***United States v. Zubaydah***

The hearing in the case of US v Abu Zubaydah begins today, 6 October in the US Supreme Court.

The US Supreme Court will decide whether the government can block victims or foreign prosecutors from obtaining information in relation to the CIA torture programme on state secrecy grounds. In the context of a Polish investigation into CIA secret detention on its soil, attempts to subpoena psychologist CIA contractors (James E Mitchell and Bruce Jessen) as witnesses were blocked by the US government invoking a broad state secrecy claim in relation to the programme, despite its notoriety.

The case deals with the excessive use of ‘state secrecy,’ across US administrations, to preclude access to any information concerning the CIA torture programme. At stake are the rights of victims and society to have the truth recognised, the ability of foreign investigators to do their job, and the credibility of the US administration’s commitment to human rights and rule of law. Twenty years into the war on terror, the case epitomises its darkest features, and the ongoing overreaching secrecy that endangers democratic governance, human rights and rule of law for the future.

THE CASE BEFORE THE SUPREME COURT

* In 2017**, Abu Zubaydah filed an ex parte application for discovery pursuant to 28 U.S.C. §1782, which permits domestic discovery for use in foreign proceedings.**
* **The application sought an order to subpoena James E. Mitchell and John Jessen for their depositions for use in an ongoing criminal investigation in Poland about the torture to which Abu** Zubaydah was subjected in that country. Mitchell and Jessen are the **psychologists who designed and oversaw the torture techniques for the CIA rendition and torture programme. Evidence has previously been provided by Mitchell, and their roles are well documented.**
* The district court originally granted the discovery application, but subsequently quashed the subpoenas after the U.S. government intervened and asserted the state secrets privilege.
* This decision was appealed. The question for appeal was ‘whether the district court erred in quashing the subpoenas after concluding that not all the discovery sought was subject to the state secrets privilege’? On 18 September 2019, the U.S. Court of Appeals for the 9th Circuit **agreed ‘with the district court that certain information requested is not privileged because it is not a state secret that would pose an exceptionally grave risk to national security’**, it also agreed ‘that the government’s assertion of the state secrets privilege is valid over much of the information requested’. However, **it concluded ‘that the district court erred in quashing the subpoenas in toto rather than attempting to disentangle nonprivileged from privileged information’.**
* On 17 December 2020, the United States filed before the Supreme Court a petition for a writ of certiorari against the U.S. Court of Appeals 9th Circuit decision. US arguments were based on national security and serious harm to state-secrets.
* Question presented: Whether the U.S. Court of Appeals for the 9th Circuit erred when it rejected the United States’ assertion of the state-secrets privilege based on **the court’s own assessment of potential harms to the national security**, and required discovery to proceed further under 28 U.S.C. 1782(a) against former Central Intelligence Agency (CIA) contractors on matters concerning alleged clandestine CIA activities.’
* On 11 February 2021, Abu Zubaydah filed its brief in opposition where it requested the denial of the petition. On 4 March 2021, the United States filed its reply to Abu Zubaydah’s brief.
* The parties final filings were submitted during July and August, accompanied by EXTENSIVE amicus interventions. An array of powerful third party interventions have been submitted, calling for justice, transparency, and an end to excessive secrecy, by among others victims groups, UN special rapporteurs, NGOs, academics, survivors of 9/11 and others.

**The briefs and core document in the US case are available here:** [**https://www.scotusblog.com/case-files/cases/united-states-v-abu-zubaydah/**](https://www.scotusblog.com/case-files/cases/united-states-v-abu-zubaydah/)

BACKGROUND:

Multiple sources, from the **US Senate Intelligence Committee to judgement of the European Court of Human Rights (ECtHR)**, have found that Mr Abu Zubaydah was a victim of brutal torture as part of the CIA led torture programme from 2002 – 2006. The violations of his rights are ongoing: he has been held in Guantanamo Bay without lawful review, charge or trial since 2006.

In 2014 and 2018 respectively, the ECHR found Poland and Lithuania responsible ‘beyond reasonable doubt’ for allowing the CIA to operate secret detentions centres on their territory. The Court **ordered the states to investigate** thoroughly, make information available publicly in line with the right of victims and society more broadly to the truth, and ensure appropriate accountability and reparation. In **follow up proceedings**, the Council of Europe’s Committee of Ministers has called on the US to ensure the violations of Zubaydah’s rights end, and to cooperate with European investigations. The US case today is part of an effort to move forward on these investigative efforts, in face if stark impunity for CIA crimes to date.

A petition to the **United Nations Working Group on Arbitrary Detention is also pending** against the US, UK, Afghanistan, Poland, Lithuania, Thailand and Morocco, available [here](https://static1.squarespace.com/static/5b82ab175b409b90d4c99071/t/609c1e66dcc584609980b82d/1620844135983/30042021+AZ+v+US+filed+-public.pdf): [**https://www.rightsinpractice.org/extraordinary-rendition**](https://www.rightsinpractice.org/extraordinary-rendition)

Todays’ hearing is part of a long process of seeking justice for Mr. Abu Zubaydah and rendition victims, which has so far proved elusive. Helen Duffy Human Rights in Practice represents Mr Abu Zubaydah in international proceedings before the European and international courts and bodies. Joe Margulies leads his US team before the US Supreme Court. More information on Abu Zubaydah’s case, and that litigation on behalf, [is here](https://www.rightsinpractice.org/extraordinary-rendition).