



Pillsbury Winthrop Shaw Pittman LLP  
1200 Seventeenth Street, NW | Washington, DC 20036 | tel 202.663.8000 | fax 202.663.8007

David F. Klein  
tel: +1.202.663.9207  
david.klein@pillsburylaw.com

October 25, 2021

Honorable Scott S. Harris  
Clerk  
Supreme Court of the United States  
Washington, D.C. 20543

Re: *United States v. Abu Zubaydah*, No. 20-827

Dear Mr. Harris:

I write in response to Acting Solicitor General Fletcher's letter of October 15, 2021 ("Letter") on behalf of the Government. Please be advised that counsel have been unable to consult with Abu Zubaydah before responding to the Government's letter.

At oral argument, Justice Gorsuch asked, "What is the government's objection to [Abu Zubaydah] testifying to his own treatment and not requiring any admission from the Government of any kind?" Tr. 71. After colloquy, Justice Gorsuch elaborated: "I'm asking much more directly, and I'd just really appreciate a straight answer to this, will the Government make [Abu Zubaydah] available to testify as to his treatment during these dates?" Tr. 73. And Justice Sotomayor added: "Without the Government invoking a state secret privilege to the testimony." Tr. 74-75. That is the question the Government committed to answer.

The Government's answer is "No." The Government has agreed to let Abu Zubaydah "send a declaration to the Polish investigation," but only after review and redaction by the privilege review team ("PRT"), which operates as part of the habeas litigation. Letter at 1, 2. In practice, this team solicits the input of the CIA before making its determinations. In other words, the Government will allow Abu Zubaydah to submit a written declaration about his treatment at the hands of the CIA so long as the CIA authorizes it.

The Government's letter makes no commitments about how much, if any, of Abu Zubaydah's declaration will be shared with the Polish prosecutor, and does not say whether Abu Zubaydah will be allowed to specify *when* he was tortured, an issue that was central at oral argument. The Government also rejects the possibility of making Abu Zubaydah "available" to give oral testimony (which we understand to have been the thrust of Justice Gorsuch's question). Instead, the Government proposes a multi-layered barrier between the witness and the investigators interested in his testimony.

Despite these limitations, it is at least theoretically possible the Government's new position will lead to a declaration that can assist the Polish prosecutor. Whether theory becomes reality depends on the extent to which the Government in fact makes Abu Zubaydah genuinely "available to testify." When Guantanamo habeas petitioners have attempted in the past to describe their torture to the outside world (as opposed to classified filings in habeas cases), the Government has sometimes redacted virtually every word, as demonstrated by the attached example. In this letter to British authorities, counsel for Moazzam Begg attempted to describe the torture Mr. Begg endured at the hands of the CIA. The entire account was redacted and the redactions were classified. Mr. Begg has since been released and the letter has been declassified.

Simply as a logistical matter, it will take some time to learn whether the Government intends similar redactions in this case. Because this option has never been available to Abu Zubaydah,<sup>1</sup> no declaration about his treatment during his imprisonment in Poland has ever been prepared. Counsel will need to meet with him to determine whether and to what extent, after years of torture and solitary confinement, he can still reliably reconstruct this history. Assuming a declaration is possible, the Government's rules require that it be prepared in a secure facility. And once we submit it for review, past experience suggests we may wait a considerable length of time for the PRT to make its judgment. We suggest the Court set a reasonable deadline for the PRT to finish its review.

While this process goes forward, Respondents propose the Court: (1) hold the matter in abeyance and (2) instruct the District Court (which retains concurrent jurisdiction) to supervise the preparation and Government approval of Abu Zubaydah's declaration. *See, e.g., FDA v. Am. Coll. Of Obstetricians & Gynecologists*, 141 S. Ct. 10 (2020). The District Court could also appoint a Magistrate or Special Master for this purpose, with the power to rule on disputes between the parties about the scope of the government's redactions. *See, e.g., In re Agent Orange Prod. Liab. Litig.*, 97 F.R.D. 427 (E.D.N.Y. 1983) (Weinstein, J.).

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<sup>1</sup> The Government repeatedly rejected Poland's MLAT requests for Abu Zubaydah's own testimony about his maltreatment. Letter at 1, 2.

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Once the declaration has been completed and a redacted version has been approved by the PRT, the parties would return to the Court and address the impact of the declaration, if any, on the issues before the Court.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David F. Klein". The signature is fluid and cursive, with a prominent initial "D" and "K".

David F. Klein  
Counsel for Respondent Abu Zubaydah

Attachment

**ATTACHMENT**

Letter from Clive Stafford Smith, OBE to Tony Blair (November 26, 2004) (as redacted by Privilege Review Team)



JUSTICE IN EXILE

c/o Reprieve

65 Fleet Street

London EC4Y 1HS

England

Tel: 020 7353 4640 / Fax: 020 7353 4641

clivessgb@aol.com

November 26, 2004

Prime Minister Tony Blair  
c/o British Embassy  
3100 Massachusetts Avenue  
Washington, D.C. 20008-3600  
Fax # 202 588 7870

*Re: Request for Immediate Inquiry into  
British Official Complicity in the Abuse of  
British Nationals currently held in Guantanamo Bay*

Dear Prime Minister:

I have recently returned from Guantanamo Bay, where I was able to visit two of my clients, both British nationals who are being held there. I learned some very troubling information that requires immediate and firm action on the part of your government.



[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

I am writing this letter to you, as required by the rules imposed by the U.S. Department of Defense, in a secure facility in the U.S. It will be reviewed by a team of U.S. government lawyers to determine whether you, and the people of Britain, are permitted to review it. Any deletions in this letter are a result of this process.

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(w) Under a separate cover, if it is permitted by the censors, I will forward a 29 page preliminary report concerning the torture inflicted on one of the men. Similar acts were perpetrated on the other, but without my notes I cannot reconstruct them with sufficient accuracy.

I remain,

Yours sincerely,

Clive A. Stafford Smith, O.B.E.

cc. Hon. Jack Straw, Foreign Secretary  
Lord Goldsmith

*doc: 04.11.26M15A*

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