11-9-2022

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CICLR Nov 9 5 min read

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In 2002, the Pakistani government arrested Abu Zubaydah, a suspected lieutenant of the terrorist group Al Qaeda, before passing him off to the Central Intelligence Agency (CIA).[1] Early on in Zubaydah's imprisonment he was moved between various CIA detention cites.[2] Zubaydah claims the CIA held him in a detention site (aka "black-site") in Poland during 2002 and 2003.[3] Neither the CIA, nor any other branch of government, have confirmed that there is a detention site located in Poland.[4]

In 2010, lawyers representing Zubaydah filed a criminal complaint asking the Polish government to prosecute any Polish nationals involved in the treatment of Zubaydah.[5] The Polish government requested that the United States send it information regarding the detention of Zubaydah in Poland under the Mutual Legal Assistance Treaty.[6] The United States denied this request.[7] Zubaydah's lawyers filed a 28 U. S. C. § 1782 discovery application that would allow U.S. courts to subpoena evidence for foreign tribunals.[8] Zubaydah tried to subpoena information from James Mitchell and John Jessen,

former CIA contractors and the architects of the CIA's post 9/11 torture program.[9] The U.S. government moved to quash the subpoena, arguing that the information requested is protected under the state secrets doctrine[10] and that Mitchell and Jessen's responses could disclose the nature of the CIA's relationship with foreign governments and actors.[11] The District Court granted the government's motion, saying that it was not possible to conduct "meaningful discovery" without disclosing protected information.[12] Zubaydah requested the use of code names in order to allow the discovery to go forward while concealing confidential information.[13] This was rejected as well.[14]

On appeal, the Ninth Circuit affirmed in part and reversed in part.[15] The Ninth Circuit ruled that any information that was already publicly known was not subject to protection and ruled that Mitchell and Jessen were no longer government actors, therefore, any information they divulged would not show that the U.S. government "confirmed or denied" anything regarding the alleged detention.[16] The court ruled that three areas of information were not protected: (1) information about the existence of a detention site in Poland, (2) information about the use of torture at this site, and (3) information about the treatment of Zubaydah at this site.[17]

In April 2022, the Supreme Court, in a 7-2 decision, reversed the Ninth Circuit's decision and quashed the subpoenas.[18] The majority cited to *U.S. v. Reynolds*, a case that allowed the government to prevent disclosure of information that would harm national security interests.[19] Under *Reynolds*, the government can claim information is privileged when its disclosure would harm national security interests.[20] It is then up to the court to determine whether or not the information should be kept quiet.[21] Although the court itself must assess the sufficiency of the government's privilege claim, "the showing of necessity which is made," by the party seeking disclosure of the ostensibly privileged information, "will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate."[22]

The Court said that any response by Mitchell or Jessen to the three categories of questions that are allowed would confirm the existence of a CIA site in Poland; therefore, the Court must analyze whether the disclosure of the existence of that site is a protected state secret.[23] The Court agreed with the government's argument that the disclosure of information about the CIA's relationship with a foreign entity would place the CIA's ability to maintain "clandestine relationships" with this entity and other foreign entities in jeopardy.[24]

Additionally, the majority rejected the idea that discovery could go forward while using codes that would prevent the disclosure of the location of the site.[25] Justice Breyer argued that because this discovery is meant to be used in a Polish criminal investigation, even a redacted version of the testimony would make it clear that there is a CIA site in Poland.[26]

In his dissent, Justice Gorsuch lays out the sequence of events the Zubaydah suffered through and explains where these details have been made publicly available.[27] Justice Gorsuch concedes that the President has broad authority over foreign affairs.[28] But he argues that the Constitution provided Congress with power to regulate the jurisdiction of federal courts, and with that power, Congress passed a statute allowing the courts to order discovery from domestic persons for use in foreign tribunals.[29] This is not to say that Justice Gorsuch is against the state secrets privilege as a whole, just that the executive's power to control state secrets should be considered along with the competing interests of the legislature and

judiciary.[30] Justice Gorsuch argues that the executive should not just be taken at their word about national security threats, as there have been various instances in the past where the government exaggerated or entirely lied about such threats to prevent the release of compromising or embarrassing information.[31] Justice Gorsuch argues that the government did not do enough to prove that the disclosure of this information would be a threat to national security. Justice Gorsuch also says that the government has not done enough to show that there would be a threat to national security, rather it only said that there would be a threat and the court took it at its word and asked Zubaydah to disprove it, essentially flipping the burden of proof onto Zubaydah.[32]

Gorsuch then goes on to discuss the fact that the case should not be dismissed even if the location of the site is a state secret.[33] Gorsuch makes the case that discovery regarding the treatment of Zubaydah should go forward and the parties can use code names or go through some other method to prevent any protected information from leaking.[34]

While *Reynolds* does say that the court should give the executive some deference and avoid *in camera* reviews when they are not necessary for the sake of national security, this is a case where the information is already public, so there is relatively very little potential harm in allowing a judge to review the government's claim that national security is at risk. This case sets an extremely low bar for determining whether or not national security is at risk due to the disclosure of evidence in a suit against the government. The court admittedly just took the Director's word as fact with no other analysis required.[35] If the government's burden of proof can be overcome by a simple declaration with no further evidence, there might as well be a blanket privilege for all evidence which might embarrass the government or its actors. This is a recipe that is bound to result in governmental abuse of power.

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[1] United States v. Zubaydah, 142 S. Ct. 959, 964 (2022).
[2] *Id.* at 964-65.
[3] *Id.*
[4] *Id.*
[5] *Id.* at 965.
[6] *Id.*
[7] Zubaydah, 142 S. Ct. at 965.
[8] *Id.*
[9] *Id.* at 964-65.
[10] *Id.* at 963-64.
[11] *Id.* at 966.
[12] *Id.* at 961.
[13] Zubaydah, 142 S. Ct. at 966.
[14] *Id.*
[15] *Id.*
[16] *Id.*

[17] *Id.*
[18] *Id.* at 964.
[19] *See generally* United States v. Reynolds, 73 S. Ct. 528, 345 U.S. 1 (1953).
[20] *Id.* at 7-8.
[21] *Id.* at *8*.
[22] *Id.* at 11.
[23] Zubaydah, 142 S. Ct. at 968.
[24] *Id.* at 968-69
[25] *Id.* at 972
[26] *Id.*
[27] *Id.* at 985-88 (Gorsuch, J., dissenting).
[28] *Id.* at 990.
[29] Zubaydah, 142 S. Ct. at 990 (Gorsuch, J., dissenting).
[30] *Id.* at 990-91.
[31] *Id.* at 992-93
[32] *Id.* at 997.
[33] *Id.* at 998-1001
[34] *Id.*
[35] Zubaydah at 969