignore the MLAT between Poland and the United States.[153] Finally, Justice Kagan pushed back on the idea of distinguishing between contractors and employees in this context because United States allies presumably would not make this distinction themselves.[154]

In their concluding questions, Justice Gorsuch and Justice Breyer pressed the Government to answer whether it would make Abu Zubaydah available to testify on his own behalf but did not receive a direct answer.[155]

VIII. CONCLUSION

The Court should affirm the Ninth Circuit's decision. Instead of handing the executive practically unlimited power in the realm of the state secrets privilege, the Court ought to reject the Government's

147. *Id.* at 15.
148. *Id.*
149. *Id.* at 16.
150. *Id.*
151. *Id.* at 41.
152. Transcript of Oral Argument, *supra* note 141, at 47.
153. *Id.* at 58.
154. *Id.* at 69.
155. *Id.* at 72.

blanket assertion of the state secrets privilege. The Court should permit the subpoenas of the individuals in question and allow the district court to attempt to separate privileged and nonprivileged information before possibly dismissing the case. Mitchell and Jessen have been permitted to reveal similar nonprivileged information on multiple occasions and have done so without revealing any information covered by the state secrets privilege. This can and should be done again. Affirming the Ninth Circuit's limited holding preserves precedent, protects national security, and maintains the balance between the judiciary and the executive.