



U.S. Department of Justice

Office of the Solicitor General

The Acting Solicitor General

Washington, D.C. 20530

October 15, 2021

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

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

Dear Mr. Harris:

This case arises out of respondents' application under 28 U.S.C. 1782 to compel discovery from two former Central Intelligence Agency (CIA) contractors for use in a Polish prosecutor's investigation into allegations that respondent Zayn Husayn (a.k.a. Abu Zubaydah) was mistreated at an alleged CIA detention facility in Poland. During oral argument, several Justices asked whether and under what conditions Abu Zubaydah himself could provide testimony for use in the Polish investigation and requested a written response from the United States. Tr. 54, 71-77. This letter responds to those questions.

Abu Zubaydah's testimony has not been a subject of this litigation, and it would not resolve the parties' dispute over respondents' Section 1782 application. In 2015, moreover, the United States rejected a request from Polish prosecutors to facilitate Abu Zubaydah's testimony under the countries' bilateral mutual legal-assistance treaty. Nonetheless, the government would permit Abu Zubaydah, upon his request, to send a declaration that could then be transmitted to the Polish investigation. Like other communications from similarly situated detainees, such a declaration would be subject to a review that could result in the redaction of information that could prejudice the security interests of the United States.

1. Abu Zubaydah is being detained under the authority conferred by the Authorization for Use of Military Force (AUMF) against the "nations, organizations, or persons" that "planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons." Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001). Congress has "affirm[ed]" that the AUMF authorizes the law-of-war detention of persons who were "part of or substantially supported al-Qaeda" or "associated forces" until "the end of the hostilities authorized by" the AUMF. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1021(a), (b)(2), and (c)(1), 125 Stat. 1562. The legality of Abu Zubaydah's detention is subject to review in his pending habeas case, *Husayn v. Austin*, No. 08-cv-1360 (D.D.C.). In addition, the Executive Branch conducts periodic reviews to determine whether his detention remains "necessary to protect against a significant threat to the security of the United

States.” Exec. Order No. 13,567, § 2, 3 C.F.R. 227 (2011 Comp.); see Periodic Review Secretariat, U.S. Dep’t of Def., *Subsequent Full Review*, <https://go.usa.gov/xMxnZ>.

2. Abu Zubaydah’s communications are governed by an order in his habeas case and by Department of Defense procedures that reflect his status as a detainee held pursuant to the AUMF and the law of war.

The district court hearing Abu Zubaydah’s habeas case has entered an order governing access to, and communications with, Abu Zubaydah. See Doc. 78, at 20-31, *Husayn, supra* (Jan. 9, 2009) (amended order in force). The order defines “[l]egal mail” as documents relating to the habeas case that are transmitted between Abu Zubaydah and his habeas counsel. *Id.* § 2, ¶¶ 4, 8. Legal mail sent by Abu Zubaydah is transmitted through a designated Privilege Team and must be treated as containing classified information pending a classification review. *Id.* § 2, ¶¶ 14(a)-(d), 21-27. Materials obtained directly from Abu Zubaydah during in-person meetings are similarly treated as classified pending classification review. *Id.* § 2, ¶¶ 17-19, 21-27. The public docket in the habeas case includes several declarations from Abu Zubaydah that have been reviewed for classified material, including a declaration describing his treatment in CIA custody. Doc. 405, at 54-74, *Husayn, supra* (Sept. 16, 2016) (redacted version of declaration dated July 23, 2009).

The district court’s order further provides that if Abu Zubaydah sends materials unrelated to the habeas proceeding to his habeas counsel, or if counsel obtains from Abu Zubaydah correspondence directed to other individuals, “counsel shall return” such materials to military personnel “for processing according to the standard operating procedures for detainee nonlegal mail.” Doc. 78, § 2, ¶¶ 14(f) and 20, *Husayn, supra*. Those standard operating procedures were established by the Department of Defense. The Department’s policy is to ensure humane treatment of detainees in its custody under the law of war. Department of Def., Directive No. 2310.01E, § 3.b (Aug. 19, 2014), <https://go.usa.gov/xM7Gz>. That includes affording detainees “appropriate contacts with the outside world.” *Id.* § 3.b(1)(b). Those contacts, however, remain subject to review and redaction for security concerns. See, e.g., Department of Def., *Review of Department Compliance with President’s Executive Order on Detainee Conditions of Confinement* 37 (2009). Such screening of detainees’ correspondence is firmly grounded in the law of war. The Third Geneva Convention, for example, recognizes “[t]he Detaining Power’s general right to conduct censorship” of “all communications sent to or by” prisoners of war and to excise information that it finds “prejudicial” to its security. Office of Gen. Counsel, Department of Def., *Law of War Manual* § 9.20.6, at 597-598 (Dec. 2016), <https://go.usa.gov/xMAEb>; see Geneva Convention Relative to the Treatment of Prisoners of War, arts. 71, 76, Aug. 12, 1949, 6 U.S.T. 3316, 3370, 3376.*

* These provisions of the Geneva Conventions illustrate pertinent law-of-war principles, but they do not directly apply to the United States’ conflict with al-Qaeda and associated forces. Among other things, those non-state entities are not High Contracting Parties of the Geneva Conventions. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 628-630 (2006) (noting without resolving the government’s position on the applicability of provisions of the Geneva Conventions other than Common Article 3).

3. As noted above, Abu Zubaydah's testimony was one of the forms of evidence requested by Polish prosecutors under the Treaty Between the United States of America and the Republic of Poland on Mutual Legal Assistance in Criminal Matters (MLAT), U.S.-Pol., July 10, 1996, T.I.A.S. No. 99-917.1. In 2011, prosecutors asked the United States to facilitate Abu Zubaydah's testimony about his allegation, made through counsel, that he was detained and mistreated in Poland. See C.A. E.R. 632. Polish authorities have publicly represented that they discussed that MLAT request with their United States counterparts as a part of broader "bilateral consultations" and in multiple letters between 2012 and 2015. *Id.* at 633. In 2015, the United States denied the request under the MLAT's exception for matters implicating national security or other essential interests (Article 3(1)(c)). See *ibid.*; see also U.S. Br. 8-9, 45-46.

Although the United States declined the Polish prosecutors' request to facilitate Abu Zubaydah's testimony, and although the nonlegal mail process available to Abu Zubaydah is typically limited to communications with family members, the Department of Defense has informed this Office that under the circumstances presented here it would allow Abu Zubaydah, upon his request, to use such a process to send a declaration that could be transmitted to Polish prosecutors. Like other communications from similarly situated detainees, such a declaration would be subject to a security review. As illustrated by Abu Zubaydah's declaration in his habeas case, that review would not prevent him from describing his treatment while in CIA custody, but it could result in the redaction of information that could prejudice the security of the United States. That national-security judgment is necessarily context-specific, and the scope of the necessary redactions would thus depend on the content of the declaration.

Sincerely,

Brian H. Fletcher
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cc: See Attached Service List

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