

(New York Times April 27, 2021)

Supreme Court to Rule on Whether C.I.A. Black Sites Are State Secrets

A Guantánamo detainee is seeking information from two former government contractors in connection with a Polish criminal inquiry into a facility there.

By Adam Liptak and Carol Rosenberg

WASHINGTON — The Supreme Court on Monday agreed to decide whether the government can block a detainee at Guantánamo Bay from obtaining information from two former C.I.A. contractors involved in torturing him on the ground that it would expose state secrets.

The detainee, known as Abu Zubaydah, sought to subpoena the contractors, James E. Mitchell and Bruce Jessen, in connection with a Polish criminal investigation. The inquiry was prompted by a determination by the European Court of Human Rights that Mr. Zubaydah had been tortured in 2002 and 2003 at so-called black sites operated by the C.I.A., including one in Poland.

Mr. Zubaydah was the first prisoner held by the C.I.A. after the terrorist attacks on Sept. 11, 2001, to undergo so-called enhanced interrogation techniques, which were based on a list of suggestions drawn up for use on him by Dr. Mitchell and Dr. Jessen, both psychologists.

Dr. Mitchell has testified that he and Dr. Jessen, who had experience with an Air Force program that taught pilots how to resist torture, were hired by the C.I.A. to consult on the interrogation of Mr. Zubaydah. They were ultimately assigned to carry out the techniques on him in the summer of 2002.

A federal judge granted the government's motion to block the subpoena, saying that “proceeding with discovery would present an unacceptable risk of disclosing state secrets.”

But a divided three-judge panel of the United States Court of Appeals for the Ninth Circuit, in San Francisco, ruled that it might be possible to segregate information protected by the state secrets privilege, which bars disclosures that could endanger national security, from other materials.

The full Ninth Circuit declined to rehear the panel's decision, over the dissents of 12 judges who said the ruling was riddled with “grave legal errors” and posed “a serious risk to our national security.”

The government, in briefs filed by both the Trump and Biden administrations, asked the Supreme Court to intervene, saying that “the identities of its foreign intelligence partners and the location of former C.I.A. detention facilities in their countries” could not be disclosed “without risking undue harm to the national security.”

The case could have consequences for the trial of the five men at Guantánamo who are accused of conspiring in the Sept. 11 attacks. Prosecutors in the case against Khalid Shaikh Mohammed and four other defendants have withheld those details from defense lawyers in the death-penalty case for national security reasons.

The defense lawyers want that information to seek the testimony of eyewitnesses to bolster their argument that the United States has lost the moral authority to execute prisoners who have been tortured.

Mr. Zubaydah, a Palestinian man whose real name is Zayn al-Abidin Muhammad Husayn, was captured in Pakistan in March 2002 and was initially thought to be a high-level member of Al Qaeda. A 2014 report from the Senate Select Committee on Intelligence said “the C.I.A. later concluded that Abu Zubaydah was not a member of Al Qaeda.”

The Bush administration transferred Mr. Zubaydah, who is 50, to the Pentagon's wartime prison at Guantánamo Bay, Cuba, in September 2006, after more than four years in C.I.A. custody. He is held as a “law of war detainee,” whom interagency review boards have deemed too dangerous to release. He was granted access to a lawyer for the first time in his sixth year of U.S. confinement, but unlike the defendants in the Sept. 11 case, he has never been charged with a crime.

It is undisputed that Mr. Zubaydah was subjected to brutal interrogations at one or more black sites.

“On 83 different occasions in a single month of 2002, he was strapped to an inclined board with his head lower than his feet while C.I.A. contractors poured water up his nose and down his throat, bringing him within sight of death,” Mr. Zubaydah's lawyers told the justices. “He was handcuffed and repeatedly slammed into walls, and suspended naked from hooks in the ceiling for hours at a time.”

“He was forced to remain awake for 11 consecutive days, and doused again and again with cold water when he collapsed into sleep,” they wrote. “He was forced into a tall, narrow box the size of a coffin, and crammed into another box that would nearly fit under a chair, where he was left for hours. He was subjected to a particularly grotesque humiliation described by the C.I.A. as ‘rectal rehydration.’”

Dr. Mitchell testified last year in a court hearing at Guantánamo that in August 2002, he and Dr. Jessen concluded that Mr. Zubaydah was cooperating with his interrogators and that they no longer needed to waterboard him to force his cooperation. He said that C.I.A. headquarters insisted that they continue.

The government argued that disclosures about the nature of the interrogations were different from ones about where they took place, notwithstanding the European court's findings and press reports.

“In the world of clandestine intelligence operations, where tradecraft is deployed to cloak the true nature of activities and misdirect attention, things may be uncertain notwithstanding suppositions based on incomplete and circumstantial information,” said the government's latest brief in the case, United States v. Abu Zubaydah, No. 20-827, which was filed in March.

Judge Richard A. Paez, concurring in the full Ninth Circuit's decision not to rehear the case, wrote that courts **should not blind themselves to what everyone knows.**

“Given the overwhelming, publicly available evidence that Abu Zubaydah was detained at a black site in Poland, it is difficult to take seriously the suggestion that media outlets are untrustworthy and that the standards applied by other judicial bodies are inadequate,” he wrote. “Good grief, the president of Poland publicly acknowledged in 2012 that, during his presidency, Abu Zubaydah was detained in Poland by the C.I.A.”