The State Secrets Sidestep: *Zubaydah* and *Fazaga* Offer Little Guidance on Core Questions of Accountability

*By Elizabeth Goitein**

Introduction

Since the Supreme Court first recognized the state secrets evidentiary privilege in 1953, courts have struggled with basic questions about the privilege and its application. Does the privilege have roots in Article II of the Constitution, or is it solely a common-law doctrine? Can the privilege render an entire case nonjusticiable, and if so, under what circumstances? When is it appropriate to dismiss a case based on an assertion that specific items of evidence are privileged? Does a law addressing the use of sensitive national security information in certain proceedings preempt the procedures that would otherwise apply when the government asserts the privilege? How much deference do courts owe the executive branch's claims of national security harm?

When the Supreme Court granted certiorari in two cases involving assertions of the state secrets privilege—*United States v. Husayn, aka Zubaydah, et al.*[1] and *FBI v. Fazaga*[2]—observers speculated that the Court might finally provide clarity on these matters. The Court, however, took pains to avoid the primary questions that have occupied courts and commentators. Indeed, the Court in *Fazaga* went so far as to concoct a false resolution to the parties' dispute as a means of avoiding the constitutional and statutory interpretation questions the case presented.

That's not to say that the Court left matters as they were before its rulings. In *Zubaydah*, the Court created a dangerous new precedent by upholding an invocation of the privilege to shield information

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[1] 142 S. Ct. 959 (2022).

[2] 142 S. Ct. 1051 (2022).

that is a matter of public record. In doing so, the Court exhibited an unwarranted degree of deference to the government's national security claims. The Court, however, was not faced with the question of whether to review the privileged evidence *in camera*—the context in which the issue of deference typically arises. Moreover, the Court's decision to order dismissal of the lawsuit turned on the unique nature of the proceedings authorized by the statute at issue and should have little precedential value for cases arising under other laws.

As for the Court's decision in *Fazaga*, it did not simply fail to shed light on the issues raised by the case. It further muddied the waters with a ruling that generates more conceptual problems than it resolves. The case involved a provision of the Foreign Intelligence Surveillance Act (FISA) that requires courts to follow certain procedures in cases involving FISA surveillance when the executive branch claims that disclosure of evidence through litigation would harm national security. The question before the Court was whether these statutory procedures take precedence over conflicting common-law procedures that may be triggered by a claim of privilege. Rather than decide this question, the Court held that the two procedural schemes are not irreconcilable precisely because they are different. This incoherent conclusion leaves the district court—and future courts faced with similar dilemmas—with no workable guidance for handling the cases before them.

This article proceeds as follows. Part I describes the two versions of the state secrets privilege—one a nonjusticiability rule, the other an evidentiary doctrine—and the foundational cases that established them. Part II presents the thorny questions raised in recent decades by the application of the privilege. Parts III and IV discuss the Court's rulings in *Zubaydah* and *Fazaga*, showing how they fail both on their own terms and as answers to the questions outlined in part II. The conclusion briefly argues that Congress should step in to supply the clarity the Court failed to provide.

I. The Foundational Cases: *Totten* and *Reynolds*

There are two distinct version of the state secrets privilege. First, it can operate as a bar to justiciability in an extremely narrow category of cases that generally involve government contracts. Second, and far more commonly, it can operate as an evidentiary privilege, preventing the introduction of privileged evidence in civil lawsuits or

criminal cases. *Zubaydah* and *Fazaga* involve the latter version, but it is important to understand both, as the executive branch has made a concerted effort, with some success, to conflate the two.

A Civil War-era case, *Totten v. United States*,[3] established the first version of the privilege. In *Totten*, the administrator of a Union spy's estate alleged that the United States had defaulted on an espionage contract signed by President Abraham Lincoln. The Court noted that "[t]he service stipulated by the contract was a secret service . . . the employment and the service were to be equally concealed."[4] Thus, "[b]oth employer and agent must have understood that the lips of the other were to be for ever sealed respecting the relation of either to the matter."[5] The Court concluded that "[t]he secrecy which such contracts impose precludes any action for their enforcement. The publicity produced by any such action would itself be a breach of contract of that kind, and thus defeat a recovery."[6] In what was arguably *dicta*, the Court went on to state: "It may be stated as a general principle, that public policy prohibits the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated."[7]

The Supreme Court has described *Totten* as articulating a rule "prohibiting suits against the Government based on covert espionage agreements."[8] Reflecting that understanding, courts generally have limited their application of *Totten* to cases involving secret contracts with the government, where the contracting party was on notice that the contract was unenforceable in court. The Supreme Court has invoked *Totten* in only one case that did not involve such a contract: *Weinberger v. Catholic Action of Hawaii/Peace Education Project*.[9] There, the goal of the suit was to compel the preparation and public disclosure of an environmental impact statement (EIS) for a Navy storage facility that the plaintiffs believed would house nuclear weapons. Such a statement would

[3] 92 U.S. 105 (1875).

[4] *Id.* at 106.

[5] *Id.*

[6] *Id.* at 107.

[7] *Id.*

[8] Tenet v. Doe, 544 U.S. 1, 3 (2005).

[9] 454 U.S. 139 (1981).

only be required, however, if the Navy in fact planned to store nuclear weapons at the facility—a fact the Navy could neither confirm nor deny without harming national security. The Court thus held that the question was not subject to judicial scrutiny under the logic of *Totten*.[10]

The second version of the privilege was established in 1953 in the case of *United States v. Reynolds*.[11] The lawsuit was brought by the widows of three civilian observers who were killed when a B-29 aircraft caught fire and crashed during a test flight. The widows sued the Air Force, alleging negligence, and sought to obtain the official accident report during discovery. The government invoked "the privilege against revealing military secrets,"[12] claiming that the aircraft was on a "confidential mission" and carried "confidential equipment on board."[13]

The Court noted that the asserted privilege "is well established in the law of evidence."[14] It observed that the privilege "is not to be lightly invoked," and that there must be a formal claim of privilege lodged by the head of the relevant agency after personal consideration of the matter.[15] At that point, "[t]he court itself must determine whether the circumstances are appropriate for the claim

[10] See *id.* at 146–47. It is difficult to reconcile this invocation of *Totten* with the Supreme Court's pronouncements in other cases, most recently *General Dynamics Corp. v. United States*, to the effect that *Totten* is limited to cases involving secret contracts. See Gen. Dynamics Corp. v. United States, 563 U.S. 478, 485 (2011). Indeed, the Court's description of the dilemma in *Weinberger* more closely tracks the application of *United States v. Reynolds* in situations where the privilege shields evidence that the plaintiffs would need to establish a prima facie case. United States v. Reynolds, 345 U.S. 1 (1953). Compare Weinberger, 454 U.S. at 146 (observing that "it has not been and cannot be established that the Navy has proposed the . . . action that would require the preparation of an EIS") with Mohamed v. Jeppesen Dataplan, 614 F.3d 1070, 1083 (9th Cir. 2010) (holding that a privilege claim under *Reynolds* may lead to dismissal of the case "if the plaintiff cannot prove the prima facie elements of her claim with nonprivileged evidence") (internal quotation marks and citation omitted). For this reason, scholars have suggested that the citation to *Totten* in *Weinberger* is best seen as an anomaly rather than a reframing of the rule. See, e.g., Matthew Plunkett, The Transformation of the State Secrets Doctrine through Conflation of Reynolds and Totten: The Problems with Jeppesen and El-Masri, 2 U.C. Irvine L. Rev. 809 (2012).

[11] 345 U.S. 1 (1953).

[12] *Id.* at 6.

[13] Herring v. United States, 424 F.3d 384, 392 (3d Cir. 2005) (quoting from the formal privilege claim entered in *Reynolds*).

[14] Reynolds, 345 U.S. at 6–7.

[15] *Id.* at 7.

of privilege."[16] In some cases, "it may be possible" for the court to rule on the claim without reviewing the evidence itself; in others, *in camera* review might be necessary.[17] The nongovernment party's need for the information in question "will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate."[18]

The Court upheld the government's privilege claim without reviewing the accident report. It found that "there was a reasonable danger that the accident investigation report would contain references to the secret electronic equipment which was the primary concern of the mission."[19] It further found that the plaintiffs had other means by which they could prove negligence and therefore had not made the showing of necessity that would have justified further probing by the Court. Notably, the Court did not order the case dismissed; it remanded the case to the district court for further proceedings, and the plaintiffs ultimately reached a settlement with the government.

As recently as 2011, the Supreme Court in *General Dynamics Corp. v. United States*[20] underscored that *Totten* and *Reynolds* are separate doctrines. *General Dynamics* presented a dispute over a government contract that involved classified matters. The government asserted the state secrets privilege and sought dismissal of the suit. Citing *dicta* in *Reynolds*, the parties argued over whether the government should have to forfeit the claim to which the privileged evidence pertained. A unanimous Court, however, noted that "*Reynolds* has less to do with these cases than parties believe."[21] In *Reynolds*, the Court had "decided a purely evidentiary dispute by applying evidentiary rules: The privileged information is excluded and the trial goes on without it."[22] In contrast, the Court observed, "[w]hat we are called upon to exercise is not our power to determine the procedural rules of evidence, but our common-law authority to fashion contractual remedies in Government-contracting disputes."[23] That authority was

[16] *Id.* at 8.

[17] *Id.* at 10.

[18] *Id.* at 11.

[19] *Id.* at 10.

[20] 563 U.S. 478 (2011).

[21] *Id.* at 485.

[22] *Id.*

[23] *Id.*

the subject of *Totten* and its progeny, which established the rule that "public policy forbids suits based on covert espionage agreements."[24]

II. Concerns Arising from Post-9/11 Uses

A. Dismissal on the Pleadings

During the 50 years that followed *Reynolds*, the privilege was invoked relatively sparingly and with little public controversy. In the wake of 9/11, however, there was a marked uptick in the number of state secrets privilege assertions by the executive branch.[25] At the same time, the George W. Bush administration began to explicitly conflate the *Reynolds* and *Totten* doctrines. It argued that lawsuits having nothing to do with contract disputes could not be litigated, and must be dismissed at the outset, because the "very subject matter" of the suit—language the *Reynolds* Court had used to describe the reasoning in *Totten*[26]—was a state secret.[27] The administration made this claim in lawsuits challenging a range of government abuses and constitutional violations that took place after 9/11, most notably "extraordinary rendition" (the practice of kidnapping individuals and sending them to other countries to be tortured)[28] and illegal surveillance.[29]

President Barack Obama criticized the Bush administration's frequent use of the privilege to get cases thrown out of court and

[24] *Id.* at 486 (internal quotation marks and citation omitted).

[25] See generally Daniel R. Cassman, Keep It Secret, Keep It Safe: An Empirical Analysis of the State Secrets Doctrine, 67 Stan. L. Rev. 1173 (2015).

[26] Reynolds, 345 U.S. at 11 n.26.

[27] See generally Amanda Frost, The State Secrets Privilege and the Separation of Powers, 75 Fordham L. Rev. 1931 (2007).

[28] See, e.g., Mem. of the United States In Sup. of Motion to Dismiss at 2, Mohamed v. Jeppesen Dataplan, Inc., 539 F. Supp. 2d 1128 (N.D. Cal. 2008) (No. C-07-02798-JW), ECF No. 43; Appellee's Br. at 13, El-Masri v. United States, 479 F.3d 296 (4th Cir. 2007) (No. 06-1667), ECF No. 80; Reply of the United States of America to Plaintiffs' Opp. to United States' Invocation of the State Secrets Privilege at 7, Arar v. Ashcroft, 414 F. Supp. 2d 250 (E.D.N.Y. 2006) (No. 1:04-cv-00249-DGT-SMG), ECF No. 72.

[29] See, e.g., In Sup. of the United States' Assertion of the Mil. and State Secrets Privilege at 7, Al-Haramain Islamic Foundation v. Bush, 451 F. Supp. 2d 1215 (D. Or. 2006) (No. 06-274-KI), ECF No. 59; Mem. of the United States In Sup. of the Mil. and State Secrets Privilege and Motion to Dismiss at 15, Hepting v. AT&T Corp., 439 F. Supp. 2d 974 (N.D. Cal. 2006) (No. 4:06-cv-00672-JSW), ECF No. 124; Mem. of Points and Authorities In Sup. of the United States' Assertion of the Mil. and State Secrets Privilege at 5, American Civil Liberties Union v. NSA, 438 F. Supp. 2d 754 (E.D. Mich. 2006) (No. 2:06-cv-10204-ADT-RSW), ECF No. 34.

promised to use the privilege more judiciously.[30] In September 2009, Attorney General Eric Holder issued a policy that purported to establish a higher standard for invoking the privilege and required privilege assertions to go through various layers of internal approval.[31] In practice, however, the policy changed nothing. Following a review of pending cases, the Department of Justice decided to continue pressing the Bush administration's arguments in all of them.[32] The department took a similar approach in subsequent lawsuits, urging courts to dismiss plaintiffs' claims on the pleadings before any discovery had taken place—that is, before the relevant evidence had been identified, let alone reviewed for privilege.

Some courts were receptive to the executive branch's attempts to erase the distinction between the *Reynolds* and *Totten* doctrines. They agreed that the subject of the lawsuit was a state secret, and they dismissed the case without ever reviewing or ruling on any specific items of evidence. Other courts insisted that they must rely on *Reynolds* alone and treat the state secrets doctrine as an evidentiary privilege, not a justiciability bar. Yet they, too, frequently dismissed cases or claims at the pleadings stage. Over time, three scenarios emerged[33] in which courts were willing to dismiss claims at the outset of litigation based on a purported application of the *Reynolds* privilege:

(1) Plaintiffs cannot make out a prima facie case without using privileged evidence.[34]
(2) Defendants cannot mount their defense without using privileged evidence.[35]

[30] See Andrew Malcolm, Obama White House Breaks Another Promise to Reject Bush Secrecy, L.A. Times (Jul. 22, 2009), https://lat.ms/3JsIKyW.

[31] See Dep't of Justice, Mem. from the Att'y Gen., Policies and Procedures Governing Invocation of the State Secrets Privilege (Sept. 13, 2009), https://bit.ly/3Q4DHGW.

[32] See Letter from Ronald Weich, Ass't Att'y Gen., to Patrick J. Leahy, Chairman, S. Comm. on the Judiciary (Apr. 29, 2011), https://bit.ly/3cU3i73.

[33] These three scenarios are succinctly summarized by the Ninth Circuit in Mohamed v. Jeppesen Dataplan, 614 F.3d 1070, 1083 (9th Cir. 2010).

[34] See, e.g., Halkin v. Helms, 690 F.2d 977 (D.C. Cir. 1982).

[35] See, e.g., Molerio v. FBI, 749 F.2d 815, 822 (D.C. Cir. 1984). Some courts have required that the defense be "meritorious," not merely "colorable," on the ground that "it would be manifestly unfair to a plaintiff to impose a presumption that the defendant has a valid defense that is obscured by the privilege." In Re Sealed Case, 494 F.3d 139, 149–50 (D.C. Cir. 2007).

(3) Privileged information is so central to the case that any attempt to disentangle it from nonprivileged information might fail, leading to inadvertent disclosures of privileged information.[36]

Of these three scenarios, only the first reflects the proper application of an evidentiary privilege, and even then only in part. When evidence is subject to a legal privilege—whether attorney-client, therapist-patient, marital confidence, or any other—the general rule is that the case simply proceeds without that evidence. In a situation where removal of the privileged material leaves plaintiffs with insufficient evidence to establish a prima facie case, they will be unable to overcome a motion for summary judgment, and the lawsuit will be dismissed.

Even in such cases, however, dismissal should not take place at the pleadings stage. Until the relevant evidence has been identified through discovery and the court has determined which evidence is privileged, the court cannot fairly conclude that plaintiffs lack sufficient nonprivileged evidence to continue. Without following this process, the court is simply making a prediction—or, more accurately, accepting the government's prediction—as to what the evidence in the case will be. Whatever one might think of this approach, it is not how evidentiary privileges ordinarily work. In no other context do courts dismiss cases based on parties' predictions of how the evidentiary disputes in the case will be resolved.

The second scenario is even less defensible. If courts were truly treating the state secrets doctrine as an evidentiary privilege, it would be irrelevant whether defendants needed privileged evidence to mount a valid defense. The evidence would simply drop out of the case, and the chips would fall where they may.[37] In some cases, the general rule that the lawsuit goes forward without the privileged evidence might result in grievous wrongs against plaintiffs going unrighted; in others, defendants might be held accountable

[36] See, e.g., Jeppesen, 614 F.3d at 1087–88; El-Masri v. United States, 479 F.3d 276, 308 (4th Cir. 2007).

[37] See Charles T. McCormick, McCormick's Handbook of the Law of Evidence 233 (E. Cleary ed., 1972) ("[T]he result" of a successful claim of privilege "is simply that the evidence is unavailable, as though a witness had died, and the case will proceed accordingly, with no consequences save those resulting from the loss of the evidence.").

for wrongs they did not commit. The courts' approach to the state secrets privilege, by contrast, imposes a "heads-we-win, tails-you-lose" rule, where the harms of withdrawing the evidence are always visited on the plaintiff, never the defendant. That approach is particularly unsound when the defendant is the party invoking the privilege and can accordingly choose whether asserting it is worth forfeiting a defense.

The third scenario is simply the subject-matter privilege by another name. Some courts have acknowledged this, while others have gamely attempted to distinguish this circumstance from *Totten*. In fact, there is no functional distinction between dismissing a case at the outset because the "very subject matter" of the case is a state secret, and dismissing a case at the outset because state secrets are so central to the case that they are bound to arise. And once again—as in the first and second scenarios—the court's assessment of the centrality of state secrets turns on a *prediction* about the evidence in the case, uninformed by the actual evidence itself. In short, nothing about this scenario resembles the manner in which courts apply any of the other evidentiary privileges that routinely come before them in civil or criminal cases.

B. Common Law or Constitution?

In addition to conflating *Reynolds* and *Totten*, the lawsuits challenging unlawful surveillance after 9/11 surfaced two foundational questions about the state secrets privilege that the Supreme Court has never answered: To what extent does the privilege have roots in the Constitution, as well as the common law, and how should that affect courts' analysis of legislation touching on the privilege?

In *Reynolds*, the Court asserted that the state secrets privilege is "well established in the law of evidence"; the Court did not find that the privilege also had origins in the Constitution. However, in another context—involving the president's authority to withhold security clearances from federal employees—the Court held that the president's "authority to classify and control access to information bearing on national security . . . flows primarily from [the Commander-in-Chief Clause's] constitutional investment of power in the President."[38] In addition, in a case involving the presidential communications privilege,

[38] Dep't of the Navy v. Egan, 484 U.S. 518, 527 (1988).

the Court noted in *dicta* that "military or diplomatic secrets" implicate "Art. II duties" and that "the courts have traditionally shown the utmost deference to [these] Presidential responsibilities."[39] Extrapolating from these statements, some lower courts have asserted that the state secrets privilege has "a constitutional dimension."[40]

Of course, even if the privilege were entirely constitutional in origin, that would not mean Congress could not regulate it. Under the famous three-part test Justice Robert Jackson set forth in his concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, Congress is barred from constraining a president's exercise of constitutional powers only where those powers are "conclusive and preclusive," and Congress itself is without any constitutional authority to act.[41] In the many areas in which the president and Congress share power, Congress may exercise its own constitutional authorities even if they tread on those of the president. Control of national security information falls into this shared-power category, as is evident from the many laws Congress has passed on this subject over the past century—including the National Security Act of 1947 (requiring protection of national-security information but also requiring disclosures to Congress), the Atomic Energy Act of 1954 (establishing a system for protecting information about nuclear weapons and capabilities), and the Freedom of Information Act (authorizing courts to review governmental withholding of classified information).

Nonetheless, in post-9/11 lawsuits involving foreign intelligence surveillance, the government has cited the privilege's (purported) constitutional roots in arguing for a cramped interpretation of 50 U.S.C. § 1806(f), a provision of FISA. As discussed in part IV.A, § 1806(f) establishes a procedure for courts to follow when the government asserts that disclosure of FISA surveillance materials in litigation would harm national security. Contrary to the plain text of the provision, the government interprets it to apply only when the government seeks to use evidence against the opposing party. It grounds this interpretation partly in the doctrine of "constitutional avoidance," arguing that a literal reading of the provision would interfere with the constitutional prerogatives protected by the state secrets privilege.

[39] United States v. Nixon, 418 U.S. 683, 710 (1974).

[40] El Masri, 479 F.3d at 303.

[41] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 638 (1952) (Jackson, J., concurring).

C. Deference

A third concern about courts' implementation of the privilege since 9/11 is the level of deference courts have shown the executive branch. Courts usually begin their analyses by acknowledging that they have the final word on whether the privilege applies and underscoring the importance of their review. In one decision, for instance, the Ninth Circuit stated, "[w]e take very seriously our obligation to review the [claim] with a very careful, indeed a skeptical, eye, and not to accept at face value the government's claim or justification of privilege."[42] In that same decision, however, the court also stated: "[W]e acknowledge the need to defer to the Executive on matters of foreign policy and national security and surely cannot legitimately find ourselves second-guessing the Executive in this area."[43] Other Ninth Circuit decisions have gone even further, proclaiming that assertions of the state secrets privilege must be accorded "utmost deference."[44] Examining these statements, the three-judge panel of the Ninth Circuit in *Zubaydah* observed that "[o]ur guidance on evaluating the need for secrecy has been contradictory."[45] This tension is evident in almost every decision addressing the privilege—and is almost always resolved in favor of deference.

To date, the issue of deference has arisen largely in the context of courts' willingness to rely on executive officials' affidavits without reviewing the actual evidence. Indeed, in cases where the government seeks dismissal on the pleadings, there is generally no evidence for the court to review. Courts point to the Supreme Court's statement in *Reynolds* that when "the occasion for the privilege is appropriate," the court "should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers."[46] However, this statement followed an important caveat: Such restraint is in order only when the court is "satisf[ied] . . . from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national

[42] Jeppesen, 614 F.3d at 1082 (quotation marks and citation omitted).

[43] *Id.* at 1081–82 (quotation marks and citation omitted).

[44] Kasza, 133 F.3d at 1166.

[45] Husayn v. Mitchell, 938 F.3d 1123, 1131 (9th Cir. 2019).

[46] Reynolds, 345 U.S. at 10.

security, should not be divulged."[47] The Court stated only that *ex parte*, *in camera* review of the evidence should not be "automatic"[48]—not that it was never, or even rarely, appropriate.

Reynolds itself is an object lesson in the importance of reviewing the evidence. Nearly half a century after the Court's ruling, the accident report was declassified. The Supreme Court, without looking at the report, had concluded that there was "a reasonable danger that [it] would contain references to the secret electronic equipment which was the primary concern of the mission."[49] In fact, the report contained no such references—but it did support the plaintiffs' claims of negligence. Although the Third Circuit later speculated that some other facts contained in the report might legitimately have been deemed sensitive, the few facts the court identified (for example, the fact that the aircraft could fly at an altitude of more than 20,000 feet[50]) easily could have been redacted—as the *Reynolds* Court would have seen had it examined the document.

As *Reynolds* illustrates, federal agencies are not neutral actors in lawsuits that allege they have violated the law. They have a conflict of interest and a clear motive to stretch the permissible bounds of privilege claims. When courts insist on reviewing the evidence, they are not disputing the executive branch's judgments about what might cause harm to national security. They are acknowledging the fact that the executive branch sometimes uses claims of national security to withhold information for reasons *other than* national security.

This simple reality is evident in the phenomenon of overclassification. The standard for classifying information is roughly the same as the standard for invoking the state secrets privilege: Information may be classified if its disclosure could reasonably be expected to harm national security. Yet there is little dispute that much of the information classified by executive officials does not meet this standard. The current Director of National Intelligence has acknowledged that overclassification is a significant problem,[51] and former executive

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] Herring, 424 F.3d at 391 n.3.

[51] Dustin Volz, Vast Troves of Classified Info Undermine National Security, Spy Chief Says, Wall St. J. (Jan. 27, 2022), https://on.wsj.com/3OUKW3g.

branch officials have estimated that anywhere from 50–90 percent of classified information could safely be released.[52]

According to the Brennan Center's analysis, overclassification often occurs because busy officials classify documents by rote rather than engaging in an analysis of the national security implications.[53] But there are also multiple examples, going back many decades, of officials classifying documents to hide misconduct or avoid embarrassment. In 1947, the Atomic Emergency Commission classified information on nuclear radiation experiments it was conducting on human beings because disclosure "might have [an] adverse effect on public opinion or result in legal suits."[54] In the 1960s, the FBI classified information about its wiretapping of Dr. Martin Luther King, Jr.'s telephone as "top secret," even though the sole purpose of its activities was to gain information about King's personal life that could be used to "completely discredit [him] as a leader of the Negro people."[55] In 2019, White House officials placed the transcript of Donald Trump's call to Ukrainian President Volodymyr Zelenskyy in a system for top secret information, even though such readouts are routinely classified at a much lower level, to minimize the number of people who might learn that Trump had pressured Zelenskyy to investigate the son of his political rival, Joe Biden.[56]

Against this backdrop, courts are on solid ground when they insist on reviewing evidence that is subject to claims of privilege. As a general matter, courts may not have the expertise to assess whether disclosing facts X, Y, or Z will harm national security (although even then, there may be exceptions), but they surely can assess whether

[52] See Hearing on the Espionage Act and the Legal and Constitutional Implications of Wikileaks, H. Comm. on the Judiciary, 111th Cong., 2d sess. 8 (2010) (statement of Thomas Blanton, Dir., Nat'l Sec. Archive), https://bit.ly/3cUKapz.

[53] Elizabeth Goitein & David M. Shapiro, Reducing Overclassification through Accountability, Brennan Ctr., Oct. 5, 2011.

[54] Mem. from O.G. Haywood, Jr., Colonel, Corps of Engineers, to Dr. [Harold] Fidler, Atomic Energy Comm'n, Med. Experiments on Humans (Apr. 17, 1947), https://bit.ly/3PWnCU7.

[55] Senate Select Comm. to Study Gov't Operations, Final Report Intell. Activities and the Rights of Americans, Book III, S. Rep. No. 94-755, at 125 (1976).

[56] Julian E. Barnes, Michael Crowley, Matthew Rosenberg & Mark Mazzetti, White House Classified Computer System Is Used to Hold Transcripts of Sensitive Calls, N.Y. Times (Sept. 27, 2019), https://nyti.ms/2mnvo0K.

documents actually include facts X, Y, or Z, or whether facts X, Y, and Z can readily be redacted. Nonetheless, courts frequently forgo this review, deferring not only to the government's claims of national security harm but to its representations about the evidence in the case.

III. The *Zubaydah* Decision

Two of the questions discussed in part II were at issue in *Zubaydah*: how much deference to grant the executive branch's predictions of national security harm and when the invocation of the privilege may lead to dismissal of a lawsuit. On the first question, the Court established a disturbing new precedent. On the second, it made a wrong turn—but in a way that is unlikely to recur in future cases, given the unusual nature of the statute under which the litigation was brought.

A. Background and Lower Courts

After 9/11, Zayn al-Abidin Muhammad Husayn, otherwise known as Abu Zubaydah, was mistakenly believed to be a high-level al Qaeda operative. He was taken to several CIA black sites and subjected to torture, including 83 waterboarding sessions in the span of one month, hundreds of hours in a coffin-sized "confinement box," mock burials, sleep deprivation, and exposure to insects to trigger his "entomophobia." As a result of this treatment, Zubaydah sustained "permanent brain damage and physical impairments, including over 300 seizures in the span of three years and the loss of his left eye."[57]

The European Court of Human Rights found "beyond a reasonable doubt" that some of this torture took place at a CIA black site in Poland between December 2002 and September 2003—confirming allegations long made by the media, nongovernmental organizations, and even former Polish officials. This finding led Polish authorities to open a criminal investigation into various Polish actors who might have been complicit in the human rights violations. Polish prosecutors sought to depose James Mitchell and John Jessen, the American contractors who helped develop the CIA's torture program. They requested assistance from the United States under a Mutual Legal Assistance Treaty (MLAT), but the United States denied the request.

[57] Husayn, 938 F.3d at 1127.

To secure the contractors' deposition testimony, Zubaydah and his attorney filed suit under 28 U.S.C. § 1782, which allows U.S. courts to issue subpoenas requiring people to give testimony in foreign or international tribunals. The United States intervened and claimed the state secrets privilege, seeking to quash the subpoena. The district court held that some of the information the subpoena sought to elicit was privileged and some was not, but that the two categories could not be "disentangled"—the third scenario discussed in part II.A, above. Accordingly, it granted the government's motion to quash.

On appeal, the Ninth Circuit reversed. It held that the existence of a CIA black site in Poland and the treatment Abu Zubaydah suffered there were matters of public record and therefore could not qualify as "state secrets." The panel rejected the government's argument that Mitchell and Jessen's testimony would serve as "official confirmation" that the CIA had operated a black site in Poland, thus erasing any remaining doubt on that fact and betraying the trust of the Polish government. For one thing, the district court had found that Mitchell and Jessen were not agents of the government—a finding that the government did not contest—and so their testimony could not provide "official confirmation" of U.S. government activity. Furthermore, the former Polish president himself had acknowledged the existence of a CIA black site in Poland, and it was current Polish authorities who sought Mitchell and Jessen's testimony.

On the other hand, the Ninth Circuit held that the names of Polish officials involved in the torture, operational details about the facility, and other such matters remained nonpublic and sensitive, and that they were properly subject to the privilege. The privileged and non-privileged evidence could be disentangled, the panel reasoned, because such evidence *had* previously been disentangled: Mitchell and Jessen had given similar testimony in another lawsuit, *Salim v. Mitchell*.[58] As in that case, Mitchell and Jessen could answer deposition questions "us[ing] code names and pseudonyms, where appropriate."[59]

B. State Secrets and "Official Confirmation": A Dangerous New Precedent

In a splintered ruling with three concurring opinions and a strongly worded dissent, the Supreme Court reversed. Departing from both

[58] Salim v. Mitchell, 268 F. Supp. 3d 1132 (E.D. Wash. 2017).

[59] Husayn, 938 F.3d at 1137.

the district court and the Ninth Circuit, the Court upheld the government's assertion of the state secrets privilege over any testimony that would confirm the existence of a CIA black site in Poland. In doing so, it created a disturbing new precedent: The government may assert the state secrets privilege over matters that are well-known to the public based on the claim that "official confirmation" of established facts would itself harm national security.

The existence of a CIA black site in Poland is, in all relevant respects, a matter of public record. Initially, this fact was discovered and widely reported as a result of investigations performed by journalists and nongovernmental organizations. It has since been confirmed by more authoritative sources, including the European Court of Human Rights, which reviewed a wealth of evidence and issued a determination "beyond a reasonable doubt." Even former Polish officials have publicly acknowledged the existence of the black site.

The Court, however, ruled that "[s]ometimes information that has entered the public domain may nonetheless fall within the scope of the state secrets privilege."[60] This ruling represents an expanded conception of the doctrine. Previously, lower courts had assumed that public information was not subject to the privilege—in the Ninth Circuit's words, "In order to be a state secret, a fact must first be a secret."[61] Indeed, in another Ninth Circuit case, the government had conceded that the privilege "does not extend to public documents."[62] Nonetheless, the Court held that "official confirmation" of facts in the public domain—which, according to the Court, could encompass confirmation by government contractors such as Mitchell and Jessen—could cause sufficient harm to national security to justify invocation of the privilege.

The Court identified two reasons why "official confirmation" of the existence of a CIA black site in Poland could harm national security. First, it accepted the government's argument that the government's "refus[al] to confirm or deny . . . public speculation about its cooperation with Poland . . . leav[es] an important element of doubt about the veracity of that speculation."[63] This notion is specious. The finding of

[60] Zubaydah, 142 S. Ct. at 968.

[61] Husayn, 938 F.3d at 1133.

[62] Jeppesen, 614 F.3d at 1090.

[63] Zubaydah, 142 S. Ct. at 969 (internal quotation marks and citation omitted).

the European Court of Human Rights is not "speculation." Neither is the statement of the former president of Poland. In light of the sheer number of respected sources that have confirmed the black site's existence, including individuals with first-hand knowledge, there is simply no doubt remaining on this point. Contrary to the Court's implication, a statement by a United States government official is not the sole means—or even the primary means—by which a fact, even a fact about the U.S. government's activities, may be established.

Second, the Court agreed with the government that "the CIA's refusal to confirm or deny its cooperation with foreign intelligence services plays an important role in and of itself in maintaining the trust on which those relationships are based."[64] In other words, foreign intelligence services might be less willing to cooperate with the CIA in the future if they thought the CIA would betray its confidences. This argument fails for the same reason the first one does: There are, quite simply, no confidences left to betray. Whatever reputational harm Poland might suffer as a result of its cooperation with the CIA, and whatever adverse consequences might flow from the lifting of the veil, have happened already.

The sole exception might be the legal liability of Polish individuals who were complicit in Zubaydah's torture. By invoking the state secrets privilege, the U.S. government could impede or delay legal accountability for those acts. Here, though, it was incumbent on the Court to ask: Does it truly serve national security to honor a promise to conceal participation in war crimes? Would it not better serve national security, in the long run, to adopt a rule—analogous to the crime-fraud exception to the attorney-client privilege[65]—that the protection courts accord to secret U.S. agreements with foreign intelligence services does not extend to the commission of human rights violations? This is one area where courts, with their commitment to the rule of law and the vindication of legal rights, might indeed have a broader and more complete perspective on national security than the executive branch. At a minimum, the Court was well within its rights to question this assessment of national security harm—but failed to do so.

[64] *Id.*

[65] See United States v. Zolin, 491 U.S. 554, 562–63 (1989).

By accepting the government's "official confirmation" argument without probing its validity under the specific facts of this case, the Court exhibited undue deference to the government's claim of national security harm. It did so without shedding light on the more common question of whether courts should defer to claims of national security harm without reviewing the evidence in question.[66] Nonetheless, there are two silver linings to the decision when it comes to the question of deference.

First, seven justices rejected the efforts of Justices Clarence Thomas and Samuel Alito to further gut judicial inquiry into state secrets privilege assertions through a bizarre reading of *Reynolds*. Under this reading, the court would be required to accept the government's claim of privilege, no questions asked, unless the non-government party could show that the evidence was "immediately and essentially applicable" to its case.[67] If the nongovernment party made such a showing, the court could then ask whether "there is a reasonable danger that military secrets are at stake," affording "utmost deference" to the government's assessment.[68] Although they do not say so directly, Justices Alito and Thomas clearly believe that *in camera* review of the evidence is rarely, if ever, appropriate.

The Court had little difficulty disposing of this proposed approach. Parsing *Reynolds*, it observed that the proper steps for asserting and reviewing the privilege are as follows: (1) The government must formally invoke the privilege; (2) the court must determine whether the circumstances are appropriate for the claim of privilege; and (3) after determining that the government has offered a valid reason for invoking the privilege, the court should inquire into

[66] Justice Gorsuch did suggest that the Court should have remanded the case to the district court "for *in camera* review of any evidence the government might wish to present to substantiate its privilege claim." Zubaydah, 142 S. Ct. at 998 (Gorsuch, J., concurring). But the privileged evidence itself—at least, the evidence that formed the core of the Court's opinion—was evidence confirming that the CIA operated a black site in Poland. Once the Court determined that any answer to discovery questions posed in that investigation, regardless of whether the answer referenced a CIA black site in Poland, would necessarily confirm the black site's existence, the question of whether to conduct *in camera* review of the privileged evidence was effectively mooted.

[67] *Id.* at 975 (Thomas, J., concurring) (quoting United States v. Burr, 25 F. Cas. 30, 37 (No. 14,692d) (C.C. Va. 1807) (Marshall, C.J.)).

[68] *Id*.

the nongovernment party's need for the evidence, which will then inform whether the court should probe more deeply into the government's claim—for example, by conducting an *in camera* review of the evidence, if the court has not done so already.

The second silver lining is the dissent authored by Justice Neil Gorsuch and joined by Justice Sonia Sotomayor—two justices who do not often join forces. The dissent is a powerful rebuke of excessive deference to the executive branch in national security matters. It begins, "[t]here comes a point where we should not be ignorant as judges of what we know to be true as citizens."[69] It bluntly names the government's true motive for invoking the privilege: "[I]t seems that the government wants this suit dismissed because it hopes to impede the Polish criminal investigation and avoid (or delay) further embarrassment for past misdeeds."[70] And it ends with a powerful appeal to the role of the courts: "[E]mbarrassing as these facts [of Zubaydah's torture] may be, there is no state secret here. This Court's duty is to the rule of the law and the search for truth. We should not let shame obscure our vision."[71]

Beyond its compelling rhetoric, the dissent raises important objections to the majority's approach that few courts have identified. Perhaps most crucially, it cautions that the president's Article II interest in protecting information through the assertion of a state secrets privilege claim "must be carefully assessed against the competing powers Article I and Article III have vested in Congress and the Judiciary."[72] By shutting down litigation, the dissent explains, the privilege curtails Congress's Article I authority to authorize lawsuits (which Congress did here through 28 U.S.C. § 1782) and the judiciary's Article III responsibility to decide cases and controversies.

The dissent also foregrounds a reality that too few judges are willing to openly acknowledge: "[E]xecutive officials can sometimes be tempted to misuse claims of national security to shroud major abuses and even ordinary negligence from public view."[73] It lists examples of this phenomenon, both historical and more recent. And it highlights

[69] *Id.* at 985 (Gorsuch, J., dissenting) (internal quotation marks and citations omitted).

[70] *Id.* at 1001.

[71] *Id.*

[72] *Id.* at 991.

[73] *Id.* at 992.

the phenomenon of overclassification discussed above. Without suggesting nefarious motives on the part of executive branch officials, it concludes that judicial skepticism of national security claims is necessary to safeguard the constitutional separation of powers:

> It may be understandable that those most responsible for the Nation's security will press every tool available to them to maximum advantage. There has always been something of a hydraulic pressure inherent within each of the separate Branches to test the outer limits of its power. It may be nothing less than human nature. But when classification standards are so broadly drawn and loosely administered, temptation enough exists for executive officials to cover up their own mistakes and even their wrongdoing under the guise of protecting national security. This Court hardly needs to add fuel to the fire by abdicating any pretense of an independent judicial inquiry into the propriety of a claim of privilege and extending instead "utmost deference" to the Executive's mere assertion of one. Walking that path would only invite more claims of secrecy in more doubtful circumstances—and facilitate the loss of liberty and due process history shows very often follows.[74]

In its broad rejection of excessive deference to executive claims of national security, the dissent holds potential significance for future cases on a wide range of subjects.

C. The Dismissal Remedy: Wrong but Not Precedential

Having held that the existence of a CIA black site in Poland was a state secret, the Court remanded the case to the Ninth Circuit "with instructions to dismiss Zubaydah's current application for discovery under § 1782."[75] It concluded that there was no way to revise the discovery questions to avoid official confirmation of the black site. This was plainly wrong as a factual matter. However, given that conclusion, the decision to dismiss should be understood as a reflection of the unusual nature of § 1782 proceedings and not as a precedent for other types of lawsuits.

In dismissing the case, the Court observed that "any response Mitchell and Jessen gave to Zubaydah's subpoenas would tend to

[74] *Id.* at 993–94.

[75] *Id.* at 972.

confirm (or deny) the existence of a black site in Poland," given that "12 of Zubaydah's 13 document requests contain the word 'Poland' or 'Polish,'" and 10 of them specifically sought documents concerning the Polish detention site.[76] "If Mitchell and Jessen acknowledge the existence of documents responsive to these requests, they will effectively acknowledge the existence of the detention facilities referenced therein."[77] Merely answering the requests, in other words, would reveal state secrets.

The Court's logic may be sound with respect to the original discovery requests. However, Zubaydah offered to revise the requests to omit reference to the location of the detention site, focusing instead on conduct that took place within a certain time period (December 2002 to September 2003) and leaving it to other witnesses to establish where this conduct took place. Although there is ample information about Zubaydah's treatment in the public domain, very little of that information relates specifically to the time period in question. Bafflingly, the Court held that these revisions would be insufficient, suggesting that "the nature of this case (an exclusively discovery-related proceeding aimed at producing evidence for use by Polish criminal investigators)" would inevitably tie the discovery responses to Poland.[78]

As Justices Elena Kagan and Gorsuch noted, the Court's reasoning was flawed. True, prosecutors would not be asking Mitchell and Jessen what they did between 2002 and 2003 if they did not believe the conduct happened in Poland. But the belief of Polish authorities—presumably to be confirmed by witnesses other than Mitchell and Jessen—is not "official confirmation" by the United States, and therefore does not trigger any of the national security harms the government posited. Mitchell and Jessen's testimony, limited to what took place at an undisclosed location during a specific time period, would provide neither confirmation nor denial of the existence of a CIA black site in Poland.

The questions remain: Given the Court's conclusions that (1) the existence of a CIA black site in Poland was a state secret and (2) answering the document requests would necessarily have confirmed

[76] *Id*. at 968.

[77] *Id*.

[78] *Id.* at 972.

or denied that fact, was dismissal an appropriate remedy? And what does the Court's approach here signify for future cases?

On these questions, the key factor is the unusual nature of a proceeding under § 1782. The Ninth Circuit panel observed that, "[u]nlike our prior cases, this is a pure discovery matter where there are no claims to prove or defenses to assert."[79] The Supreme Court similarly described it as "an exclusively discovery-related proceeding aimed at producing evidence for use by Polish criminal investigators."[80] Once the Court determined (albeit wrongly) that the mere act of responding to the discovery requests would necessarily reveal state secrets, there was no reason to assess whether the plaintiff had sufficient nonprivileged evidence to make out a prima facie case. As the Court stated, "[this] is a purely evidentiary proceeding and thus unlike most litigation, which may, after a successful assertion of the state secrets privilege, continue without the government's privileged proof."[81]

Accordingly, had the Court been correct that responding to the discovery requests would necessarily have entailed revealing privileged information, the decision to order dismissal would have been sound. More important, it should not be seen as setting a precedent for other types of lawsuits. The Court was clear that the remedy it imposed turned on "the nature of this litigation," in which the discovery requests themselves were "the proceeding's sole object."[82] In lawsuits where that is not the case, the proper remedy—as the Court acknowledged—would be to "continue without the Government's privileged proof."[83] This acknowledgment, and not the dismissal of Zubaydah's case, should inform courts' analyses in future cases.

IV. The *Fazaga* Decision

Fazaga, on its face, raised the issue of whether a statutory provision of FISA displaces the procedures that would otherwise apply when the government claims the state secrets privilege—which in turn raised the question of whether the privilege is constitutional

[79] Husayn, 938 F.3d at 1135.

[80] Zubaydah, 142 S. Ct. at 972.

[81] *Id.* (internal quotation marks and citation omitted).

[82] *Id*.

[83] *Id*. (internal quotation marks omitted).

in nature. The Court, however, managed to avoid these questions entirely by wishing away the conflict between the FISA procedures and those that flow from state secrets privilege claims. Its ruling is likely to generate substantial confusion among lower courts.

A. Background and Lower Courts

At issue in *Fazaga* was a surveillance campaign the FBI conducted in 2005 and 2006 against Muslim American communities in southern California. The plaintiffs, three Muslim Americans who were caught up in this operation, alleged that the FBI's surveillance violated their constitutional rights under the First, Fourth, and Fifth Amendments, as well as FISA, which governs surveillance for foreign intelligence purposes that takes place on U.S. soil and/or targets U.S. persons.

The FBI moved to dismiss the case on multiple grounds. With respect to the religious freedom claims, the FBI invoked the state secrets privilege. It was undisputed that the plaintiffs could make out a prima facie case using nonprivileged evidence. However, the attorney general, as the head of the agency in which the FBI is housed, submitted an affidavit asserting that defending against these claims would require the FBI to present sensitive evidence about its investigation, the disclosure of which would harm "national security interests."[84]

The plaintiffs argued that dismissal of the religious freedom claims based on the state secrets privilege was foreclosed by 50 U.S.C. § 1806(f), a provision of FISA that establishes special procedures for handling sensitive national security information in cases involving electronic surveillance. Those procedures may be triggered whenever (1) the government intends to "enter into evidence or otherwise use or disclose" any information obtained or derived from electronic surveillance;[85] (2) the target of electronic surveillance seeks to suppress evidence obtained or derived from such surveillance;[86] or (3) the target of surveillance makes a motion or request to "discover or obtain" materials relating to electronic surveillance or to "discover,

[84] Decl. of Eric H. Holder, Att'y Gen. of the U.S. at 1, Fazaga v. FBI, 885 F. Supp. 2d 978 (C.D. Cal. 2012) (No. 8:11-cv-00301-CJC-VBK), ECF No. 32-3.

[85] 50 U.S.C. §§ 1806(c), (d) (2018).

[86] *Id.* § 1806(e).

obtain, or suppress" information obtained or derived from electronic surveillance.[87]

In such cases, the attorney general may submit an affidavit attesting that disclosure or an adversary hearing would "harm the national security of the United States."[88] The court must then review, *in camera* and *ex parte*, "such . . . materials relating to the surveillance as may be necessary to determine whether the surveillance . . . was lawfully authorized and conducted."[89] The court may disclose some or all of the information to the nongovernment party "under appropriate security procedures and protective orders," but "only where such disclosure is necessary to make an accurate determination of the legality of the surveillance."[90] If the court determines that the surveillance was unlawful, it must suppress the unlawfully obtained evidence "or otherwise grant the motion" of the nongovernment party.[91]

At the time the case came before the Ninth Circuit, only two courts had previously considered whether these statutory procedures preempt contrary procedures under the state secrets privilege; both held that they do.[92] The FBI argued, however, that FISA's alternative procedures apply only when litigants challenge the admissibility of evidence that the government seeks to introduce—despite the law's broad language stating that the provision applies "whenever any motion or request is made by [the target of surveillance] pursuant to any . . . statute or rule of the United States or any State to . . . discover, obtain, or suppress evidence or information obtained or derived from electronic surveillance."[93] A literal reading of that language, the government claimed, would be inconsistent with the statute's overall structure, which suggests an intent to provide a suppression remedy rather than a mechanism to resolve the merits of claims in civil litigation.

[87] *Id.* § 1806(f).

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] *Id.* § 1806(g).

[92] See Jewel v. Nat'l Sec. Agency, 965 F. Supp. 2d 1090, 1105–06 (N.D. Cal. 2013); In re Nat'l Sec. Agency Telecomms. Records Litig., 564 F. Supp. 2d 1109, 1117–24 (N.D. Cal. 2008). Since then, the Fourth Circuit has held that § 1806(f) does not preempt the usual operation of the state secrets privilege. See Wikimedia Found. v. Nat'l Sec. Agency, 14 F.4th 276 (4th Cir. 2021).

[93] 50 U.S.C. § 1806(f) (2018).

In support of this interpretation, the FBI asserted that the state secrets privilege is rooted not only in the common law, but also in the president's authority under Article II of the Constitution to safeguard national security information. Absent a clear statement from Congress, the government argued, the court should not interpret § 1806(f) as "displacing" procedures or remedies available under the state secrets privilege, as such a reading would infringe on the president's exercise of Article II powers and therefore raise constitutional questions.

In reply, the plaintiffs pointed out that the FBI's reading ignored the plain text of the statute, which makes clear that § 1806(f) is triggered by *any* government use of sensitive information, or any request by the target of surveillance to discover or obtain such information, in *any* case. As for the structure and purpose of the law, the plaintiffs noted that FISA established a means to challenge unauthorized electronic surveillance through civil litigation, and that the FBI's reading of § 1806(f) would essentially prevent courts from adjudicating such cases. That, in turn, would subvert the purpose of FISA itself: reining in unilateral and unreviewable executive branch surveillance.[94]

On the constitutional question, the plaintiffs disputed the government's characterization of the privilege. They argued that the *Reynolds* version of the privilege is squarely rooted in the common law and not the Constitution. They also pointed out that the government could choose whether to present the privileged information in its defense, and because the government retained the option of nondisclosure, there could be no infringement on whatever constitutional authority the president might have.

[94] The Brennan Center for Justice, joined by several other organizations, submitted an amicus brief underscoring this conclusion. The brief demonstrated that the primary alternative means for challenging unlawful FISA surveillance—review by the Foreign Intelligence Surveillance Court (FISC) and challenges to the government's evidence in criminal proceedings—have proven ineffective. FISC oversight is fatally constrained by the absence of adversarial proceedings and what the FISC itself has called an "institutional lack of candor" on the government's part. In criminal cases, the government has frequently failed to comply with its statutory obligation to notify defendants when it relies on evidence "obtained or derived" from FISA surveillance; even when such notification occurs, defendants cannot meaningfully challenge the surveillance because they are not permitted to see the underlying materials. Accordingly, if civil litigation were effectively foreclosed through the government's reading of § 1806(f), there would be no meaningful avenues left for holding the government accountable. See Br. for Brennan Center for Justice et al. as Amici Curiae In Support of Respondents, FBI v. Fazaga, 142 S. Ct. 1051 (No. 20-828), https://bit.ly/3JmQgeF.

The district court essentially punted on the question, holding (erroneously) that § 1806(f) applies only to claims alleging violations of FISA, whereas the government had asserted the state secrets privilege only with respect to the plaintiffs' religious freedom claims.[95] It nonetheless dismissed *all* the plaintiffs' claims based on the state secrets privilege, even though the government had not sought this remedy.

On appeal, the Ninth Circuit clarified that § 1806(f) applies in any case involving a challenge to the lawfulness or use of electronic surveillance, "whether the challenge is under FISA itself, the Constitution, or any other law."[96] It went on to side with the plaintiffs/appellants in their interpretation of the provision. Relying on the statute's text, structure, legislative history, and overall purpose, the panel ruled that § 1806(f) is not limited to instances in which the government seeks to introduce evidence and the nongovernment party seeks to suppress it. Moreover, it concluded that "Congress intended FISA to displace the state secrets privilege and its dismissal remedy with respect to electronic surveillance."[97] The panel acknowledged that the privilege "may have a constitutional core or constitutional overtones," but emphasized that, "at bottom, it is an evidentiary rule rooted in common law, *not* constitutional law."[98] To regulate a common-law privilege, Congress need only "speak[] directly to the question otherwise answered by federal common law,"[99] and Congress had done that through § 1806(f)—a provision that clearly establishes procedures for handling information that could harm national security if disclosed through litigation.

B. The Supreme Court's Incoherent Resolution

The Supreme Court granted certiorari "to decide whether § 1806(f) displaces the state secrets privilege."[100] The respondents, however, raised an additional issue. They argued that even if FISA's procedures did not control, the district court erred in holding that dismissal is

[95] Fazaga v. FBI, 884 F. Supp. 2d 1022, 1037–38 (C.D. Cal. 2012).

[96] Fazaga v. FBI, 965 F.3d 1015, 1052 (9th Cir. 2020).

[97] *Id.*

[98] *Id.* at 1045.

[99] *Id.* at 1044 (emphasis, internal quotation marks, and alterations omitted).

[100] 142 S. Ct. at 2720.

appropriate when the government requires privileged evidence to mount a defense. The respondents had not briefed this issue in the courts below—and those courts therefore had not addressed it—because it was foreclosed by Ninth Circuit precedent, but they offered it before the Supreme Court as an alternative ground for affirmance.

The Supreme Court thus appeared to have two options for resolving the case. First, it could rule on the correct interpretation of FISA—a decision that would determine whether civil lawsuits constitute a viable means of challenging unlawful foreign intelligence surveillance, or whether courts would effectively lose the ability to hold the government accountable for such violations. This approach might also require the Court to weigh in on whether the privilege has "constitutional overtones" and how that affects Congress's ability to regulate its exercise. Alternatively, the Court could hold that the state secrets privilege, outside the *Totten* contract context, should be treated like other evidentiary privileges, resulting only in the removal of the privileged evidence from the case. Such a ruling would return the privilege to its origins and help ensure that national security policies cannot categorically escape judicial review.

The Court did neither. Instead, it held that, "even as interpreted by respondents"—and the Court expressly declined to decide which party's interpretation was correct—FISA "does not displace the state secrets privilege."[101] It reached that conclusion because, in the Court's estimation, "nothing about the operation of that provision is at all incompatible with the state secrets privilege."[102] In other words, neither approach displaced the other; they could simply (the Court posited) coexist. Having thus disposed of the FISA question, the Court remanded the case for unspecified "further proceedings consistent with this opinion."[103]

The Court's conclusion that FISA and the state secrets privilege effectively operate on separate tracks was based on several observations. First, it asserted that "the state secrets privilege will not be invoked in the great majority of cases in which § 1806(f) is triggered," as that provision "is most likely to come into play when the Government seeks to use FISA evidence in a judicial or administrative proceeding, as

[101] Fazaga, 142 S. Ct. at 1060.

[102] *Id.* at 1061.

[103] *Id.* at 1063.

the Government will obviously not invoke the state secrets privilege to block disclosure of information that it wishes to use."[104]

This statement betrays the Court's lack of familiarity with how the government actually uses FISA surveillance in criminal cases. Although FISA requires the government to notify defendants when using evidence "obtained or derived from" FISA surveillance,[105] the government historically has managed to avoid that obligation through a creative interpretation of the words "derived from."[106] In particular, the government engages in a well-documented practice of "parallel construction," using less controversial authorities to recreate evidence obtained under FISA and thus avoiding notification.[107] In such cases, the government is simultaneously using FISA-derived evidence *and* attempting to shield any materials that would reveal the role played by FISA.

The Court's next set of reasons for concluding that "there is no clash between § 1806(f) and the state secrets privilege" was that "[t]he statute and the privilege (1) require courts to conduct different inquiries, (2) authorize courts to award different forms of relief, and (3) direct the parties and the courts to follow different procedures."[108] On the first point, the Court noted that § 1806(f) does not allow the court to assess the validity of the government's claim of national security harm; rather, the court must assume that the information is sensitive and determine whether it reveals unlawful surveillance. By contrast, the state secrets privilege requires courts to determine whether disclosure of the information would indeed harm national security; on the other hand, it does not authorize or require an assessment of whether the information indicates unlawful government conduct.

On the second point, the Court observed that the state secrets privilege, unlike § 1806(f), "sometimes authorizes district courts to dismiss claims on the pleadings."[109] The Court declined to address what circumstances, beyond those presented in *Totten*, would justify

[104] *Id.* at 1061.

[105] 50 U.S.C. § 1806(c) (2018).

[106] See Patrick C. Toomey, Why Aren't Criminal Defendants Getting Notice of Section 602 Surveillance—Again?, Just Security (Dec. 11, 2015), https://bit.ly/3d0uSQj.

[107] See Human Rights Watch, Dark Side: Secret Origins of Evidence in US Criminal Cases (Jan. 9, 2018), https://bit.ly/3SkllDJ.

[108] Fazaga, 142 S. Ct. at 1061.

[109] *Id.* at 1062.

dismissal, leaving the central controversy posed by the state secrets privilege unresolved.

On the third point, the Court highlighted certain differences between § 1806(f) proceedings and the proceedings that accompany assertions of the state secrets privilege. First, § 1806(f) is triggered by the attorney general, while the state secrets privilege is invoked by the head of the relevant agency. Second, under § 1806(f), the court must review, *in camera* and *ex parte*, such materials as are necessary to determine the lawfulness of the surveillance. By contrast, when the government invokes the state secrets privilege, a review of the information "even by the judge alone, in chambers" should not take place if the court is satisfied, "from all the circumstances of the case," that there is a "reasonable danger" that compulsion of the evidence would harm national security.[110]

The Court's conclusion that § 1806(f) and the state secrets privilege do not conflict because they operate differently borders on the nonsensical. The clash between § 1806(f) and the state secrets privilege exists precisely *because* they require the courts to do different things when faced with the same threshold circumstance—namely, information that could harm national security if disclosed through litigation. Critically, the Court identified no substantive difference between the type of information addressed by § 1806(f) and the state secrets privilege; both apply to information that allegedly requires protection in the interest of national security. What differs is how the court should respond to such a claim, both in terms of the procedures it applies and the relief it grants.

Those differences are what render § 1806(f) and state secrets fundamentally incompatible. A court cannot both rule on the validity of a claim of national security harm (state secrets) and not rule on it (§ 1806(f)). It cannot both assess whether sensitive information reveals unlawful surveillance (§ 1806(f)) and not make that assessment (state secrets). It cannot both review sensitive materials *in camera* and *ex parte* (§ 1806(f)) and refrain from such review (state secrets). It cannot both grant relief to the nongovernment party (§ 1806(f)) and dismiss that party's claims (state secrets).

In this regard, it might have been a poor choice for the respondents to frame § 1806(f) as "displacing" the state secrets privilege. That characterization obscures the fact that the information addressed in

[110] Reynolds, 345 U.S. at 10.

§ 1806(f) *is* information subject to the state secrets privilege—namely, information that would allegedly harm national security if disclosed through litigation. Section 1806(f) does not displace the privilege so much as it establishes procedures courts should follow when faced with claims of privilege in cases involving electronic surveillance. As the district court put it in *Jewel v. NSA*, one of the previous cases addressing this issue, § 1806(f) "is, in effect, a 'codification of the state secrets privilege for purposes of relevant cases under FISA, as modified to reflect Congress's precise directive to the federal courts for the handling of [electronic surveillance] materials and information with purported national security implications.'"[111] Viewed in such a manner, it becomes clear that the procedures set forth in § 1806(f) and the procedures established in the common law cannot coexist.

Going forward, any time information that may be subject to the state secrets privilege is at issue in electronic surveillance cases, the government will simply choose which set of procedures gives it the greater litigation advantage. If the government believes the information will help its case—for instance, if it seeks to introduce FISA-derived evidence against a criminal defendant (and has not obscured the evidence's origins through parallel construction)—it will file an affidavit signed by the attorney general and ask the court to proceed under § 1806(f). If, however, the information would give the nongovernment party an advantage—likely because it reveals unlawful surveillance—the government will instead file an affidavit signed by the head of the relevant agency asserting the state secrets privilege.

That outcome is bad enough. Among other things, it eviscerates the availability of civil litigation to challenge unlawful surveillance just as surely as would a ruling that adopted the government's cramped interpretation of § 1806(f). The shortcomings of the Court's opinion become even more clear, however, when one considers how district courts will apply the ruling in future cases involving challenges to unlawful surveillance by the Department of Justice or its components. The government will surely file an affidavit invoking the state secrets privilege and claiming that information about the surveillance cannot be disclosed without harm to national security. But because the head of the defendant agency happens to be the attorney general, that same affidavit should trigger the procedures set

[111] Jewel, 965 F. Supp. 2d at 1106 (quoting In re NSA, 564 F. Supp. 2d at 1119).

forth in § 1806(f). As the Supreme Court so clearly outlined, those are different procedures. Which will the court follow?[112]

Had the Court acknowledged that § 1806(f) and the common law provide different and often conflicting ways of handling sensitive national security information in litigation involving electronic surveillance, it would have had to decide which set of procedures must prevail. The answer would be clear: If Congress has directly weighed in on matters that would otherwise be governed by the common law, the common law must yield.[113] Moreover, even if the Court were to hold that the state secrets privilege is squarely rooted in Article II, that would not weigh against the application of § 1806(f). Congress may restrict the president's exercise of Article II authority unless that authority rests solely with the president. Even Justice Brett Kavanaugh, whose questions at oral argument made clear his belief that the state secrets privilege is rooted in Article II, expressed "real doubts" as to whether the president's authority in this area is "exclusive and preclusive."[114]

V. Conclusion: The Need for Congressional Action

As *Zubaydah* and *Fazaga* show, the Supreme Court is in no hurry to resolve the main questions triggered by lower courts' decisions over the past 20 years. We are no closer to knowing when the Court thinks dismissal is an appropriate remedy in a case involving a *Reynolds* claim, or the extent to which the Court views the privilege as rooted in the Constitution. Moreover, we are left with little clarity as to how courts should apply *Fazaga* in future cases involving electronic surveillance by the Department of Justice or its components.

The solution is for Congress to step in and resolve these issues. As noted above, even if the privilege has constitutional dimensions,

[112] Indeed, it is unclear how the district court in *Fazaga* itself should proceed. The district court had held that § 1806(f) does not apply to claims brought under laws other than FISA. The Ninth Circuit disagreed, holding that § 1806(f) applies to any case where FISA surveillance is at issue, regardless of the nature of the claims. The Supreme Court does not appear to have disturbed that aspect of the Ninth Circuit's decision. Accordingly, on remand, the district court presumably must decide which set of procedures to follow in response to the attorney general's affidavit.

[113] See, e.g., Pasquantino v. United States, 544 U.S. 349, 359 (2005).

[114] Tr. of Oral Arg. at 124, FBI v. Fazaga, 142 S. Ct. 1051 (2022) (No. 20-828).

Congress may regulate the privilege's exercise in light of Congress's own authority to act in the areas of national security and access to information by the courts and the public.[115] Congress's reforms should be centered around two principles: treating the state secrets doctrine as an evidentiary privilege and ensuring that judicial deference does not turn into judicial abdication. The following measures would put those principles into practice.

First, Congress should prohibit rulings that are based on *predictions* about what the evidence might be, rather than an assessment of the actual evidence. Accordingly, no case should be dismissed based on the privilege before the parties have had a chance to conduct discovery and identify the relevant evidence that will be used in the case. If responding to a discovery request would entail revealing information the government asserts is privileged, the court may rule on the privilege claim in that context.

Second, Congress should ensure that courts scrutinize claims of privilege more carefully than they have done to date—not for the purpose of questioning national security judgments, but for the purpose of assessing whether national security is in fact the basis for the claim. There should be two facets to this increased scrutiny:

- Congress should require courts to review the evidence itself, or a sample of the evidence if the total amount is too voluminous, in all cases. This contradicts the Supreme Court's guidance in *Reynolds*. Whether the privilege is viewed as a common-law privilege or a constitutional one, however, Congress is entitled to modify its implementation as long as it is acting within its own constitutional authorities. It need only be clear about its intent to do so.
- Congress should direct the courts to use the many tools at their disposal to make the process as adversarial as possible. Congress can look to the Classified Information Procedures Act[116] (CIPA) as a model: the law contemplates various ways of protecting classified information in an adversary setting. For instance, in cases where disclosure to the nongovernment

[115] See generally Vicki Divoll, The "Full Access Doctrine": Congress's Constitutional Entitlement to National Security Information from the Executive, 34 Harv. J.L. & Pub. Pol'y 493 (2011).

[116] Pub. L. No. 96-456 (1980) (codified as amended at 18 U.S.C. Appendix §§ 1–16).

> party and/or that party's counsel would risk national security harm even with protective orders in place, courts may appoint cleared counsel to represent the nongovernment party in the proceedings.

Third, Congress should similarly take a page from CIPA in fashioning remedies when privileged information is vital to either party's case. Where possible, courts should order nonprivileged substitutes for the privileged evidence, such as redacted versions, summaries, or admissions of fact that steer clear of privileged information. Only if no adequate substitute is possible, and only if plaintiffs lack sufficient nonprivileged evidence to make out a prima facie case, should the court dismiss the lawsuit. In civil cases where the defendant is the government, the government's need for privileged evidence to mount a defense should not justify dismissal of the claim. Such an outcome is inconsistent with how evidentiary privileges are treated in other contexts, and it ignores the fact that the government can always choose which evidence to present in its defense.

Finally, Congress should amend § 1806(f) to incorporate by reference the more robust judicial review procedures described above, while stating clearly that in cases where the court finds that disclosure would harm national security, it must determine the lawfulness of the surveillance described in the privileged materials.

Many of these reforms are embodied in the State Secrets Protection Act, first introduced by Senator Ted Kennedy and Representative Jerrold Nadler in 2008.[117] Since that time, the courts have continued to struggle with the privilege. The Supreme Court finally has weighed in, with two decisions that raise more questions than they answer. There is no reason for Congress to wait any longer. Legislation is needed to prevent national security policies from entering an accountability-free zone in which judicial review is effectively unavailable, no matter how grievous or unconstitutional the wrongs inflicted.

[117] S. 2533, 110th Cong. (2008); H.R. 5607, 110th Cong. (2008).