



November 5, 2015

The Honorable Loretta Lynch  
Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530

Dear Attorney General Lynch:

The American Civil Liberties Union represents the plaintiffs in *Salim v. Mitchell*, Civil Case 2:15-cv-00286-JLQ, a lawsuit recently filed in the Eastern District of Washington by three victims of torture. The plaintiffs allege that defendants James Mitchell and John “Bruce” Jessen, the two psychologists who designed and implemented the CIA’s former interrogation program, subjected them to torture and other cruel, inhuman or degrading treatment, as well as to nonconsensual human experimentation. The United States is not a party to the lawsuit, but in past cases involving the CIA’s interrogation program, the United States has intervened to seek dismissal on state secrets grounds. We write to urge you not to do so in this suit.

In the last decade, the Justice Department has repeatedly invoked the state secrets privilege to seek dismissal of cases brought by private litigants who suffered serious harm from egregious abuses in the CIA’s discontinued rendition, detention, and interrogation program. Whatever the merits of earlier invocations, this case is different: the plaintiffs’ allegations are based on officially acknowledged, detailed, public information from official government reports—including the executive summary of the Senate Select Committee on Intelligence’s Study of the CIA’s Detention and Interrogation Program (“SSCI Report”), the CIA’s June 2013 response to that report, Congressional testimony, and Defendant Mitchell’s own public admissions.

In previous cases, the Justice Department sought dismissal on the basis of the privilege where it contended that “the very subject matter” of the suit was a secret, or that state secrets would be so central to the parties’ claims or defenses that litigation could not proceed. Neither argument has force here. The subject matter of the *Salim* plaintiffs’ claims—their torture and other ill-treatment by defendants in the CIA’s former detention and interrogation program—is not a secret. Nor can the Justice Department reasonably predict that state secrets will be central to claims and defenses in the litigation. The key allegations in the complaint rest on officially acknowledged facts:

- The CIA's former detention and interrogation program involved the use of standardized, publicly acknowledged methods of coercion and abuse;
- The plaintiffs have been officially identified as detainees who were subjected to the program's most coercive methods, the so-called "enhanced interrogation techniques";
- Following public release of the SSCI Report, the CIA permitted defendant Mitchell to confirm that he was under contract to the agency and that he was "part of the enhanced interrogation program." He confirmed that he is the CIA contractor referred to in the SSCI report as "Grayson Swigert" and that his partner was Bruce Jessen.
- The SSCI Report details that defendants were responsible for proposing and designing the coercive methods used in the CIA's program, advocating for their use on detainees, and evaluating the effectiveness of those methods.

Plaintiffs make no claims against foreign governments or covert CIA personnel. The resolution of their claims does not require resort to secret information. Accordingly, invocation of the state secrets privilege to dismiss the case would be inappropriate.

That conclusion comports with the Justice Department's September 23, 2009 Policies and Procedures Governing Invocation of the States Secrets Privilege, which instructs that the state secrets privilege should only be invoked "when genuine and significant harm to national defense or foreign relations is at stake and only to the extent necessary to safeguard those interests."<sup>1</sup> Because the key facts at issue in *Salim v. Mitchell* are not legitimately secret, the Justice Department's own internal standard cannot be met. To the extent the Justice Department nevertheless believes that particular evidence relevant to any specific allegation is legitimately a state secret, the proper time to raise that concern is at the discovery stage.

Moreover, the Justice Department should carefully scrutinize any request made by the CIA to intervene in *Salim v Mitchell* in light of the Justice Department policy that the state secrets privilege will not be invoked to "conceal violations of law," or to "prevent embarrassment to a person, organization or agency of the United States Government." The SSCI Report

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<sup>1</sup> Memorandum from the US Attorney General, "Policies and Procedures Governing Invocation of the State Secrets Privilege," September 23, 2009, <http://www.justice.gov/sites/default/files/opa/legacy/2009/09/23/state-secret-privileges.pdf>

reveals past attempts on the part of the agency to abuse the judicial process to conceal violations of the law and to prevent embarrassment. For example, the SSCI Report found that the CIA “coordinated the release of classified information to the media, including inaccurate information” about the use and effectiveness of “enhanced interrogation techniques.”<sup>2</sup> In internal emails, one CIA attorney acknowledged that these authorized leaks to the press made “the [legal] declaration I just wrote about the secrecy of the interrogation program a work of fiction.”<sup>3</sup> A second attorney wrote, referencing CIA statements that it could neither confirm nor deny the existence of certain documents about the torture program, “[o]ur Glomar figleaf is getting pretty thin.”

In addition, the Justice Department should consider that for years before the SSCI Report’s release, current and former CIA officials claimed that the release of the report would endanger national security by placing intelligence officers and hostages at risk. According to Senator Dianne Feinstein, this culminated “days before the public release of our report on CIA detention and interrogation,” when SSCI was given “an intelligence assessment predicting violence throughout the world and significant damage to United States relationships” if they proceeded with plans to publish the Executive summary.<sup>4</sup> None of that transpired. As Senator Feinstein noted in a Senate hearing, “[t]he threat assessment was not correct.” The release of the SSCI Report and subsequent public debate about the CIA’s former detention and torture program have demonstrated that the program may be publicly discussed and examined in detail without harm to national security. Indeed, the CIA has itself participated extensively in this discussion.<sup>5</sup>

Due in large part to the Justice Department’s previous invocations of the state secrets privilege, survivors of CIA torture and “extraordinary rendition” have been blocked from pursuing any remedy in U.S. courts, compounding the physical and psychological harm caused by their forced disappearances, torture and other ill-treatment. This denial of a judicial remedy violates the United States’ binding obligations under the U.N. Convention Against Torture. In particular, article 14 requires that the U.S. government ensure that torture victims “obtain[] redress” in its legal system through “an enforceable right to fair and adequate compensation.” The use

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<sup>2</sup> SSCI Report Study Findings at 8-9

<sup>3</sup> SSCI Report at 405

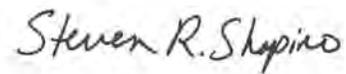
<sup>4</sup> SSCI hearing, February 12, 2015, video available at <http://www.c-span.org/video/?c4527978/feinstein-callstorture-report-threat-assessment>

<sup>5</sup> For example, the CIA has declassified and released its June 2013 Response to the Senate Select Committee on Intelligence’s Study on the Former Detention and Interrogation Program.

of secrecy to block torture victims from U.S. courts has also led to erosion of the American public's trust in our nation's willingness to provide fair justice. This should not be President Obama's legacy on accountability for torture.

We urge the Justice Department to allow torture victims their day in court, and we would appreciate the opportunity to meet with you regarding this matter.

Respectfully,

A handwritten signature in black ink that reads "Steven R. Shapiro". The signature is written in a cursive style with a clear, legible font.

Steven R. Shapiro  
Legal Director