Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

UNITED STATES *v.* HUSAYN, AKA ZUBAYDAH, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 20–827. Argued October 6, 2021—Decided March 3, 2022

In the aftermath of the September 11, 2001, terrorist attacks, the Central Intelligence Agency believed that Abu Zubaydah was a senior al Qaeda lieutenant likely to possess knowledge of future attacks against the United States. Zubaydah—currently a detainee at the Guantánamo Bay Naval Base—says that in 2002 and 2003 he was held at a CIA detention site in Poland, where he was subjected to "enhanced interrogation" techniques. In 2010, Zubaydah filed a criminal complaint in Poland, seeking to hold accountable any Polish nationals involved in his alleged mistreatment at the CIA site ostensibly located in that country. The United States denied multiple requests by Polish prosecutors for information related to Zubaydah's claim on the ground that providing such information would threaten national security. Zubaydah filed a discovery application pursuant to 28 U. S. C. §1782, which permits district courts to order production of testimony or documents "for use in a proceeding in a foreign . . . tribunal." Zubaydah asked for permission to serve two former CIA contractors with subpoenas requesting information regarding the alleged CIA detention facility in Poland and Zubaydah's treatment there. The Government intervened and asserted the state secrets privilege in opposition to Zubaydah's discovery request.

The District Court rejected the Government's claim that merely confirming that a detention site was operated in Poland would threaten national security. The District Court nevertheless dismissed Zubaydah's discovery application. It concluded that the state secrets privilege applied to operational details concerning the CIA's cooperation with a foreign government, and that meaningful discovery could not proceed without disclosing privileged information. On appeal, the

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Ninth Circuit agreed with the District Court that much of the information sought by Zubaydah was protected from disclosure by the state secrets privilege, but the panel majority concluded that the District Court had erred when it dismissed the case. It believed that the state secrets privilege did not apply to publicly known information. The panel majority also concluded that because the CIA contractors were private parties and not Government agents, they could not confirm or deny anything on the Government's behalf. Given these holdings, the panel majority determined that discovery into three topics could continue: the existence of a CIA detention facility in Poland, the conditions of confinement and interrogation at that facility, and Zubaydah's treatment at that location.

Held: The judgment is reversed, and the case is remanded.

938 F. 3d 1123, reversed and remanded.

JUSTICE BREYER delivered the opinion of the Court with respect to all but Parts II–B–2 and III, concluding that, in the context of Zubaydah's §1782 discovery application, the Court of Appeals erred in holding that the state secrets privilege did not apply to information that could confirm or deny the existence of a CIA detention site in Poland. Pp. 7–13, 14–15, 18.

(a) The state secrets privilege permits the Government to prevent disclosure of information when that disclosure would harm national security interests. *United States* v. *Reynolds,* 345 U. S. 1, 10–11. To assert the 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." *Id.,* at 7–8. "The court itself must determine whether the circumstances are appropriate for the claim of privilege." *Id.,* at 8. However, in making that determination, a court should exercise its traditional "reluctan[ce] to intrude upon the authority of the Executive in military and national security affairs," *Department of Navy* v. *Egan,* 484 U. S. 518, 530. If the Government has offered a valid reason for invoking the privilege, "the showing of necessity" by the party seeking disclosure of the ostensibly privileged information will "determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate." *Reynolds,* 345 U. S., at 11. The narrow evidentiary dispute before the Court asks how these principles apply to Zubaydah's specific discovery requests. Pp. 7–9.

(b) In certain circumstances, the Government may assert the state secrets privilege to bar the confirmation or denial of information that has entered the public domain through unofficial sources. Here, the information held by the Ninth Circuit to be nonprivileged would necessarily tend to confirm (or deny) that the CIA maintained a detention site in Poland. The Government has shown that such information—

even if already made public through unofficial sources—could significantly harm national security. The CIA Director stated in his declaration that "clandestine" relationships with foreign intelligence services are "critical" and "based on mutual trust that the classified existence and nature of the relationship will not be disclosed." App. to Pet. for Cert. 135a–136a. Given the nature of Zubaydah's specific discovery requests there is a reasonable danger that in this case a former CIA insider's confirmation of confidential cooperation between the CIA and a foreign intelligence service could badly damage the CIA's clandestine relationships with foreign authorities. Pp. 9–13.

(c) The CIA contractors' confirmation (or denial) of the information Zubaydah seeks would be tantamount to disclosure by the CIA itself. The contractors worked directly for the CIA and had a central role in the events in question. The CIA Director describes the harm that would result from the contractors responding to the subpoenas, not the risks of a response from the CIA (or any other CIA official or employee). Pp. 14–15.

(d) Zubaydah's need for location information is not great, perhaps close to nonexistent. At oral argument, he suggested that he did not seek confirmation of the detention site's Polish location so much as he sought information about what had happened there. P. 15.

(e) Here, the state secrets privilege applies to the existence (or nonexistence) of a CIA facility in Poland, and therefore precludes further discovery into all three categories of information the Ninth Circuit concluded to be nonprivileged. P. 15.

(f) This case is remanded with instructions to dismiss Zubaydah's current application for discovery under §1782. P. 18.

BREYER, J., delivered the opinion of the Court, except as to Parts II–B–2 and III. ROBERTS, C. J., joined that opinion in full, KAVANAUGH and BARRETT, JJ., joined as to all but Part II–B–2, KAGAN, J., joined as to all but Parts III and IV and the judgment of dismissal, and THOMAS and ALITO, JJ., joined Part IV. THOMAS, J., filed an opinion concurring in part and concurring in the judgment, in which ALITO, J., joined. KAVANAUGH, J., filed an opinion concurring in part, in which BARRETT, J., joined. KAGAN, J., filed an opinion concurring in part and dissenting in part. GORSUCH, J., filed a dissenting opinion, in which SOTOMAYOR, J., joined.

SUPREME COURT OF THE UNITED STATES

No. 20–827

UNITED STATES, PETITIONER *v.* ZAYN AL-ABIDIN MUHAMMAD HUSAYN, AKA ABU ZUBAYDAH, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[March 3, 2022]

JUSTICE BREYER delivered the opinion of the Court, except as to Parts II–B–2 and III.*

Abu Zubaydah, a detainee in the Guantánamo Bay Naval Base, and his attorney filed an *ex parte* 28 U. S. C. §1782 motion in Federal District Court seeking to subpoena two former Central Intelligence Agency contractors. Zubaydah sought to obtain information (for use in Polish litigation) about his treatment in 2002 and 2003 at a CIA detention site, which Zubaydah says was located in Poland. See 28 U. S. C. §1782 (permitting district courts to order production of testimony or documents "for use in a proceeding in a foreign . . . tribunal"). The Government intervened. It moved to quash the subpoenas based on the state secrets privilege. That privilege allows the Government to bar the disclosure of information that, were it revealed, would harm national security. *United States* v. *Reynolds*, 345 U. S. 1, 6–7 (1953).

The Court of Appeals for the Ninth Circuit mostly accepted the Government's claim of privilege. *Husayn* v.

*JUSTICE KAGAN joins all but Parts III and IV of this opinion and the judgment of dismissal.

Mitchell, 938 F. 3d 1123, 1134 (2019). But it concluded that the privilege did not cover information about the location of the detention site, which Zubaydah alleges to have been in Poland. *Ibid.* The Court of Appeals believed that the site's location had already been publicly disclosed and that the state secrets privilege did not bar disclosure of information that was no longer secret (and which, in any event, was being sought from private parties). *Id.,* at 1132–1133. The Government argues that the privilege should apply because Zubaydah's discovery request could force former CIA contractors to confirm the location of the detention site and that confirmation would itself significantly harm national security interests. In our view, the Government has provided sufficient support for its claim of harm to warrant application of the privilege. We reverse the Ninth Circuit's contrary holding.

I

A

For present purposes, we can assume the following: In the aftermath of the September 11, 2001, terrorist attacks, the CIA believed that Zubaydah was a senior al Qaeda lieutenant likely to possess knowledge of future attacks against the United States. S. Rep. No. 288, 113th Cong., 2d Sess., p. 21, and n. 60 (2014) (SSCI Report). In March 2002, Zubaydah was captured by Pakistani government officials working with the CIA. *Id.,* at 21. The CIA then transferred him to a detention site that some sources allege was located in Thailand. *Id.,* at 22–23; see also 3 Record 552.

Zubaydah remained at this location for several months. SSCI Report 22, 67. During that time he was subjected to what the Government then called "enhanced interrogation" techniques, including waterboarding, stress positions, cramped confinement, and sleep deprivation. *Id.,* at 40–41. The Government has since concluded that this treatment constituted torture. See Press Conference by the President,

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