

Accountability for Forensic Psychiatrists and Psychologists in U.S. Intelligence Settings

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One approach to the cultural analysis of forensic mental health systems is to analyze how societies establish professional standards to evaluate medicolegal questions.¹ This approach draws on themes within the sociomedical sciences such as the work of lawyers and psychiatrists in making interpretations about human functioning² and the authoritative position of the law in defining socially normal and abnormal behaviors.³ In DSM-5, the Cross-Cultural Issues Subgroup has defined culture as: “Systems of knowledge, concepts, rules, and practices that are learned and transmitted across generations. Culture includes language, religion and spirituality, family structures, life-cycle stages, ceremonial rituals, and customs, as well as moral and legal systems” (Ref. 4, p 749). Therefore, examining contestations over legal standards can reveal which forms of knowledge, concepts, rules, and practices prevail in adversarial systems where defense and prosecution teams compete to establish rules of evidence.¹

This editorial modifies that approach by examining the Supreme Court’s ruling in *United States v. Zubaydah*⁵ that prosecutors could invoke the state secrets privilege to prevent two psychologist-independent contractors for the Central Intelligence Agency (CIA) from testifying about their treatment of Guantánamo detainee Abu Zubaydah. First introduced in the 1953 case *United States v. Reynolds*,⁶ the state secrets privilege allows courts to exclude evidence from a

case based solely on affidavits from the government that legal proceedings would disclose sensitive information that could endanger national security. Justice Stephen Breyer delivered the majority opinion, and four justices filed separate opinions. This editorial analyzes these five opinions to show how forms of knowledge, concepts, rules, and practices related to national security prevailed over professional ethics for forensic psychiatrists and psychologists. The case raises questions about how the federal government continues to suppress mechanisms of accountability in the Global War on Terror.

The Facts of the Case

The majority opinion lists the main facts about the case.⁵ After the September 11, 2001 attacks, the CIA believed that Abu Zubaydah was a senior Al Qaeda member with knowledge about future attacks. Mr. Zubaydah claimed he was held at a CIA detention site in Poland from December 2002 to September 2003 where two CIA contractors, Drs. John Jessen and James Mitchell, supervised “enhanced interrogation techniques” (EITs). In 2010, Mr. Zubaydah filed a criminal complaint in Poland to hold Polish nationals responsible for his alleged mistreatment. The United States government denied requests from Polish prosecutors for information about his mistreatment, claiming that such information would endanger national security. Mr. Zubaydah then filed a discovery application under 28 U. S. C. §1782,⁷ which permits district courts to produce evidence for proceedings in a foreign tribunal. Mr. Zubaydah sought information needed to serve the two independent contractors with subpoenas requesting information about the alleged CIA facility in Poland and his treatment there. The

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government asserted the state secrets privilege to block his request. Twelve of his subpoena requests to the independent contractors contained the word “Poland” or “Polish,” linking his treatment to this classified CIA site. The U.S. District Court for the Eastern District of Washington dismissed Mr. Zubaydah’s discovery application, concluding that the state secrets privilege covered the CIA’s operations with a foreign government. The Ninth Circuit Court of Appeals disagreed for two reasons: the site was known to be in Poland through unofficial sources, and independent contractors could not confirm or deny information on behalf of the Government as private entities. The Ninth Circuit allowed discovery in three areas: the existence of a CIA detention facility in Poland, the conditions of Mr. Zubaydah’s confinement, and his treatment, including interrogations.

The Opinions

The majority opinion referenced the state secrets privilege from *United States v. Reynolds*.⁶ Legally, the head of a government agency must assert to a court that disclosing information would harm national security, the party seeking disclosure must show a need for the disclosure, and a court must rule whether the privilege is appropriate.⁶ The majority opinion also invoked precedent in *Department of Navy v. Egan* for its “reluctan[ce] to intrude upon the authority of the Executive in military and national security affairs” (Ref. 8, p. 530). The legal dispute between Mr. Zubaydah and the Polish government centered on the location of the CIA site. In 2011, Mr. Zubaydah filed a lawsuit against the Republic of Lithuania for allowing the CIA to maintain a site on its territory under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms to the European Court of Human Rights. As a part of that case, the European Court of Human Rights issued a judgment inferring that part of Mr. Zubaydah’s treatment occurred in Poland,⁹ but the CIA, its contractors, and the Polish government have never disclosed its location. The CIA Director asserted the state secrets privilege, maintaining that the CIA:

‘has steadfastly refused to confirm or deny the accuracy’ of public speculation about its cooperation with Poland, leaving ‘an important element of doubt about the veracity’ of that speculation, providing ‘an additional layer of confidentiality,’ and at least confirming that the United States will ‘stand firm in safeguarding any coordinated clandestine activities,’ despite the passage of time, the existence of media reports, and changes in public opinion (Ref. 5, p 969).

The majority opinion held that disclosure from CIA contractors “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” (Ref. 5, p 969). It also ruled that Mr. Zubaydah needed information about his treatment, not the location of his custody, and ordered the Ninth Circuit to dismiss his application since any response to his discovery requests would necessarily confirm or deny a site in Poland. The majority agreed that Mr. Zubaydah could file a different discovery request without specifying the site’s location.⁵

Justice Clarence Thomas’s opinion, which Justice Samuel Alito joined, concurred in part and concurred in the judgment. Justice Thomas wrote that Mr. Zubaydah’s request for discovery was “dubious” since it would not provide him with any meaningful relief such as release from imprisonment (Ref. 5, p 974). Therefore, he argued that Mr. Zubaydah’s discovery request should have been dismissed without the government needing to invoke the state secrets privilege.

Justice Brett Kavanaugh’s opinion, which Justice Amy Coney Barrett joined, concurred in part to explain how *Reynolds* works in practice. Justice Kavanaugh held that once a government agency head asserts privilege, the court must undertake a “threshold judicial inquiry” of a case’s circumstances (Ref. 5, p 977). Justice Kavanaugh, like the majority, affirmed that the state secrets privilege is absolute and would not require the court to examine evidence when the government invokes privilege.

Justice Elena Kagan concurred in part and dissented in part. She agreed that the government could invoke the state secrets privilege to block information about the detention site’s location. But she suggested remanding the case to district court so Mr. Zubaydah could seek information about his treatment in CIA custody while removing all Poland-specific references. She pointed out that a 2014 Senate Select Committee on Intelligence (SSCI) report “distinguished between the ‘where’ and the ‘what’” (Ref. 5, p 984) in using codenames for CIA detention sites but releasing details of how detainees like Mr. Zubaydah were tortured. The CIA has also permitted both contractors to testify in civil and military commission hearings about detainee treatment without disclosing the locations of sites. Therefore, she argued that the Court could

allow Mr. Zubaydah to remove all Poland-specific references for testimony about his detention without the Ninth Court dismissing the entire suit.

Justice Neil Gorsuch's opinion, which Justice Sonia Sotomayor joined, concurred in part and dissented in part. Like Justice Kagan, they referenced the SSCI report which revealed that Mr. Zubaydah had been waterboarded at least 80 times, buried alive for hundreds of hours, and administered rectal exams to exert "total control over the detainee" (Ref. 5, p 986). This opinion noted that the Council of Europe and the European Court of Human Rights inferred that Mr. Zubaydah was held in Poland, and that both CIA contractors testified about their treatment of him in other cases. Therefore, Justice Gorsuch disputed the government's argument that the independent contractors' disclosure of a site in Poland "would invite a reasonable danger of additional harm to national security" (Ref. 5, p 997).

Justice Gorsuch agreed that Mr. Zubaydah's attorneys should "be allowed discovery from Mitchell and Jessen about his interrogations, treatment, and conditions of confinement from December 2002 until September 2003, with safeguards to protect against the disclosure of the site's location and the involvement of foreign nationals" (Ref. 5, p 990). He reasoned that the Constitution's separation of powers demands accountability from the Executive branch: "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" (Ref. 5, p 991). He referenced *United States v. Burr*¹⁰ in which Chief Justice John Marshall refused to grant President Thomas Jefferson's attorney the right to withhold evidence that could contain state secrets. Instead, the court decided independently whether to sustain the privilege, a point reiterated in *United States v. Reynolds*.⁶ Justice Gorsuch pointed to the Executive branch's claim of national security before the Supreme Court in *Korematsu v. United States*¹¹ to force the internment of Japanese-Americans in World War II; the government knew at the time that Japanese-Americans did not pose a national security threat and apologized 74 years later (Ref. 5, p 993). Ironically, decades after *United States v. Reynolds*, the government released a report showing that no state secret was actually at risk in that case, just proof of government

negligence in denying families legal retribution from the state secrets privilege.⁵

Justice Gorsuch opined that, according to *United States v. Reynolds*, the government must show a reasonable danger of harm to national security to invoke privilege, that the court should review evidence *in camera* before upholding the privilege, and that the government should produce nonprivileged evidence for cases to proceed rather than dismiss a lawsuit.⁵ He recommended tools to protect disclosures of state secrets, such as directing the independent contractors to not answer sensitive questions, using codenames for CIA sites, redacting sensitive information, and restricting the release of documents after court and government review. Justice Gorsuch also wondered whether EITs affected Mr. Zubaydah's competence to stand trial, noting that "No one seems confident that Zubaydah remains mentally competent to testify about his treatment decades ago" (Ref. 5, p 1000). Hence, he supported amending the discovery requests to remove site-specific references and allow evidence to be presented about Mr. Zubaydah's treatment in CIA custody.

Prioritizing National Security over Bioethics

Cultural analysis shows which systems of knowledge and concepts prevailed within the Supreme Court. Justices Breyer, Thomas, and Kavanaugh argued over the rules and practices for interpreting the state secrets privilege. Nonetheless, a commitment to national security trumped arguments that advanced pathways to justice for Abu Zubaydah after his mistreatment by forensic psychiatrists and psychologists.

A result of these deliberations is an incomplete account of bioethical violations by forensic professionals in the Global War on Terror. The opinions of Justice Kagan and Gorsuch referenced the 2014 SSCI report which includes passages on CIA psychiatrists participating in interrogations. One passage quoted this account from Federal Bureau of Investigation officers on April 13, 2002: "We spent the rest of the day in the adjoining room with [the CIA officer] and one of the psychiatrists [REDACTED] waiting for [Abu Zubaydah] to signal he was ready to talk" (Ref. 12, p 28). The CIA's comments on the report provide counterarguments to the SSCI,¹³ but the CIA did not address the role of psychiatrists in EITs anywhere in its text. In 1985, the American Psychological Association and American Psychiatric Association (APA) released a joint statement¹⁴ to "condemn torture where it occurs"

and affirmed support for the *UN Declaration and Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment* (UNCAT)¹⁵ as well as the *UN Principles of Medical Ethics*.¹⁶ After news surfaced of psychiatrists' involvement in the EIT program that Drs. Jessen and Mitchell designed, the APA reaffirmed its commitment to the UNCAT in 2006 and stated, "No psychiatrist should participate directly in the interrogation of persons held in custody by military or civilian investigative or law enforcement authorities, whether in the United States or elsewhere. Direct participation includes being present in the interrogation room, asking or suggesting questions, or advising authorities on the use of specific techniques of interrogation with particular detainees" (Ref. 17, #3). Since Abu Zubaydah had been seeking information about his confinement, interrogation, and treatment in CIA custody, his case could have added to the public record of psychiatrists participating in the EIT program.

The opinions of Justice Kagan and Gorsuch, moreover, reference testimony that Dr. Mitchell provided in a case before Guantánamo's military commissions system. In January 2020, he testified about developing the EIT program in the trial of five detainees charged with the attacks of September 11, 2001. In response to a question about whether Dr. Jessen knew about the American Psychological Association's recommendation to forbid psychologists from participating in national security investigations, Dr. Mitchell said flatly, "I disagreed with their position on psychologists helping national security" (Ref. 18, p 31506). Before the U.S. government declassified information and journalists reported on the involvement of health professionals in interrogations, civilian bioethicists advised military and intelligence agencies to train psychiatrists and psychologists in bioethics to prevent human rights abuses.^{19,20} Dr. Mitchell's testimony indicates that he understood bioethics arguments on the role of psychologists in interrogations, but that he disagreed with ethics guidelines. His testimony raises questions about mechanisms that the American Psychiatric Association and American Psychological Association can enforce when individuals deliberately violate professional ethics.

Furthermore, Dr. Mitchell detailed how the CIA's Office of Medical Services (OMS) raised ethics concerns about the EIT program during his testimony:

There was a question from, as I recall, the chief psychologist for the Office of Medical Services who seemed to think that it was somehow cheating for Dr. Jessen and I to be interrogators because we were Ph.D. psychologists who had a lot of background in human behavior and that we might be able to somehow Svengali these people into providing information and not giving them a fair chance (Ref. 21, pp 31580-31581).

This testimony challenges a recurrent theme among civilian bioethicists that the CIA's Office of Medical Services ignored ethics positions from the American Psychiatric and Psychological Associations as Drs. Jessen and Mitchell developed the EIT program. Bioethicists have called Guantánamo an "ethics-free zone"²² where the OMS specified roles for health care personnel in interrogations.²³⁻²⁵ As detainee cases have proceeded through the legal system, however, disagreements within the CIA about the EIT program have surfaced through declassified documents and testimony, raising questions about who resolved ethics disputes and how.²⁶ Abu Zubaydah's case could have added to public knowledge by introducing details about the conditions of his confinement, interrogation, and treatment. President Barack Obama's extension of immunity to those in the EIT program has provided legal cover for senior government officials to excuse the participation of health professionals in acts that would be classified as torture within international legal frameworks.²⁷ Cases like Abu Zubaydah's are vital in producing evidence to reconstruct how national security continues to prevail in discussions about forensic ethics in military and intelligence settings.

Forensic psychiatrists have increasingly championed advocacy that aligns the profession to those of "the most vulnerable, the least heard" in combatting structural inequities throughout the legal system (Ref. 28, p 429), to ponder whether the profession "serves as an agent of the system that oppresses many or as a solution to their oppression, and is engaged in research on these questions" (Ref. 29, p 158). Of 779 detainees at Guantánamo, less than 4 percent have ever had charges referred against them in the American legal system, and all have come from Muslim backgrounds.³⁰ The EIT program positioned forensic psychologists and psychiatrists as agents of an oppressive system that violated professional ethics, and forensic psychiatrists must elevate the voices of the most vulnerable and least heard. Abu Zubaydah remains in indefinite law-of-war detention.³¹ Fifteen years ago, news broke of him keeping a diary in the voices of three different people, and FBI experts raised questions about his mental fitness.³² Research on the legal proceedings of Guantánamo

detainees can illuminate how the U.S. government continues to invoke national security over ethical accountability so that forensic psychiatrists can work toward solutions for their oppression.

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