

Testimony of
Ms. Colleen Kelly
before the
Senate Judiciary Committee
Closing Guantanamo: Ending Twenty Years of Injustice

December 7, 2021

Good morning, Chairman Durbin, Ranking Member Grassley, members of the committee. Thank you for this opportunity to share my experience with you today. I am a family nurse practitioner in the Bronx, New York, and the mother of three grown children. My younger brother, Bill Kelly Jr., was killed in the North Tower of the World Trade Center on September 11th.

Bill was 30 years old, and just starting to come into his own. He was a pretty good chef, a bartender, an ever-hopeful duck hunter, and a guy as comfortable in surfing shorts as in a business suit. Bill had been working for three years at Bloomberg Tradebook, and his four sisters – myself included – would fight over who got to be Bill’s ‘date’ at the annual company holiday party.

Bill didn’t work at the World Trade Center. He happened to be at a two-day conference – an event he had repeatedly asked his boss to attend. Bill’s boss acquiesced, so in a twist of fate, Bill was at the wrong place, at the wrong time. In a second twist of fate, Bill was photographed inside the conference center on the 106th floor early that morning. The photographer’s camera broke, and thankfully, she left the building at about 8:30 a.m. and headed to another assignment. American Airlines Flight 11 struck the North Tower minutes later. Bill sent messages to his co-workers via his Blackberry saying that he was trapped. At first, he was hopeful that the fire department would save him. 343 firefighters lost their lives that day attempting to do just that.

I tell you this to emphasize that each of the 2,977 people murdered on September 11th has a family, co-workers, and friends. And for all of us, there has been no justice or accountability for what happened on September 11th.

Bill comes from a large Irish family. My three sisters and I are blessed that our parents – now in their eighties – are still with us. We grew up in a “divided” household, of sorts. My mom is a Democrat and my dad is a Republican. So I feel comfortable sitting here today, in another divided household. It feels like the family dinner table, only with a few extra friends.

My 84-year-old father put it succinctly a week ago when I asked for his thoughts about the 9/11 Military Commissions. He said, “This is not justice.” I agree 100%. I did not come to this assessment quickly, nor without thoughtful deliberation.

After 9/11, I co-founded September 11th Families for Peaceful Tomorrows. Each of our 260 members lost a relative on 9/11. We all believe firmly in the rule of law as a remedy for addressing violent crime and conflict. The rule of law is a bedrock principle of our nation, and after 9/11 we expected our government to uphold the rule of law in seeking accountability for our relatives' deaths. It failed to do so and as a result we still are awaiting justice twenty years later. Peaceful Tomorrows has official observer status in the military commissions, so I come to this conclusion having observed the commissions first hand from Guantanamo over a dozen times.

Twenty Years and Still No Justice

Five men stand accused in the military commissions at Guantanamo of responsibility for planning and supporting the 9/11 attacks. The courtroom at Guantanamo was actually built to try six men, but before any charges were brought, the Convening Authority of the Commissions, who was previously a senior Pentagon official, determined that Mohammed al-Qahtani, supposedly the 20th hijacker, had been tortured by U.S. military personnel and would not be tried.

Instead, in May of 2012—more than a decade after 9/11—five men were arraigned. Today, another nine years and seven months later, a trial has not even begun. Instead, family members have heard years of argument in pre-trial hearings. While these hearings have produced no legal justice for 9/11, they have revealed the shocking role of torture in undermining the 9/11 prosecution. Instead of learning how and why the attacks were carried out, and who was responsible for doing what, family members have followed seemingly endless litigation largely concerned with the defendants' torture by government agents and the government's attempts to keep that information from coming to light.

Rather than being in the public spotlight, as is appropriate for such a public crime, the military commissions are shielded from public view. To observe the legal proceedings against the 9/11 accused, family members and those injured are permitted to watch via closed circuit TV at four sites: Fort Hamilton, Fort Meade, Fort Devens, and Fort Dix. The Pentagon was added in 2020, but we need an approved escort to watch there. In recent years, family attendance at these sites combined has been less than 10 or 15 individuals per hearing – a sign of how family members have grown frustrated and lost confidence in the proceedings.

Up to five family members can also attend each hearing in person. However, attending the pre-trial hearings at Guantanamo involves travel first to Washington D.C., then a 3-hour flight to Guantanamo, followed by a boat across Guantanamo Bay. It also requires a week-long stay on the military base – obstacles that have discouraged most from going.

I have personally traveled to Guantanamo to watch the week-long 9/11 proceedings more than a dozen times. I have also sat at Fort Hamilton, Fort Meade, and the Pentagon as delay after delay unfolded year after year. And I have watched 9/11 family members' remarks at press conferences shift over the years from gratitude to the prosecution, to frustration and disappointment over why the proceedings are taking so long.

In May of 2012, I sat at Fort Hamilton with my dear friend Rita Lasar, another co-founder of September 11th Families for Peaceful Tomorrows, to watch the arraignment of the

9/11 accused. Rita's brother Abe died when he refused to leave his disabled co-worker on the 27th floor of the North Tower. Rita Lasar is now deceased.

In 2017, I was on the plane to Guantanamo with Lee Hanson, the only 9/11 family member yet to be deposed in the pre-trial hearings. Lee Hanson, who lost his son, daughter-in-law, and granddaughter on United Airlines Flight 175, is now deceased.

In 2019, I was on a boat crossing Guantanamo Bay with Alice Hoagland, mother of United Airlines Flight 93 hero Mark Bingham. Alice Hoagland is now deceased.

The point here is that family members and the injured want a measure of accountability and justice before our deaths. Our government failed to protect its citizens on September 11th. And our government has failed for two decades to bring those responsible to justice. This can and must end.

In 2015, September 11th Families for Peaceful Tomorrows applied for and received NGO observer status, allowing us to send a member to each military commission hearing at Guantanamo. We are the only family member organization with this status and one of our members has attended, in person, nearly every hearing in the last six years. We felt it was important to witness first-hand all that happens at Guantanamo, both inside and outside the courtroom, to see the accused and to have the accused see us, to bear witness not only for our loved ones, but for the outside world.

We have been steadfast in our commitment, but over nine years we have been stunned by the troubling staff turnover within the 9/11 commission. I have lost count of the number of Convening Authorities, but it is over ten. There is (as of October of this year) a new acting chief prosecutor; there will soon be a new chief defense counsel. One of the five defendants facing the death penalty is being represented by his second learned counsel, and we have seen numerous other personnel changes in both military and civilian staff. But most egregious is that before a trial has even begun, there have been four judges (eight if you count those who were named but served only administrative functions or recused themselves).

The military judges in this case are required to make complex and consequential rulings. To highlight just one issue as an example: Judge Pohl – the first judge in the 9/11 case – ruled that the 2007 statements made by the 9/11 accused to FBI agents would not be admissible. He made this ruling as a remedy for the prohibition against defense teams obtaining information about the defendants' treatment at CIA "black sites." Judge Parrella – the second judge – overruled Pohl's decision, finding Pohl's "determination, and resulting remedy, to be premature." In 2019, Judge Cohen – the third judge – found "the record is not sufficiently developed for the Commission to make findings" and set a schedule for hearings with witnesses. We have yet to see what the newest and fourth Judge – Col. Matthew McCall – will do. This is not a higher court reversing a lower court decision; this is ping pong decision making within the same courtroom. This is no way to conduct what is one of the most important trials in American history.

We know that each of the 9/11 defendants was tortured. After years of watching the pre-trial hearings, following motions and decisions, and in many cases reversals of decisions, members of our organization began to feel that the classification of information about torture and the invocation of the state secrets privilege were less about risks to our national security and

more about withholding information that is embarrassing to the government. Our concern grew so great that in August of this year, September 11th Families for Peaceful Tomorrows filed an amicus brief in the Supreme Court case *U.S.A. v. Abu Zubaydah*. As stated in our brief:

Peaceful Tomorrows seeks justice and accountability for the September 11th attacks and for the torture that was subsequently carried out in its family members' names by the United States government. To that end, Peaceful Tomorrows wants those responsible for the September 11th attacks held accountable for their crimes pursuant to a just process that follows the rule of law. To ensure a just process, Peaceful Tomorrows believes the rule of law must also apply to our government. That includes the judiciary serving as a gatekeeper to prevent unjustified invocations of the state secrets privilege....

The Government ultimately chose military commissions as the legal mechanism for accountability for 9/11. Today, I am asking this Committee to acknowledge that the military commissions have fundamentally failed, and to encourage the Biden Administration to end them and find a means to bring the 9/11 case to resolution.

A Path to Resolution, If Not Justice

In searching for alternatives, our organization's members have met with federal prosecutors from the Southern District of New York and the Eastern District of Virginia, to learn more about prosecuting complex terrorism trials. In 2017, we began exploring the option of pre-trial agreements with legal advisors. Today we advocate strongly for pursuing pre-trial agreements in the 9/11 case. We have seen their effectiveness in the Badat, Kotey, and Khan cases.

We were particularly convinced after reading the letter from seven of the eight senior military officers who sat on the panel in the sentencing of Majid Kahn that pre-trial agreements can provide resolution in cases where the accused was tortured – which is true for the five 9/11 defendants and all the other men currently charged in the military commissions at Guantanamo. These panel members were blunt in denouncing Mr. Khan's torture as “a stain on the moral fiber of America” that “should be a source of shame for the U.S. government.”

We want to share what we, as family members, would hope to achieve by reaching agreements in these cases. We understand that in exchange for guilty pleas the government would in all likelihood no longer seek the death penalty; this would be in part in recognition of the torture each of the defendants experienced. What we would hope to finally get, however, is answers to our questions about 9/11 from the defendants—answers and information that we have been denied for two decades.

Those who have not been watching what has been unfolding in the commissions may not see this as justice. Indeed, it is *not* the outcome that September 11th Families for Peaceful Tomorrows advocated for at our founding. But it is a way – perhaps the only way – forward at this point. Pre-trial agreements could also be a means to resolve the other military commissions cases and provide a path to achieving Guantanamo's eventual closure.

Conclusion

My brother Bill was killed in what was likely the most public event in human history. While people around the globe literally watched two towers, the Pentagon, and a field in Pennsylvania burn, I watched my brother Bill being murdered, one agonizing moment after another. My family does not have any of my brother's remains, nor do one-third of 9/11 families. I am asking this Committee and the Biden Administration to deliver the next best thing – a resolution to the 9/11 Military Commission that provides answers to our questions, accountability for unlawful acts, justice too long denied, and a path to closing Guantanamo. Perhaps then, this long-festering, very personal yet collective national wound can truly begin to heal.

Attachment A



POLICY RECOMMENDATIONS:
September 11th Families for Peaceful Tomorrows
Guantanamo Detention and the 9/11 Military Commission
“Highlighting the Absence of Justice”
(Updated December 2021)

We are an organization of 9/11 family members deeply concerned about the continued operation of the Guantanamo Bay Detention Camp and the failure of the Military Commissions at Guantanamo to deliver justice and accountability for the crimes of 9/11. When we organized as September 11th Families for Peaceful Tomorrows, in 2002, central to our goals was “to bring those responsible for the September 11, 2001 attacks to justice in accordance with the principles of international law.” We believed in a principled, legal response that did not escalate the conflict nor produce even more deaths of innocent civilians. We remain committed to the Rule of Law as the bedrock of any legitimate U.S. response to the 9/11 attacks and support closing the Guantanamo Detention Camp with all deliberate speed.

Today, nearly 20 years after Peaceful Tomorrows organized and more that 20 years after our family members’ murders, there has been no justice for their deaths. In May of 2012, five men accused of planning the 9/11 attacks were arraigned in the Military Commissions at Guantanamo, but after nine years and seven months a trial has not yet begun. Failure to hear the case against the accused and to reach a verdict in a court of law is a profound affront to our families, but more consequentially it is an abdication of what the U.S. owes all of its citizens, indeed all the people of the world.

We believe that even at this late date there is a path forward that offers some resolution to the case against the 9/11 accused and also brings an end to the fundamentally flawed Military Commissions system at Guantanamo. This path would also pave the way for the closure of the Guantanamo Detention Camp that has been a stain on our nation’s honor since it opened. We are, of course, most concerned with the proceedings in the 9/11 case. While years of argument and testimony in pre-trial hearings have produced no legal justice for 9/11, they have revealed the shocking role of torture in undermining the 9/11 case. Instead of learning how and why the attacks were carried out, and who was responsible for doing what, family members have followed seemingly endless litigation largely concerned with obtaining classified information about the defendants’ torture by the CIA.

September 11th Families for Peaceful Tomorrows supports a profound change of course. We believe pre-trial agreements are a means to resolving the 9/11 case and the other extant Guantanamo Military Commissions cases and provide a path to achieving the Biden Administration’s goal of closing Guantanamo. To further these goals, September 11th Families for Peaceful Tomorrows makes the following recommendations:

- President Biden and the Secretary of Defense should commit to appointing a Convening Authority for the Military Commissions who will advocate for pre-trial agreements.
- The Attorney General should support and facilitate pre-trial agreements, either within the Military Commissions or an Article III federal court framework.

Specifically, in the 9/11 case:

- In exchange for guilty pleas from 9/11 defendants, the government should no longer seek the death penalty; this would be in part in recognition of the torture each of the defendants experienced.
- There should be a stipulation of facts.

- A mechanism should be created by which 9/11 family members and the injured could address questions to the 9/11 defendants and learn their answers.
- The 9/11 defendants should be permitted to make a statement during their sentencing hearing.
- The 9/11 defendants should be required to testify during any future litigation that allegedly involves them, or about which they may have information.

At the same time:

- The Periodic Review Board should redouble its efforts to clear for transfer all detainees who will never be charged.
- President Biden should appoint a special envoy in the Department of State with responsibility for safely and speedily relocating cleared detainees.

Many may not see this as justice. It is NOT the legal outcome that September 11th Families for Peaceful Tomorrows advocated for at our founding - but it is a way forward to achieve the justice and accountability too long denied.

Attachment B

No. 20-827

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

—v.—

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

Respondents.

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

**BRIEF FOR *AMICUS CURIAE* SEPTEMBER 11TH
FAMILIES FOR PEACEFUL TOMORROWS
IN SUPPORT OF RESPONDENTS**

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INTEREST OF *AMICUS CURIAE*¹

September 11th Families for Peaceful Tomorrows (“Peaceful Tomorrows”) is an organization of more than 250 family members of those killed in the attacks of September 11, 2001, who have united to turn their grief into action for peace. Founded in February 2002, Peaceful Tomorrows’ mission is to develop and advocate for peaceful actions in the pursuit of justice – breaking down the cycles of violence engendered by war and terrorism.

Consistent with its mission, Peaceful Tomorrows seeks justice and accountability for the September 11th attacks and for the torture that was subsequently carried out in its family members’ names by the United States government. To that end, Peaceful Tomorrows wants those responsible for the September 11th attacks held accountable for their crimes pursuant to a just process that follows the rule of law. To ensure a just process, Peaceful Tomorrows believes the rule of law must also apply to our government. That includes the judiciary serving as a gatekeeper to prevent unjustified invocations of the state secrets privilege, which may otherwise suppress information that is not privileged or is merely embarrassing to the government.

The scope of the state secrets privilege and the judiciary’s role as a gatekeeper against abuses of the privilege affect Peaceful Tomorrows. Its members

¹ All parties consented in writing to the filing of this *amicus* brief. No party or party’s counsel authored this brief in whole, or in part, or made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *Amicus* and its counsel made a monetary contribution to the preparation or submission of this brief.

have closely followed the Office of Military Commissions' case in Guantanamo Bay, Cuba involving the individuals charged with plotting the September 11th attacks. In May 2012, five men were arraigned in Guantanamo on charges of aiding the nineteen men who hijacked passenger planes and crashed them into the World Trade Center, the Pentagon, and a Pennsylvania field on September 11th.² The case, *United States v. Khalid Sheikh Mohammad, et al.* (the "9/11 Proceedings" or the "Proceedings"), remains stalled at the pretrial phase nearly a decade after its inception.³ The docket contains over 10,000 entries, tens of thousands of pages of transcripts, and countless motion papers, many of which relate to discovery disputes over the classified status of evidence concerning the Central Intelligence Agency ("CIA") detainee torture program – or what the government calls "enhanced interrogation techniques."⁴ Any trial may still be years away.⁵

² See John Ryan, *Pretrial of the Century: The Sept. 11 Case at Guantanamo Bay*, Lawdragon, 60 (Sept. 21, 2016, printed in Lawdragon 500 Issue 17, Jan. 2017), <https://www.lawdragon.com/docs/Pretrial-of-the-Century-Guantanamo.pdf>.

³ *Id.*

⁴ See Docket of *United States v. Khalid Shaikh Mohammad et al.*, Dept. of Defense, Office of Military Commissions, <https://www.mc.mil/CASES.aspx>; see also Report of the Senate Select Committee on Intelligence, Committee Study of the Central Intelligence Agency's Detention and Interrogation Program (Dec. 9, 2014), <https://www.intelligence.senate.gov/sites/default/files/documents/CRPT-113srpt288.pdf>.

In December 2014, the U.S. Senate Select Committee on Intelligence released its findings and an executive summary of its Study of the CIA's Detention and Interrogation Program (the "Senate Report"). The Senate Report details the CIA's "enhanced interrogation" program and its torture of the five

Peaceful Tomorrows' members have observed firsthand that a significant cause of the delay in the Proceedings has been the government's broad invocations of national security to withhold purportedly classified evidence relating to the torture of the defendants at various CIA "black sites."⁶ They have also observed the critical need for effective judicial gatekeeping in adjudicating these privilege invocations.

As these discovery disputes have raged on, much of the information the government sought and still seeks to suppress has become public. It is no longer secret that the CIA tortured detainees, including Abu Zubaydah, at CIA detention sites abroad. It is no longer secret that one such site was in Poland. Indeed, individuals involved with the torture of Mr. Zubaydah – whose depositions Respondents now seek – have already testified at length twice and one published a detailed description about it in a book, all with the full knowledge of the government. The government's continued reliance on the state secrets privilege to suppress evidence that, simply put, is no longer secret underscores the need for judicial oversight over and scrutiny of sweeping privilege claims.

defendants and other detainees, including Respondent Abu Zubaydah.

⁵ See Carol Rosenberg, *Trial Guide: The Sept. 11 Case at Guantánamo Bay*, N.Y. Times (July 9, 2021), <https://www.nytimes.com/article/september-11-trial-guantanamo-bay.html>.

⁶ See John Ryan, *Pretrial of the Century: The Sept. 11 Case at Guantánamo Bay*, Lawdragon 500 Issue 17, 63-72; see also generally Senate Report.

As the twentieth anniversary of the September 11th attacks draws near, members of Peaceful Tomorrows are deeply troubled by the failure to bring the defendants to a just trial. They are equally troubled by numerous instances in which the government may have invoked national security to evade embarrassment and accountability for torturing detainees, rather than to protect national security. Peaceful Tomorrows also fears that the legitimacy of the 9/11 Proceedings will be irretrievably compromised by abuses of the state secrets privilege. This erosion of confidence and the potential government abuses of national security invocations underscore why adhering to the rule of law – including its application to the government – is essential to the integrity of our trial system.

Peaceful Tomorrows believes that affirming the decision of the Court of Appeals – requiring the District Court to serve as a true gatekeeper and subject assertions of the state secrets privilege to meaningful scrutiny pursuant this Court’s decision in *United States v. Reynolds* – is critical to the administration of justice generally, will advance the cause of justice on behalf of their loved ones lost, and will effect change in the 9/11 Proceedings.

SUMMARY OF ARGUMENT

A central issue on appeal is the judiciary’s role in ensuring that the government does not abuse the state secrets privilege to repress information in court that is already public, or to shield evidence that is not a matter of national security, but rather one of national embarrassment. Such abuses of the state secrets privilege would undermine public confidence in our trial system and enable the government to

evade accountability for its actions. Accordingly, this Court should insist on applying the process it established in *United States v. Reynolds*, 345 U.S. 1 (1953), that requires courts to scrutinize the government's invocations of the state secrets privilege and, as is appropriate here, seek to disentangle non-privileged information from privileged information whenever possible.

The government argues for effectively unlimited deference to the executive branch on matters of national security. But unlimited deference is not the law. Quite the contrary, in *Reynolds*, this Court held that decisions over the admissibility of evidence in court proceedings cannot be "abdicated" to the executive branch, even in the sensitive arena of national security.

In Point I, we explain that the state secrets doctrine applies only to information that is kept secret, and the disclosure of which poses a genuine risk to national security. Under *Reynolds*, courts have a crucial gatekeeping function: they must scrutinize blanket invocations of the privilege and make an independent determination that the evidence the government seeks to protect is, in fact, privileged. And where, as here, both privileged and non-privileged information is implicated, the court must try to disentangle one from the other before taking the drastic step of precluding discovery. The Court of Appeals reversed and remanded because the District Court did not undertake that analysis and was, instead, overly deferential to the government's privilege claim. Peaceful Tomorrows agrees with Respondents that the Court of Appeals' decision should be affirmed so that the District Court can exercise its gatekeeping function.

In Point II, members of Peaceful Tomorrows share their firsthand accounts of how the government's sweeping reliance on national security has impeded the cause of justice and accountability in the 9/11 Proceedings. In telling those stories, Peaceful Tomorrows and its members aim to amplify the need for careful judicial review of state secrets privilege invocations to promote confidence in and the integrity of our trial system.⁷

ARGUMENT

I. THE *REYNOLDS* DOCTRINE PRECLUDES BLIND DEFERENCE TO THE EXECUTIVE BRANCH

A. Under *Reynolds*, Courts Must Subject Blanket Invocations of the State Secrets Privilege to Independent Judicial Scrutiny

To withhold evidence based on the state secrets privilege, the government must demonstrate “a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged.” *United States v. Reynolds*, 345 U.S. 1, 10 (1953). The privilege applies to information that is actually kept secret, not to information that has entered the public domain. *See id.* (“It is equally apparent that these

⁷ Peaceful Tomorrows recognizes that the 9/11 Proceedings are taking place in a military tribunal, not a federal court, and that the precedent and procedures governing the 9/11 Proceedings are not identical to the precedent and procedures that govern this case. Nonetheless, the need for a judicial check on the government's attempt to suppress relevant evidence is a safeguard that applies in both proceedings, and is fundamental to engendering trust in the trial system.

electronic devices *must be kept secret* if their full military advantage is to be exploited in the national interests,” and “there was a reasonable danger that the accident investigation report would contain references to *the secret electronic equipment* which was the primary concern of the mission.”) (emphasis added).

The concerns underlying the privilege thus “do not apply when the alleged state secret is no secret at all, but rather a matter that is sensitive or embarrassing to the government.” Pet. App. 20a. As the Court of Appeals explained in this case:

[T]he rationale behind the state secrets privilege is to protect legitimate government interests, not to shield the government from uncomfortable facts that may be disclosed or discussed in litigation. Protecting the former is an unfortunate necessity in our complicated world of national and international affairs. Protecting the latter is inconsistent with the principle of an independent judiciary.

Id.; see also *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1085 n.8 (9th Cir. 2010) (acknowledging “the risk that government officials may be motivated to invoke the state secrets doctrine not only by their obligation to protect national security but also by a desire to protect themselves or their associates from scrutiny”); *Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983) (“[T]he privilege may not be used to shield any material not strictly necessary to prevent injury to national security.”).

To prevent the government from casting too wide of a net, courts must therefore subject blanket invocations of the state secrets privilege to meaningful and independent scrutiny. As this Court

explained in *Reynolds*: “Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers.” *Reynolds*, 345 U.S. at 9-10; see also *Jeppesen*, 614 F.3d at 1081 (*Reynolds* “places on the court a special burden to assure itself that an appropriate balance is struck between protecting national security matters and preserving an open court system.”) (citing *Al-Haramain Islamic Foundation, Inc. v. Bush*, 507 F.3d 1190, 1203 (9th Cir. 2007)); *Ellsberg*, 709 F.2d at 58 (“[T]o ensure that the state secrets privilege is asserted no more frequently and sweepingly than necessary, it is essential that the courts continue critically to examine instances of its invocation.”).

B. The Court of Appeals Correctly Held that, Under *Reynolds*, the District Court Must Scrutinize the Government’s Privilege Claim More Closely Before Taking the Drastic Step of Quashing Respondents’ Subpoenas

Reynolds established the procedure for the government to invoke, and the courts to evaluate, a claim of state secrets privilege. First, “[t]here must be a formal claim of privilege, lodged by the head of the department which has control over the matter.” *Reynolds*, 345 U.S. at 7-8. Then, “[t]he court itself must determine whether the circumstances are appropriate for the claim of privilege,” but “without forcing a disclosure of the very thing the privilege is designed to protect.” *Id.* at 8.

Analyzing privilege claims under *Reynolds* has come to involve three steps: (1) courts must determine that the procedural requirements for invoking the privilege have been met; (2) courts must then “make an independent determination” whether

the information is, in fact, privileged; and (3) if it is, courts must decide “how the matter should proceed in light of the successful privilege claim.” *Jeppesen*, 614 F.3d at 1080. At step three, “whenever possible, sensitive information must be disentangled from nonsensitive information to allow for the release of the latter.” *Ellsberg*, 709 F.2d at 57.

As the Court of Appeals emphasized in *Jeppesen*, “it should be a rare case when the state secrets doctrine leads to dismissal at the outset of a case,” and “every effort should be made to parse claims to salvage a case like this using the *Reynolds* approach.” *Jeppesen*, 614 F.3d at 1092. When some evidence is privileged but some is not dismissal is justified only when the privileged evidence is “inseparable from” the non-privileged evidence, such that “litigating the case to a judgment on the merits would present an unacceptable risk of disclosing state secrets.” *Id.* at 1083. Although the District Court concluded that at least some of the evidence Respondents seek (and the government wants to suppress) is not privileged, it did not attempt to disentangle the privileged from the non-privileged information before quashing Respondents’ subpoenas.

The government invoked the state secrets privilege “to protect seven categories of information” all relating to the CIA’s overseas detention and interrogation program. Pet. App. 126a-128a (Pompeo Decl. at ¶¶ 6-7). The District Court found that the core fact the government wants to protect – that the CIA operated a detention facility and employed enhanced interrogation techniques at a site in Poland – is no longer secret. Pet. App. 52a-53a. Nor is it a secret that Mr. Zubaydah was detained and tortured by the CIA at a foreign CIA detention site. Pet. App. 4a-6a.

As the District Court noted, the government relied heavily on *Jeppesen*, which affirmed dismissal where the government invoked the state secrets doctrine to prevent the disclosure of evidence concerning the CIA's foreign detention and interrogation program. But, as the District Court pointed out, *Jeppesen* was decided in 2010, "when more aspects of the CIA's Detention and Interrogation Program were secret." Pet. App. 51a.

In the intervening decade, much information about the enhanced interrogation program has become public knowledge. Indeed, Drs. James Mitchell and John "Bruce" Jessen, the psychologists and CIA contractors whom Respondents seek to depose, have since testified twice publicly about their role in developing the program and about the treatment of "high level detainees" – including Mr. Zubaydah – at CIA foreign detention sites.

Excerpts from their testimony in a federal court action are part of the record in this appeal. Multiple government lawyers attended those depositions "to represent the interests of the United States" and "to protect against the unauthorized disclosure of classified, protected or privileged Government information." Court of Appeals Excerpts of Record ("C.A.E.R.") at 107-08 (excerpts of Jessen deposition transcript). In the presence of all those government lawyers, Dr. Mitchell testified in detail about the enhanced interrogation techniques the CIA employed and, more specifically, about the CIA's torture of Mr. Zubaydah. C.A.E.R. at 115-19, 123-34, 138-39, 141-42, 146-48 (excerpts of Mitchell deposition transcript). More recently, in January 2020, Drs. Mitchell and Jessen testified over the course of two weeks in the 9/11 Proceedings, at length and in great detail, including about the CIA's torture of Mr.

Zubaydah at the CIA detention site at issue in this case. (See Respondents' Br. 8-9.) The government published transcripts of that testimony online. (See *id.* at 41.)

It also is no longer secret that Drs. Mitchell and Jessen traveled to the CIA black site in Poland "at least twice to supervise the interrogations," and "[d]eclassified CIA cables confirm Mitchell's and Jessen's involvement in Abu Zubaydah's torture." Pet. App. 5a. Moreover, in 2016, with the CIA's knowledge and clearance, Dr. Mitchell published a book that discusses his role as a CIA consultant in developing the CIA's enhanced interrogation program and describes in detail the treatment of Mr. Zubaydah at a CIA overseas facility. James E. Mitchell, Ph.D., *Enhanced Interrogation: Inside the Minds and Motives of the Islamic Terrorists Trying to Destroy America* (2016).

The government derides the Court of Appeals' holding that secrecy therefore no longer exists. (Gov't Br. 29-30.) But it has literally no answer to the fact that Drs. Mitchell and Jessen have already publicly testified twice and Dr. Mitchell has written about the CIA's treatment of Mr. Zubaydah at a CIA detention site. The government clearly believed detailed discovery could proceed on this subject. As the Court of Appeals found, the record in this case thus suggests that Respondents "can obtain nonprivileged information from Mitchell and Jessen," and the mere fact of their prior testimony indicates "the viability" of disentanglement. Pet. App. 25a-26a.

Mindful of the stakes, the Court of Appeals nonetheless proceeded cautiously. In its merits brief, the government incorrectly asserts that the Court of Appeals "erroneously held that discovery could

proceed,” and “directed discovery to proceed.” (Gov’t Br. 18, 21.) The Court of Appeals did not order any discovery to take place and certainly did not order the disclosure of any state secrets. It agreed that “much” of the information Petitioners seek “is covered by the state secrets privilege,” but that “a subset of information is not.” Pet. App. 20a. In light of that, it merely rejected the “government’s blanket assertion of state secrets privilege” and held that the District Court erred by quashing the subpoenas without at least “attempt[ing] to disentangle the privileged from nonprivileged information.” Pet. App. 21a, 25a-26a. Nor did the Court of Appeals signal which way the District Court should rule, making clear that “it may again conclude that dismissal is appropriate” – but only after going through the third step of the *Reynolds* analysis. Pet App. 27a-28a.

Peaceful Tomorrows respectfully submits that the Court of Appeals was correct in insisting that the District Court follow the *Reynolds* test to its end.

II. BLANKET PRIVILEGE INVOCATIONS, WITHOUT MEANINGFUL JUDICIAL OVERSIGHT, IMPEDE THE PURSUIT OF JUSTICE

Peaceful Tomorrows recognizes that there are valid and important reasons for the state secrets privilege, but there is also a real human toll and a risk to the integrity of our trial system when the government goes too far in invoking national security to suppress evidence. Peaceful Tomorrows has experienced this firsthand.

For almost two decades, the members of Peaceful Tomorrows have waited for justice and accountability for the attacks of September 11th and for the actions

taken in its aftermath. However, they have repeatedly seen the 9/11 Proceedings delayed (often for months at a time) by invocations of national security to suppress evidence of the CIA's torture of the defendants. These invocations have often appeared capricious and inconsistent – in some cases made as to information that was already or soon became public – and the members of Peaceful Tomorrows are therefore concerned about the long-term legitimacy of the 9/11 Proceedings. They now even question whether avoiding further embarrassment and scrutiny over the defendants' torture is a greater priority to the government than bringing the defendants to trial or protecting national security.

Below, we provide the personal stories of eight members of Peaceful Tomorrows, followed by their collective experience with the state secrets privilege in connection with the 9/11 Proceedings. These personal accounts highlight the importance of a strong judicial check on the government's invocation of the state secrets privilege, including with respect to the subpoenas at issue here.

A. The Individual Stories of Members of Peaceful Tomorrows

1. Colleen Kelly

Colleen Kelly's brother, Bill Kelly Jr., worked for Bloomberg, LP in midtown Manhattan. On the morning of September 11th, Colleen, a high-school nurse practitioner in New York City, heard that a plane hit the World Trade Center. She immediately turned her attention to her students, several of whom had parents who worked in or near that area. Not once did she think that Bill, who she presumed was safe at work in midtown, was in danger.

While tending to her students, Colleen received a call from her sister. Bill was actually in the North Tower. He was not normally supposed to be there. Bill had been attending a two-day conference at Windows on the World, the restaurant on the top floor of the North Tower. He was 30 years old.

In the weeks following the attack, Colleen grieved with her family over Bill's murder and the terrible twist of fate that led him to be in the wrong place at the wrong time. Colleen soon began hearing about the U.S. bombing campaign in Afghanistan. She did not support violence against innocent civilians overseas. A Catholic, Colleen wrote a letter to bishops expressing her opposition. The letter was widely circulated and ultimately covered in a *Washington Post* article. Colleen's letter attracted the attention of several other victims' family members who reached out to express their shared views. At the conclusion of a peace march, they met at the White Horse Tavern in New York City in December 2001 to share their common bond and deeply personal family tragedies. Together, they made a list of goals, which they wrote down on bar napkins. Among them, the group asked that the "perpetrators of the horrible crimes of September 11th be brought to justice in an open court of law, in the full light of day, subject to the rights that we cherish and share."

Two months later, in February 2002, Colleen and other September 11th family members founded Peaceful Tomorrows. The organization's name was inspired by the words of Martin Luther King, Jr.:

“Wars are poor chisels for carving out peaceful tomorrows.”⁸

2. Terry Rockefeller

On September 11th, Terry Rockefeller’s sister, Laura Rockefeller, left her Upper West Side apartment and headed to the 106th floor of the World Trade Center’s North Tower. Laura was 41 and an actor, singer, and director with a passion for musical theater. To help meet expenses, Laura occasionally performed freelance work for an event-planning company that organized seminars for financial managers. On the morning of September 11th, Laura was managing a conference at Windows on the World. After the conference, Laura had planned to visit Terry, Terry’s husband, and their two daughters at their home in Massachusetts. They never saw Laura again. No one attending the conference survived.

In the months following the attacks, Terry searched for answers. In May 2002, she joined Peaceful Tomorrows. Terry views Peaceful Tomorrows as offering her the most meaningful way to honor Laura’s life and ensure that other families do not experience the tragic and violent deaths of their innocent relatives. While she seeks justice and accountability for Laura’s murder, she also believes justice must be pursued in a manner that upholds the civil and human rights of the accused.

3. Jessica and Leila Murphy

Jessica and Leila Murphy were five and three years old, respectively, on September 11th. Their father, Brian Murphy, was killed in the World Trade

⁸ Martin Luther King, Jr., *The Casualties of the War in Vietnam* (Feb. 25, 1967).

Center's North Tower while at work at Cantor Fitzgerald.

Though she was only five years old, Jessica recalls that September 11th was an unusual and alarming day. Her uncle picked her up early from kindergarten. When she arrived home, swarms of family members filtered in and out of the New York City apartment she shared with her parents and Leila. As the day progressed, Jessica remained at home with her mother and Leila, but her father did not return. Leila does not remember the day, nor does she remember her father. It was not until many years later that the Murphy sisters began to understand the impact of their loss and the September 11th attacks, both on their family and on the nation.

In November 2017, Jessica and Leila read an op-ed in the *New York Times* written by Julia Rodriguez, a member of Peaceful Tomorrows who lost her brother on September 11th. In *Guantánamo Is Delaying Justice for 9/11 Families*, Ms. Rodriguez discussed her experience observing the 9/11 Proceedings.⁹ She wrote about the human rights violations against the five defendants and the prosecution's efforts to withhold discovery and otherwise abandon the fundamental values of a fair trial. Ms. Rodriguez described the system of the 9/11 Proceedings as irrevocably broken – a system that, in addition to denying basic constitutional protections to the defendants, was delaying justice for victims' family members.

⁹ Julia Rodriguez, *Guantánamo Is Delaying Justice for 9/11 Families*, N.Y. Times (Nov. 13, 2017), <https://www.nytimes.com/2017/11/13/opinion/guantanamo-911-justice.html>.

Jessica and Leila joined Peaceful Tomorrows in 2018. They supported the organization's goal of putting a stop to reactions to the September 11th attacks that involve further violence or threats to civil liberties and human rights. They objected to violence, including torture, being carried out in their father's name. They each sought accountability – accountability for the defendants through fair legal proceedings and accountability for the government for perpetrating human and civil rights violations in response to the September 11th attacks.

4. Valerie Lucznikowska

On September 11th, Valerie Lucznikowska's nephew, Adam Arias, was working at Euro Brokers on the 84th floor of the World Trade Center's South Tower. Adam was 37 years old.

In the days following the attacks, Valerie traveled from hospital to hospital putting up posters with the hope of finding Adam. After no success, but still with a glimmer of hope, Valerie went to the Victims' Center in midtown Manhattan. When she arrived, the Victims' Center issued a list of unidentified body parts found in the rubble. Valerie realized then that all hope of Adam's survival was lost.

Valerie joined Peaceful Tomorrows in 2002. She was drawn to Peaceful Tomorrows because of its mission to honor September 11th victims through peaceful solutions, including by bringing those responsible to justice in accordance with the rule of law and avoiding cycles of violence and revenge.

5. Nancy Meyer

On September 11th, Nancy's sister-in-law, Lauren Catuzzi Grandcolas, was returning from her grandmother's funeral in New Jersey to her home

near San Francisco. Lauren arrived at Newark International Airport earlier than expected that morning, and was offered a seat on a San Francisco-bound flight departing earlier than her originally scheduled flight. Lauren – who was three months pregnant with her first child and eager to get home to her husband Jack – accepted the offer and boarded United Airlines Flight 93. Lauren and 48 other passengers and crew were killed shortly after takeoff, when the plane was hijacked by terrorists and crashed into a Pennsylvania field.

In 2002, still grieving the loss of her sister-in-law, Nancy became troubled by the so-called “war on terror” in response to the September 11th attacks. In searching for other victims’ family members who shared her view that war was not the solution, Nancy came across Peaceful Tomorrows. She joined the organization in early 2004 and has since spoken around the world about her experience on September 11th and breaking the cycles of violence engendered by war and terrorism. It is a legacy she hopes to leave on behalf of Lauren and the child Lauren never had, as well as Nancy’s own children.

6. Phyllis Rodriguez

On the morning of September 11th, Phyllis Rodriguez left her White Plains, New York apartment for a brisk walk. When she returned home – ready to begin coursework for the master’s degree she was pursuing at nearby Fordham University – she noticed a new message on her answering machine. It was from her son, Greg Rodriguez. Greg was 31 years old and worked as a computer specialist at Cantor Fitzgerald. Greg said on his message that there was a disaster at the World Trade Center and asked Phyllis to tell his wife,

Elizabeth, that he was okay. That was the last time Phyllis heard Greg's voice.

That day and the next, Phyllis' family traveled from hospital to hospital searching for Greg. They met with the families and friends of other Cantor Fitzgerald employees at a hotel ballroom turned crisis center, as the company painstakingly worked to identify who was alive and who was not. Those not accounted for were presumed dead. Greg was never found.

In the days following the attacks, Phyllis' grief was coupled with fear about the consequences of the attacks. Deeply concerned about the likelihood of reactionary violence, Phyllis and her husband, Orlando, wrote an open letter titled "Not in Our Son's Name," urging the U.S. government not to wage war in retaliation for September 11th. That letter was widely circulated and garnered international attention. Other victims' families reached out to express their shared belief that further violence and suffering was not the answer. That became the groundwork for Peaceful Tomorrows, which Phyllis co-founded with Colleen Kelly and others on February 14, 2002.

7. Adele Welty

On the morning of September 11th, Adele Welty arrived at her office in lower Manhattan's City Hall. Adele worked for the City of New York as a geriatric social worker, handling cases of elder abuse and other crimes against the elderly. Adele's son, Timothy "Timmy" Welty, was a 34-year-old firefighter for Squad 288 in Queens. He and his wife Delia had two children – a son Jake, who was three years old, and a newborn daughter Julia, who was just one month old.

In the early morning hours of September 11th, Timmy signed out from his overnight post on hazmat duty. He planned to head home. Soon after, Squad 288 received a call that the Twin Towers were under attack. Timmy and his fellow firefighters rushed to the scene and were among the first to arrive.

From her office window, Adele watched the towers collapse. She tried to make her way from City Hall to the scene, but her route was blocked by FBI barricades. She walked back to her home in Queens and waited by the phone to hear from Timmy. That call never came. Timmy was killed on September 11th along with 343 other firefighters.

Several months after the attacks, Adele and her family received a call from the medical examiner. Timmy's thigh had been found near the South Tower and his hand was identified in a garbage dump on Staten Island. As she mourned the loss of her son, Adele searched for answers. She wanted to learn the facts and what led to the September 11th attacks. But as the mood of the country seemed inclined to war, Adele searched for a way to find a peaceful alternative. She came across and joined Peaceful Tomorrows.

B. The Experience of Members of Peaceful Tomorrows with the State Secrets Privilege at the 9/11 Proceedings Demonstrates the Need for Judicial Scrutiny

These eight individuals, like so many other members of Peaceful Tomorrows, have followed the 9/11 Proceedings closely. They have, collectively, attended all forty-one hearings in person at Guantanamo or via a television feed made available to family members of those who died on September

11th. Many of them, for example, watched Drs. Mitchell and Jessen testify over several days, including about subjecting Mr. Zubaydah and other detainees to “enhanced interrogation” at foreign CIA black sites. They have also seen the government repeatedly invoke “national security” to suppress evidence related to the defendants’ torture and the protracted delays these government actions have caused in the 9/11 Proceedings.

Peaceful Tomorrows is deeply concerned about potential government abuses of the state secrets privilege. It is concerned because, as detailed below, its members have witnessed the government invoke national security to, among other things, apparently circumvent the judge’s role as a gatekeeper, suppress information it soon after declassified, and attempt to suppress questioning concerning information that was clearly public already, such as portions of Dr. Mitchell’s published book.

At Guantanamo, those in the viewing gallery watch the Proceedings behind a wall of glass with a synchronized audio and video feed that arrives on a 40-second delay. The delay is designed to allow the judge and his security officer to prevent the “spill” of classified information. A red light comes on when the censor button is pushed, which cuts the audio and video feed.

Members of Peaceful Tomorrows have seen the government apparently attempt to circumvent this process and the court’s role as a gatekeeper. While Terry, Valerie, and Phyllis were observing a hearing on January 28, 2013, the audio feed spontaneously shut off as defense counsel raised a motion to preserve evidence concerning overseas detention facilities. When the feed returned, they could hear

that the judge and his security officer were flustered, as neither of them had turned off the feed and had believed they were the only ones with the ability to do so. The judge expressed his frustration with the incident:

Trial counsel, note for the record that the 40-second delay was initiated, not by me. I'm curious as to why. . . . if some external body is turning the commission off under their own view of what things ought to be, with no reasonable explanation . . . then we are going to have a little meeting about who turns that light on or off.¹⁰

This event left Terry, Valerie, and Phyllis, and many others, to wonder just who had the ability to unilaterally cut off the feed remotely to conceal potentially damning evidence about the government's treatment of the defendants in detention facilities.¹¹ This experience reinforced the critical role of a judge as gatekeeper of state secret privilege claims.

Since the start of the 9/11 Proceedings in 2012, the details of the government's enhanced interrogation program have increasingly become public. From well-documented, publicly available sources – including the testimony of Drs. Mitchell and Jessen, Dr. Mitchell's book, and the 2014 Senate Select Committee on Intelligence Report – the world knows

¹⁰ See *United States v. Khalid Shaikh Mohammad et al.*, Transcript, 1445:17-1446:7 (Jan. 28, 2013), [https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(TRANS28January2013-PM1\).pdf](https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(TRANS28January2013-PM1).pdf).

¹¹ See John Ryan, *Pretrial of the Century: The Sept. 11 Case at Guantanamo Bay*, Lawdragon 500 Issue 17, 72 (noting that as a result of this incident, “many have assumed the CIA” cut the feed of the Proceedings remotely).

that the 9/11 Proceedings defendants, Mr. Zubaydah, and other detainees were subjected to waterboarding, wall-slammings, face slapping, sleep deprivation, rectal rehydration, rectal feeding, and other brutal methods of “interrogation” while detained at various CIA black sites, including black sites located abroad.

In the experience of members of Peaceful Tomorrows, this vast and expanding body of public information has made the government’s invocations of national security in the 9/11 Proceedings increasingly questionable and worthy of scrutiny. For example, on several occasions members of Peaceful Tomorrows have watched hearings suffer protracted delays from national security objections at a mere hint of the locations of the CIA black sites where the defendants had been held. These objections rang particularly hollow, as there were safeguards in place to protect any national security concerns while permitting testimony about what happened at those sites to proceed. Specifically, the black sites were referred to by color codes to mask their precise location and relevant individuals whose identities were classified were referred to by pseudonyms.¹²

Members of Peaceful Tomorrows have also seen the judge repeatedly deem inadequate the government’s substitution of non-privileged information for

¹² See, e.g., *United States v. Khalid Shaikh Mohammad et al.*, Transcript, 30525:12-18 (Jan. 22, 2020), [https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(TRANS22Jan2020-PM-MERGED\).pdf](https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(TRANS22Jan2020-PM-MERGED).pdf) (“The commission’s position generally is that the protections that have been previously judicially approved with respect to [unique functional identifier]s, pseudonyms, et cetera should be sufficient to be able to discuss things in an open session”).

classified information, causing further delays in the 9/11 Proceedings. For example, during a July 25, 2016 hearing – more than four years after defendants’ arraignment – Colleen watched as the judge reported that he had received from the government only “fifty percent” of the discovery requested by the defendants relating to the CIA’s detention and interrogation of the defendants and other detainees.¹³ Of that, the judge reported that he was forced to reject “virtually all” of the government’s substitutions and send it back to the government for further “additions.”¹⁴ Colleen was struck by the government’s apparent lack of good faith in carrying out its obligations to provide the defense with timely and adequate substitutes for the withheld information.

In addition, members of Peaceful Tomorrows have witnessed the government invoke national security inconsistently as to the same piece of evidence. For example, during a July 23, 2018 pretrial hearing, Jessica and Leila observed defense counsel present a document that related to the defendants’ torture. Although the defense had requested the same document from the prosecution two years earlier, it had been produced only in a redacted, summarized form to protect information that, if released, the government claimed could damage national security. As it turned out, however, the government released an unredacted version of the document to a *Buzzfeed* news reporter in response to a FOIA request just two

¹³ *United States v. Khalid Shaikh Mohammad et al.*, Transcript, 12969:18-19 (July 25, 2016), [https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(TRANS25July2016-PM1\).pdf](https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(TRANS25July2016-PM1).pdf).

¹⁴ *Id.* at 12968:21-22.

years later.¹⁵ The defense obtained a copy of this unredacted version. Jessica and Leila became concerned that the government was selectively seeking to hide information – even that which it actually believed could be made public – for its own self-interest, and not to protect national security.

In light of this incident, the judge questioned the propriety of the government’s other invocations of national security:

[A]lot of it is based on the government’s representations, okay? And now, apparently the damage to national security in 2016 has gone away in 2018 . . . How do I know all of the other summaries don’t have the same problem? . . . why should I have faith that the thousands of other ones I looked at don’t have the same problem? . . . Should I be concerned that the original documents that I saw were not really properly classified? . . . In 2016, [] releasing that to the defense was going to damage national security; and now in ’18 apparently it’s not, two years later. Why should I have any faith in these determinations, then, if they can change like that?¹⁶

The members of Peaceful Tomorrows also have experience with the government trying to invoke national security to suppress information related to what Dr. Mitchell has publicly stated.¹⁷ For example,

¹⁵ *United States v. Khalid Shaikh Mohammad et al.*, Transcript, 20039:22-20040:5 (July 23, 2018), [https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(TRANS23Jul2018\)-MERGED.pdf](https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(TRANS23Jul2018)-MERGED.pdf).

¹⁶ *Id.* at 20012:22-20018:13.

¹⁷ See, e.g., Julian Borger, *Guantánamo: psychologists who designed CIA torture program to testify*, *The Guardian* (Jan. 20,

in January 2020, during Dr. Mitchell's testimony, Valerie, Terry, and Colleen watched while defense counsel tried to question Dr. Mitchell about certain passages in his book – which the government had permitted to be published – and the government objected on the grounds of national security. For instance, the government objected to a question by defense counsel about whether the “highly respected senior operations officer” mentioned in a passage of Dr. Mitchell's book had a unique functional identifier (“UFI”) (used as a code in the 9/11 Proceedings to safeguard national security concerns), and asserted that Dr. Mitchell confirming that a “senior operations officer” had a UFI threatened “national security.” Valerie, Terry, and Colleen were baffled at the government's assertions because Dr. Mitchell's book was available to the entire world and the government had allowed it to be published. The judge expressed similar skepticism: “I don't understand it. . . . help me understand what you're asserting, because I don't get it.”¹⁸ Ultimately, the judge and government were able to use the existing UFIs and additional safeguards to address the government's concerns. In other words, by exercising his gatekeeper function and implementing safeguards to disentangle privileged from non-privileged information, the judge

2020), <https://www.theguardian.com/us-news/2020/jan/20/guan-tanamo-psychologists-cia-torture-program-testify> (describing “a new set of secrecy rules introduced by the prosecution . . . that prevents defence lawyers from citing references to the interrogation programme in published books, even though they had been cleared for publication by the CIA”).

¹⁸ *United States v. Khalid Shaikh Mohammad et al.*, Transcript, 30463:19-20 (Jan. 22, 2020), [https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(TRANS22Jan2020-AM-MERGED\).pdf](https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(TRANS22Jan2020-AM-MERGED).pdf).

permitted Dr. Mitchell to testify, including about various passages in his book.¹⁹

* * * *

Through their collective experience, the pursuit of justice has appeared increasingly quixotic to the members of Peaceful Tomorrows, and they have lost confidence in the fairness and integrity of the Proceedings. As the twentieth anniversary of the September 11th attacks approaches, the members of Peaceful Tomorrows fear that the 9/11 Proceedings will never offer the justice they seek – namely, a fair trial that applies the rule of law to both sides and brings the defendants to justice. They also fear that the subjugation of the defendants’ rights will result in a broader erosion of rights and undermine the historical legitimacy of the 9/11 Proceedings themselves.

This experience has also taught the members of Peaceful Tomorrows that the government’s invocations of the state secrets privilege should be carefully examined when it comes to the enhanced interrogation program. The expanding public record and the risk of embarrassment to the government underscore the needs for disentanglement and for courts to fulfill their gatekeeper function to maintain an appropriate balance between protecting national security and preserving a fair and open court system.

¹⁹ See, e.g., *United States v. Khalid Shaikh Mohammad et al.*, Transcript, 30525:12-19 (Jan. 22, 2020), [https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(TRANS22Jan2020-PM-MERGED\).pdf](https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(TRANS22Jan2020-PM-MERGED).pdf); *United States v. Khalid Shaikh Mohammad et al.*, Transcript, Part 2 of 5, 31202:1-16 (Jan. 27, 2020), [https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(TRANS27Jan2020-MERGED\)_Part2.pdf](https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(TRANS27Jan2020-MERGED)_Part2.pdf).

Left unchecked, the risks of government abuses of the state secrets privilege and the implications on litigants and our trial system are too great.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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August 20, 2021