



Abu Zubaydah and the State Secrets Doctrine

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Zayn Al-Abidin Muhammad Husayn (also known as Abu Zubaydah) is a detainee at the U.S. Naval Station at Guantanamo Bay, Cuba. He was also the first suspected Al Qaeda detainee [rendered](#) into Central Intelligence Agency (CIA) custody at various “black sites” abroad for interrogation, including “Detention Site Blue,” allegedly in Poland, from December 2002 to September 2003. He sought depositions from two former CIA contractors who helped devise the CIA’s “Enhanced Interrogation Program,” for submission to prosecutors in Krakow, Poland, to use in a criminal investigation of Polish officials’ alleged complicity in the claimed unlawful detention and torture of Abu Zubaydah. The district court granted the application, and the United States filed a motion to intervene and to quash the subpoenas, citing, among other things, the state secrets privilege. On March 3, 2022, the Supreme Court [upheld](#) the government’s assertion of the state secrets privilege and dismissed Abu Zubaydah’s suit.

The State Secrets Doctrine

While some highlight that the state secrets doctrine is [grounded in the Constitution’s](#) Article II duties, the United States Supreme Court has long recognized a common law government privilege against the disclosure of state and military secrets in civil litigation known as the “state secrets privilege.” The Court first articulated the modern analytical framework of this evidentiary privilege in the 1953 case of [United States v. Reynolds](#). The *Reynolds* Court identified a two-step analysis for courts to evaluate an assertion of the privilege. The first requirement is a largely procedural hurdle to assure that the privilege is not “lightly invoked,” in which the head of the department in control of the information in question, after “personal consideration,” invokes the privilege in writing. The second requirement asks the court to evaluate whether there is a reasonable danger that disclosure “will expose military matters which, in the interest of national security, should not be divulged.” *Reynolds* recognized that it is the role of the judiciary to evaluate the validity of a claim of privilege, but it declined to require that courts automatically compel inspection of the underlying information. As the Court expressed, “too much judicial inquiry into the claim of privilege would force disclosure of the thing the privilege was meant to protect, while a complete abandonment of judicial control would lead to intolerable abuses.”

The privilege belongs exclusively to the government and cannot be validly asserted or waived by a private party. The government may intervene in cases in which it is not a party where litigation could potentially lead to the disclosure of secret evidence that would threaten national security. In most courts, the

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government may assert the privilege at any time, whether at the pleading stage of the litigation or during discovery in response to specific requests for information.

Abu Zubaydah v. United States

In *United States v. Abu Zubaydah*, the Supreme Court considered how the *Reynolds* analysis applies to information that is ostensibly in the public domain. The government asked the Court to overturn a decision of the Court of Appeals for the Ninth Circuit (Ninth Circuit) ordering a lower court to compel testimony from two former CIA contract personnel involved in the CIA's implementation of an enhanced interrogation program for use in foreign criminal proceedings. The Ninth Circuit **ordered** the lower court to disentangle privileged information from non-privileged information the contractors might be compelled to provide. The government **urged** the Court to hold that the Ninth Circuit should have given greater deference to the CIA Director, who declared that any information the contractors could provide would risk harm to U.S. national security, and that the court should have quashed the subpoena in its entirety.

Majority/Plurality Opinion

In a **fractured opinion** written by Justice Breyer, the Supreme Court reversed the Ninth Circuit and ordered the case dismissed, but the majority **avoided** making broad statements indicating that the government is owed anything approaching absolute deference in state secrets cases. The Court did not **suggest** that lower courts should never make efforts to disentangle non-sensitive information from information properly subject to the privilege. Rather, the majority characterized the issue as a “**narrow evidentiary dispute**” that was to be resolved on the specific facts before the court. The Court **accepted** the government's contention that officially confirming or denying that Poland hosted the black site where Abu Zubaydah claimed to have been subject to harsh interrogation techniques would pose a threat to U.S. national security and that Abu Zubaydah's deposition questions, exactly as originally **submitted**, could not be addressed without at least implicitly confirming or denying Poland's involvement.

The Court **found** that public knowledge about the location of the black site did not render the information unprivileged because official confirmation or denial was lacking, leaving open the possibility that the so-called public knowledge might be untrue. The Court **accepted** the government's contention that official confirmation or denial could complicate U.S. relationships with foreign intelligence partners. The Court **disagreed** with the Ninth Circuit that former contractors cannot confirm or deny anything officially, **holding** instead that statements by former contractors can indeed amount to official confirmation or denial of sensitive facts.

Having confirmed that potential information pointing to Poland as one site where Abu Zubaydah was allegedly tortured was subject to the state secrets doctrine, the majority **considered** Abu Zubaydah's need for the depositions. The majority interpreted Abu Zubaydah's argument that he did not necessarily need to elicit evidence establishing the location of the detention site as a concession that his need for the depositions was relatively insignificant. Accordingly, the majority **ordered** the case dismissed, with a plurality **suggesting** that Abu Zubaydah could refile an application for the depositions using questions phrased in such a way as to avoid necessarily implicating Poland.

Concurrences in Part

Justice Thomas, joined by Justice Alito, **concurred** in the judgment only, agreeing that the case should be dismissed. Justice Thomas would have begun the **inquiry** with an evaluation of “the showing of necessity . . . made” by Abu Zubaydah and only then if necessary ask whether there is a “reasonable danger” that “military secrets are at stake.” To do otherwise, he **argued**, “undermines the ‘utmost deference’ owed to the Executive's national-security judgments.” His evaluation of Abu Zubaydah's need for the depositions

concluded that Abu Zubaydah “has failed to prove any nontrivial need for his requested discovery.” First, he argued the depositions would not provide Abu Zubaydah with meaningful relief because they would amount to “discovery on behalf of foreign authorities to help them prosecute foreign nationals who allegedly committed crimes in a foreign country.” Second, he argued Abu Zubaydah has “failed to pursue ‘an available alternative’” by not asking to submit a statement himself to the Polish prosecutors. Third, he argued that Abu Zubaydah has clarified he “does not need evidence about Poland specifically and seeks discovery only regarding the conditions of his confinement while in CIA custody.” Accordingly, he argued that Abu Zubaydah’s “dubious showing of necessity” alone required dismissal of the suit.

Justice Kagan concurred in part and dissented in part, agreeing that the government had a substantial interest in maintaining secrecy regarding the location where Abu Zubaydah was held in order to protect relationships with foreign intelligence partners. She would have permitted Abu Zubaydah to rephrase his deposition questions to avoid implicating Poland and permit the district court to segregate “classified information about location while giving Zubaydah access to unclassified information about detention conditions and interrogation methods.”

Dissent

Justice Gorsuch, joined by Justice Sotomayor, dissented, taking the view that that no secrets were at stake and that the Justices should not pretend otherwise. He observed “[t]he events in question took place two decades ago [and] have long been declassified.”

Justice Gorsuch first set forth what is already known about Abu Zubaydah’s treatment, but argued that this information is missing relevant facts regarding Abu Zubaydah’s treatment during the time he was allegedly detained in Poland. He observed that Abu Zubaydah seeks that information pursuant to statute “for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation,” and had sought an accommodation at the district court to avoid mentioning the location of the mistreatment. Arguing that the breadth of the initial deposition request is now “beside the point,” Justice Gorsuch contended that information helpful to Abu Zubaydah could be elicited using code words and other familiar mechanisms to protect classified information.

Justice Gorsuch argued that accommodating both the government’s and Abu Zubaydah’s needs would not interfere in the constitutional separation of powers. Setting forth evidence of possible misuse of the state secrets doctrine in the past, Justice Gorsuch wrote the Court need not “add fuel to that fire by abdicating any pretense of an independent judicial inquiry into the propriety of a claim of privilege and extending instead ‘utmost deference’ to the Executive’s mere assertion of one.” The government, he wrote, “has not carried its burden of showing” that this case, if allowed to continue, would endanger relationships with foreign intelligence partners.

Even assuming that disclosure of the detention site would expose state secrets, Justice Gorsuch argued that the majority’s worry that deposing the CIA interrogators might lead them to “inadvertently disclose the location of their activities” is insufficient to justify dismissing the entire case, given the tools available to avoid such an outcome. In the end, Justice Gorsuch saw no reason to force Abu Zubaydah to file a new lawsuit to get the depositions he needs, and charged that the only real reason for the government to have this cases dismissed in its entirety is to “impede the Polish criminal investigation and avoid (or at least delay) further embarrassment for past misdeeds.”

Author Information

Jennifer K. Elsea
Legislative Attorney

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