

The Supreme Court - March 3, 2022

by Ian Blodger

Today, the Supreme Court of the United States issued two decisions:

United States v. Zubaydah, No. 20-827: Respondent Abu Zubaydah claims that following the September 11, 2001, terrorist attacks, the CIA held him in a detention site in Poland and subjected him to “enhanced interrogation” techniques. Zubaydah filed a criminal complaint in Poland based on this alleged mistreatment and filed an application for discovery in the United States under 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.” The Government sought dismissal of Zubaydah’s discovery request, asserting the state secrets privilege and arguing that confirming or denying the existence of a CIA detention site in Poland would threaten national security interests. The district court agreed that the state secrets privilege foreclosed any meaningful discovery and dismissed the case. The Ninth Circuit Court of Appeals held that the state secrets privilege did not apply to publicly known information, and ordered discovery to proceed on various topics. In a fractured opinion delivered by Justice Breyer, the Supreme Court held that the government may use the state secrets privilege to bar the confirmation or denial of information that has entered the public domain through unofficial sources because disclosure of this information would harm the mutual trust necessary for the CIA to perform its clandestine functions. Justice Gorsuch dissented, joined by Justice Sotomayor.

View the Court's [decision](#).

Cameron v. EMW Women’s Surgical Center, P.S.C., No. 20-601: This case concerns a state attorney general’s attempt to intervene in a federal appellate proceeding to defend the constitutionality of a Kentucky abortion-related statute. The issue arose after the Sixth Circuit Court of Appeals affirmed a decision holding the Kentucky statute unconstitutional. The Kentucky official who had been defending the law decided not to seek further review, but the Kentucky attorney general then moved to intervene to take up defense of the statute. The Court of Appeals denied the attorney general’s

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intervention motion. Today, the Supreme Court in an opinion authored by Justice Alito (and joined by four other justices) ruled that Kentucky's attorney general can intervene to defend the constitutionality of the Kentucky statute. The Court emphasized, among other things, the "constitutional considerations" in allowing states to defend their sovereign interest in federal court. Justice Thomas authored a concurrence to address a jurisdictional issue. Justices Kagan and Breyer filed a separate concurrence, agreeing that the attorney general should have been permitted to intervene but for separate reasons. Justice Sotomayor dissented.

View the Court's [decision](#).