The Supreme Court Uses Twisted Logic to Protect US Agents Committing Torture

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The Supreme Court declared last week that Americans have no right to learn the grisly details of CIA torture because the CIA has never formally confessed its crimes. The verdict symbolizes how the rule of law has become little more than a form of legal mumbo-jumbo to shroud official crimes. Why should anyone expect justice from a Supreme Court that covers up torture?

In 2002, the CIA captured **Abu Zubaydah**, a Palestinian radical, in Pakistan, mistakenly believing he was a kingpin with al-Qaeda. The CIA tortured him for years in Thailand and Poland. As dissenting **Justice Neil Gorsuch** noted, the CIA "waterboarded Zubaydah at least 80 times, simulated live burials in coffins for hundreds of hours," and brutalized him to keep him awake for six days in a row. The CIA has admitted some of the details and Zubaydah's name was mentioned more than a thousand times in a 683-page Senate report on the CIA torture regime released in 2014.

This case turned on the invocation of a holy bureaucratic relic of dubious origin—state secrets. As the court's 6–3 ruling, written by Justice Stephen Breyer, noted, "To assert the [state secrets] privilege, the Government must submit to the court a 'formal claim of privilege, lodged by the head of the department which has control over the matter.'" After a government agency claims the privilege, the court "should exercise its traditional "reluctance to intrude upon the authority of the Executive in military and national security affairs," Breyer wrote. And the most important role for the Supreme Court nowadays is apparently to sanctify the privileges it has awarded federal agencies that committed crime sprees.

Image on the right: Abu Zubaydah is a citizen of the Palestinian territories held in Guantanamo Bay. (Licensed under the Public Domain)

The court upheld a "state secrets" claim to block Zubaydah's lawyers from serving subpoenas on the psychologist masterminds of the CIA torture program to learn the details of his interrogation in Poland. The court's ruling also blocks Polish investigators seeking information about the crimes committed at a CIA torture site in their nation.

This case illustrated the fantasy world that permeates official Washington controversies. Federal judge **Richard Paez** rejected the CIA's argument in 2019 because "in order to be a 'state secret,' a fact must first be a 'secret.'" Even the president of Poland admitted that crimes were committed at that CIA torture site.

But the Supreme Court took an *Alice in Wonderland* approach, ruling that "sometimes information that has entered the public domain may nonetheless fall within the scope of the state secrets privilege." According to the Supreme Court, "truth" depends solely on what federal officials have publicly confessed. American Civil Liberties Union (ACLU) attorney **Dror Ladin** groused, "U.S. courts are the only place in the world where everyone must pretend not to know basic facts about the CIA's torture program."

It gets worse. Then CIA chief **Mike Pompeo** asserted that exposing details about torture in Poland could hinder foreign spy agencies' partnerships with the CIA. The court upheld the "state secrets privilege" to assist the CIA in "maintaining the trust upon which those relationships [between spy agencies] are based." The court warned, "To confirm publicly the existence of a CIA [torture] 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."

The court acted as if it were merely smoothing the path for a Girl Scout troop to sell cookies at a shopping center instead of shrouding a "crime against humanity" (the United Nations' verdict on torture). Pompeo bluntly described the CIA modus operandi: "We lied, we cheated, we stole. It's like we had entire training courses." The CIA's long record of lawless assassinations did nothing to weaken the deference they received from the court. Instead, the "mutual trust" between conniving spy agencies is more important than Americans having a reason to trust their own government.

In his decision, Justice Breyer stressed, "Obviously, the Court condones neither terrorism nor

torture, but in this case we are required to decide only a narrow evidentiary dispute." But the Supreme Court condones any crime it helps cover up. The court's sweeping rulings on state secrets and sovereign immunity have provided a get-out-of-jail-free card for Bush-era torturers and the makers of torture. No victim of Bush-era torture has received justice in federal courts. The Bush administration even invoked "state secrets" to prohibit torture victims from disclosing to their defense attorneys the specific interrogation methods they suffered.

State secrets claims multiplied after the start of the war on terror. The Bush administration routinely invoked "state secrets" to seek "blanket dismissal of every case challenging the constitutionality of specific, ongoing government programs," according to a study by the Constitution Project. In 2007, federal judge Harry Pregerson groused that the "bottom line … is the government declares something is a state secret, that's the end of it. The king can do no wrong." In 2009, a federal appeals court slammed the Obama administration's use of state secrets: "According to the government's theory, the judiciary should effectively cordon off all secret government actions from judicial scrutiny, immunizing the CIA and its partners from the demands and the limits of the law."

Gorsuch noted that the Supreme Court created the doctrine in a 1953 case in which the Pentagon claimed "state secrets" to cover up the details of an Air Force crash. Half a century later, the government declassified the official report, which contained no national security secrets but proved that gross negligence caused the crash (which killed three people). State secrets is akin to a fraudulent religious miracle that was not exposed until after it became canonized.

Gorsuch, who was joined by Justice Sonia Sotomayor (the most liberal member of the court) in dissent, warned that granting "utmost deference" to the CIA would "invite more claims of secrecy in more doubtful circumstances—and facilitate the loss of liberty and due process history shows very often follows." Law professor Steve Vladeck said the "ruling will make it much harder, going forward, for victims of government misconduct that occurs in secret to obtain evidence helping to prove that the conduct was unlawful." A confidential report last month revealed that the CIA is vacuuming up masses of personal information from American citizens, probably in violation of federal law. But don't expect to learn the tawdry details or the names of the victims because "state secrets." Gorsuch noted that the Supreme Court decision was granting the same type of "crown prerogatives" to federal agencies that the Declaration of Independence described as evil.

Perhaps the Supreme Court should replace the "Equal Justice under the Law" slogan atop its entrance with a new motto: "Better for People Not to Know." For five hundred years, the classic image of "Lady Justice" included a blindfold to assure impartiality. But justice nowadays supposedly requires blindfolding Americans to keep them from learning of official crimes committed in their name.

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