AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 12: The Contemporary Era – Separation of Powers/Presidential War and Foreign Affairs Powers

**United States v. Zubaydah, \_\_ U.S. \_\_** (2022)

*Abu Zubaydah was a detainee in Guantanamo Bay as a result of the War on Terror. Zubaydah was believed to be a senior figure in the al Qaeda terrorist group and his diary included his hopes of acquiring a nuclear weapon to be used against the United States. He had been captured by Pakistani security forces in the months following 9/11 and handed over to the American Central Intelligence Agency. The CIA took him to detention facilities outside the United States and subjected him to “enhanced interrogation.” The CIA claimed that Zubaydah had divulged substantial information about al Qaeda’s leadership and operations. In 2006, he was transferred to Guantanamo Bay, the American naval base in Cuba. A public Senate select committee report detailed Zubaydah’s treatment by the CIA, and a European Court of Human Rights report concluded that at one point he had been held in Poland. One of the CIA contractors involved in his interrogation subsequently published a book about his experience, and the government had allowed those contractors to testify in legal proceedings in the past.*

*He was pursuing a legal proceedings in Poland regarding claims about how he was treated in a detention facility that was being run in that country by the CIA in the years immediately following the 9/11 attacks. In order to advance a Polish criminal investigation of possible human rights violations, his lawyers sought to subpoena two CIA contractors in order to get testimony regarding the facility and his detention. The federal government moved to block the subpoenas on the grounds of state secrets privilege and a concern that the testimony could damage national security. The district court agreed with the government. The court of appeals largely accepted that privilege, but did not think that some details regarding the detention site could not be covered by the privilege since that information had already become public knowledge (though the CIA had never confirmed those public reports). In a 6-3 decision, the Supreme Court reversed the circuit court, holding that the subpoena should be quashed. The case generated not only dissents arguing for a loosening of the state secrets doctrine, but also concurring opinions arguing that the majority opinion had already loosened the doctrine too much. Note as well that the concurring opinions were written by four of the conservative justices, but the full dissent was drafted by the conservative Justice Gorsuch and joined by the Court’s most liberal member, Justice Sotomayor.*

JUSTICE BREYER delivered the opinion of the Court.

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The state secrets privilege permits the Government to prevent disclosure of information when that disclosure would harm national security interests. *United States v. Reynolds* (1953).

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Because any response to Zubaydah’s subpoenas allowed by the Ninth Circuit’s decision will have the effect of confirmation or denial (by the Government or its former contractors) of the existence of a CIA facility in Poland, the primary question for us must be whether the existence (or non-existence) of a CIA detention facility in Poland falls within the scope of the state secrets privilege. For the reasons that follow, we conclude that it does.

We agree with the Government that sometimes information that has entered the public domain may nonetheless fall within the scope of the state secrets privilege. . . .

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. . . . In a word, to confirm publicly the existence of a CIA site in Country A, can diminish the extent to which the intelligence services of Countries A, B, C, D, etc., will prove willing to cooperate with our own intelligence services in the future.

. . . . It stands to reason that a former CIA insider’s confirmation of confidential cooperation between the CIA and a foreign intelligence service could damage the CIA’s clandestine relationships with foreign authorities. Confirmation by such an insider is different in kind from speculation in the press or even by foreign courts because it leaves virtually no doubt as to the veracity of the information that has been confirmed. And there is ample reason to think that the circumstances of this case—particularly the specific discovery requests at issue here—could lead to this kind of confirmation. In any event, the CIA’s refusal to confirm or deny its cooperation with foreign intelligence services plays an important role in and of itself in maintaining the trust upon which those relationships are based.

. . . . [W]e agree with Justice Gorsuch that the Government bears the burden of showing that the privilege should apply—we simply disagree with his conclusion that it failed to meet that burden here. In our view, the Director’s declaration adequately establishes “that there is a reasonable danger that compulsion of the evidence [at issue] will expose . . . matters which, in the interest of national security, should not be divulged.” . . .

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. . . . Lower courts have explained that the official acknowledgement doctrine [in the Freedom of Information Act context] recognizes the reality that official confirmation of sensitive information may pose risks that unofficial disclosure does not. “It is one thing for a reporter or author to speculate or guess that a thing may be so or even, quoting undisclosed sources, to say that it is so; it is quite another thing for one in a position to know of it officially to say that it is so.” *Alfred A. Knopf, Inc. v. Colby* (4th Cir. 1975). Official confirmation may dispel “lingering doubts” or reveal that the information currently in the public domain is incomplete or itself a cover story. *Military Audit Project v. Casey* (DC Cir. 1981).

This logic helps to explain why disclosure by Mitchell and Jessen could be harmful in ways that disclosure by other sources would not. Here, the Government has not confirmed or otherwise officially acknowledged the existence of a CIA detention site in Poland and it has explained why, under these circumstances, confirmation of that information could reasonably be expected to significantly harm national security interests. That is sufficient to demonstrate that “the occasion for the privilege is appropriate.”

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*Reversed*.

JUSTICE THOMAS, with whom JUSTICE ALITO joins, concurring in part.

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*Reynolds* prescribed a two-step framework instructing courts “how far [they] should probe in satisfying [themselves] that the occasion for invoking the privilege is appropriate.” First, courts must assess the requesting party’s need for the Government’s privileged material. If the party’s need is “dubious,” a formal claim of privilege “will have to prevail” without judicial inquiry into the basis for the Government’s claim. A party has a dubious need unless it can show that the proposed discovery is “immediately and essentially applicable” to the party’s case. . . .

Second, if a party has made a “strong showing of necessity,” immediate dismissal of the discovery request is not required. The court may then ask whether there is a “reasonable danger” that “military secrets are at stake.” . . .

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In this case, the Court inverts the *Reynolds* test so that courts *first* ask whether the Government “has offered a valid reason for invoking the privilege,” and *then* ask whether the requesting party has demonstrated sufficient need for the discovery. . . .

*Reynolds* squarely forecloses the Court’s reasons-first approach. Regardless of need, a claim of privilege must prevail once the Government has given a “valid reason” to support it, because “even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake.” . . .

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. . . . While the Executive can control its subordinates’ access to state secrets and enforce penalties if such material is mishandled, it has little control once state secrets fall into the Judiciary’s hands. Disclosure to a judge, therefore, poses a very real national-security threat. The plurality’s cavalier statement that “sometimes” *in camera* review is warranted fails even to acknowledge that risk.

[T]he Court’s inverted *Reynolds* test undermines the “utmost deference” owed to the Executive’s national-security judgments. . . .

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JUSTICE KAVANAUGH, with whom JUSTICE BARRETT joins, concurring in part.

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In all events, once the court determines that the requested information falls within the state secrets privilege, “even the most compelling necessity” cannot overcome the privilege. The privilege is absolute, not qualified.

In state secrets cases, a court’s review from start to finish must be deferential to the Executive Branch. As this Court has long explained, the courts “have traditionally shown the utmost deference to Presidential responsibilities” in cases involving “military or diplomatic secrets,” and “have been reluctant to intrude upon the authority of the Executive in military and national security affairs,” *Department of Navy v. Egan* (1988).

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JUSTICE KAGAN, dissenting in part.

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Start with where I join the Court: I agree the Government has met its burden of showing that testimony by former CIA contractors confirming the location of Zubaydah’s detention would pose a “reasonable danger” of harm to national security. . . .

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But that does not mean, as the Court insists, that we should dismiss Zubaydah’s suit. From the beginning of this litigation, Zubaydah has distinguished between the “where” and the “what”—the location of the detention site at issue and the treatment he received there. . . . That creates the possibility of segregating the classified (location) information from the unclassified (treatment) information and allowing discovery into the latter.

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. . . . I would allow Zubaydah to amend his requests to remove all Poland-specific references, so that he can obtain testimony about his detention—in whatever country it took place.

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JUSTICE GORSUCH, with whom JUSTICE SOTOMAYOR join, dissenting.

There comes a point where we should not be ignorant as judges of what we know to be true as citizens. This case takes us well past that point. Zubaydah seeks information about his torture at the hands of the CIA. The events in question took place two decades ago. They have long been declassified. Official reports have been published, books written, and movies made about them. Still, the government seeks to have this suit dismissed on the ground it implicates a state secret—and today the Court acquiesces in that request. Ending this suit may shield the government from some further modest measure of embarrassment. But respectfully, we should not pretend it will safeguard any secret.

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Still, Zubaydah’s story remains incomplete. While we know that the CIA held Zubaydah at Detention Site Blue from December 2002 until September 2003, and while we know that the site was in Poland, what happened to him there remains unclear. . . .

Today, Polish prosecutors are seeking to unravel that part of the story and determine whether criminal charges are appropriate in that country. . . .

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I do not question that Article II grants the Executive substantial authority over the conduct of the Nation’s foreign affairs. Nor do I doubt that the Executive’s responsibility in this field often “poses ‘delicate’ and ‘complex’ questions involving ‘large elements of prophecy . . . for which the Judiciary has neither aptitude, facilities nor responsibility.’”

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. . . . Normally, too, when Congress endows the Judiciary with the statutory authority to decide a case, we have a “virtually unflagging” obligation to do just that. In deciding cases lawfully put to us, courts generally must respect as well the ancient rule that the public enjoys a right to “every man’s evidence.” In this country, no one stands above the law; not even the President may deflect evidentiary inquiries just because they may prove inconvenient or embarrassing.

None of this is to suggest that the state secrets privilege is inconsistent with our separation of powers. Even a statute that constitutionally allows federal courts to pass on matters touching on foreign affairs in most cases may, in some applications, trench on powers the Constitution reserves for the Executive. It is simply that the privilege is no blunderbuss and courts may not flee from the field at its mere display. Instead, when the Executive seeks to withhold every man’s evidence from a judicial proceeding thanks to the powers it enjoys under Article II, that claim must be carefully assessed against the competing powers Articles I and III have vested in Congress and the Judiciary. The original design of the Constitution and “our historic commitment to the rule of law” demand no less. *United States v. Nixon* (1974).

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Had Chief Justice Marshall envisioned a rule of “utmost deference” to executive claims of privilege replicating something like the privilege the English crown enjoyed, it would have been the simplest thing for him to say so. Instead, the “clear implication” of his opinions in *United States v. Burr* (CC Va. 1807)is that “the President’s special interests may warrant a careful judicial screening of subpoenas after the President interposes an objection, but that some subpoenas will nevertheless be properly sustained by judicial orders of compliance.” And “the ultimate decision” on such matters “remain[s]” with a court of law. *Nixon v. Sirica* (DC Cir. 1973).

Almost 150 years after *Burr*, the Court reaffirmed this same understanding in *United States* v. *Reynolds* (1953). . . . But under our Constitution, *Reynolds* emphasized, the Executive may not judge its own case: “Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers.”

In this particular, our Nation broke from English practice. The Declaration of Independence did not endorse crown prerogatives but described many as evils. The Constitution did not create a President in the King’s image but envisioned an executive regularly checked and balanced by other authorities. Our Founders knew from hard experience the “intolerable abuses” that flow from unchecked executive power.

Nor is their experience an alien one. More recent history reveals that executive officials can sometimes be tempted to misuse claims of national security to shroud major abuses and even ordinary negligence from public view. . . .

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. . . . Officials who have served in the Executive Branch have estimated that between 50% and 90% of classified material does not merit that treatment. . . . It seems the government once even classified a memo from one member of the Joint Chiefs of Staff to another discussing how too many documents were being classified.

It may be understandable that those most responsible for the Nation’s security will seek to press every tool available to them to maximum advantage. There has always been something of a “hydraulic pressure inherent within each of the separate Branches” to test “the outer limits of its power.” . . . This Court hardly needs to 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. Walking that path would only invite more claims of secrecy in more doubtful circumstances—and facilitate the loss of liberty and due process history shows very often follows.

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. . . . The line *Reynolds* drew seeks to accommodate the separation of powers: It ensures that a congressional mandate to entertain a case or controversy will not be automatically frustrated. It guarantees a degree of independent judicial review. Yet it also seeks to respect the Executive’s specially assigned constitutional responsibilities in the field of foreign affairs and the delicate and complex predictive judgments the Executive often must make there.

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Even on its own terms . . . the government’s submission faces an immediate problem. What was once a secret can, with the passage of time, become old news. . . .

The record before us is stark. Zubaydah’s detention in Poland took place 20 years ago. The location of the CIA’s detention site has been acknowledged by the former Polish President, investigated by the Council of Europe, and proven “beyond reasonable doubt” to the European Court of Human Rights. Doubtless, these disclosures may have done damage to national security interests. But 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. The government’s only evidence is a declaration couched in conclusory terms, which the District Court found unpersuasive. It rests on the same sort of hypothetical the majority posits today—making no effort to grapple with the particulars of this case.

. . . . But notice how [the majority] effectively reverses the burden of proof. The majority starts with the government’s conclusory assertion—and then proceeds to place on Zubaydah the burden of disproving it. A bare expression of national security concern becomes reason enough to deny the ancient right to every man’s evidence.

This may be a nice move, but it is unpersuasive. Since *Burr*, this Court has held that the Executive must do more than assert a harm to national security “might” follow from producing evidence. Since *Reynolds*, this Court has required a “reasonable,” not a speculative, showing of harm. If the government could withhold evidence and even compel the dismissal of lawsuits based on nothing more than a conclusory assertion of national security concerns—and if the burden fell on private persons to disprove those concerns—it is hard to imagine what case a court could not be forced to close. That kind of executive prerogative might have once been part of the law of England; it has never been the law here.

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. . . . In failing to give careful consideration to potential safeguards that would allow this case to proceed, the plurality defies a central and consistent teaching of this Court’s state secrets jurisprudence—that executive claims of privilege in congressionally authorized proceedings are not to be reflexively accepted, and remedies short of dismissal must be preferred. . . .

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. . . . We do not have in this case a question about how far to probe the government’s privilege claim; we have not probed that claim at all. We have replaced independent inquiry with a rubber stamp.

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