

Supreme Court Says Torture at CIA Black Site Is a “State Secret”

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*Abu Zubaydah, whom the CIA once mistakenly alleged was a top al-Qaeda leader, was waterboarded 80+ times, subjected to assault in the form of forced rectal exams, and exposed to live burials in coffins for hundreds of hours. Zubaydah sobbed, twitched and hyperventilated. During one waterboarding session, he became completely unresponsive, with bubbles coming out of his mouth. “He became so compliant that he would prepare for waterboarding at the snap of a finger,” Neil Gorsuch [wrote](#) in his 30-page dissent in *United States v. Zubaydah*.*

On March 3, in a 6-3 decision, the Supreme Court dismissed Zubaydah’s petition requesting the testimony of psychologists James Mitchell and John Jessen, whom the CIA hired to orchestrate his torture at a secret CIA prison (“CIA black site”) in Poland from December 2002 until September 2003. Zubaydah was transferred to other CIA black sites before being sent to Guantánamo in 2006, where he remains today with no charges against him.

Zubaydah sought information: (1) to confirm that the CIA black site in question was located in Poland; (2) about his torture there; and (3) about the involvement of Polish officials. First the Trump administration — now the Biden administration — claim that confirming the location of the CIA black site in Poland is a “state secret” that would significantly harm U.S. national security interests. Zubaydah needs Mitchell and Jessen’s testimony to document his treatment from December 2002 to 2003 at the CIA black site in Poland for use in the ongoing Polish criminal investigation of Poles complicit in his torture. Those details have not been publicly documented.

Former CIA Director Mike Pompeo wrote in a declaration that although the enhanced interrogation techniques are no longer classified, the location of the CIA black site in question remains a state secret. Pompeo maintained that soliciting information about the involvement of Polish nationals in Zubaydah’s treatment could compromise national security.

But the location of the Polish CIA black site has been publicly acknowledged in several

venues. The 683-page report of the Senate Select Committee on Intelligence, published in 2014, detailed the CIA detention and interrogation program, including details about Zubaydah's torture prior to being sent to the CIA's black site in Poland. In 2007, the Council of Europe issued a long report that found Zubaydah was held at the Polish CIA black site after his capture in 2002. The former president of Poland told reporters in 2012 that the CIA black site in Poland was established with his knowledge. In 2014, the European Court of Human Rights concluded beyond reasonable doubt that Zubaydah was held in Poland from December 2002 to September 2003.

Moreover, in 2017, the U.S. government allowed Mitchell and Jessen to testify about how they developed the idea of waterboarding, that they asked the CIA to stop using "enhanced interrogation techniques" (aka torture) on Zubaydah, and how the CIA leadership refused. Once again, in 2020, the U.S. government permitted the two psychologists to testify at military commission hearings at Guantánamo about how Zubaydah was waterboarded and kept awake for 120 consecutive hours.

Zubaydah's attorneys sought to elicit information about Zubaydah's conditions of confinement and the details of his treatment without risk to any state secrets. They asked that the two psychologists be allowed to testify without confirming the location of the black site or the cooperation of foreign nationals. They offered to use code words to avoid specific reference to Poland or the involvement of Polish officials.

"The Polish prosecutor already has information [that it happened in Poland] and doesn't need U.S. discovery on the topic," David Klein, Zubaydah's attorney, [told the court](#) during oral argument. "What he does need to know is what happened inside Abu Zubaydah's cell between December 2002 and September 2003. So I want to ask simple questions like, how was Abu Zubaydah fed? What was his medical condition? What was his cell like? And, yes, was he tortured?"

Breyer Defers to Pompeo's Spurious National Security Claims

The Ninth Circuit Court of Appeals held that the state secrets privilege did not apply to information already publicly known, and since Mitchell and Jensen are private parties, their disclosures would not be attributed to the U.S. government. But the Supreme Court disagreed and reversed the Ninth Circuit's decision, deferring to Pompeo's spurious national security claims.

Stephen Breyer (whose less-than-liberal voting record I documented in my February 5 *Truthout* [article](#)) wrote the plurality opinion, joined by five of his right-wing colleagues on the court. Gorsuch filed a scathing dissent on behalf of himself and Sonia Sotomayor. Elena Kagan agreed with the dissent that Zubaydah's petition should not be dismissed, but she disagreed with the dissent's reasoning.

Even though it was widely known that the site where Zubaydah was tortured was located in Poland, the court's plurality agreed with the Biden administration and held that allowing Mitchell and Jessen to testify at a criminal proceeding in Poland would officially reveal a state secret — i.e., the location of the CIA black site in Poland — that could harm national security.

"[A] court should exercise its traditional 'reluctan[ce] to intrude upon the authority of the Executive in military and national security affairs,'" Breyer wrote. He cited

Pompeo's claim that "sensitive" relationships with other countries are "based on mutual trust that the classified existence and nature of the relationship will not be disclosed."

The plurality rejected the Ninth Circuit's conclusion that since Mitchell and Jensen are private parties, their disclosures did not amount to the U.S. confirming or denying anything. Because the psychologists "worked directly for the CIA as contractors," created and implemented the enhanced interrogation program, and personally interrogated Zubaydah, their confirmation or denial "would be tantamount to a disclosure from the CIA itself," Breyer concluded.

Thus, the court held, Zubaydah cannot secure the testimony of Mitchell and Jensen about any of his three requested categories of inquiry, including the details of Zubaydah's torture during the period in question.

Gorsuch's Dissent Says That Publicly Known Information Would Not Harm National Security

"Nothing in the record of this case suggests that requiring the government to acknowledge what the world already knows to be true would invite a reasonable danger of additional harm to national security," Gorsuch wrote in dissent. He noted that the government has the burden to prove it is entitled to assert the state secrets privilege, and it has failed to carry that burden.

Decrying the court's failure to even probe the government's privilege claim at all, Gorsuch observed, "We have replaced independent inquiry with a rubber stamp."

"The Constitution did not create a President in the King's image but envisioned an executive regularly checked and balanced by other authorities," Gorsuch declared. He cited the executive branch's over-classification of documents and cautioned the court against "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 dissent accused the government of seeking dismissal of Zubaydah's petition to avoid "further embarrassment for past misdeeds." Gorsuch noted that "our government treated Zubaydah brutally — more than 80 waterboarding sessions, hundreds of hours of live burial, and what it calls 'rectal rehydration.'"

Indeed, as Zubaydah's attorney Joseph Margulies [said](#) in 2016, Abu Zubaydah is "the poster child for the torture program, and that's why they never want him to be heard from again."

Gorsuch concluded his dissent by writing, "But as embarrassing as these facts may be, there is no state secret here. This Court's duty is to the rule of law and the search for truth. We should not let shame obscure our vision."

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She is a regular contributor to Global Research.

Featured image: By 2006, at least 100 prisoners had died in US custody in Afghanistan and Iraq, most of them violently, according to government data. (Photo: US torture Image by Witness Against Torture)

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