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## COMMENTS

### NO APPETITE FOR CHANGE: THE SUPREME COURT BUTTRESSES THE STATE SECRETS PRIVILEGE, TWICE

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Yassir Fazaga and Zayn al-Abidin Muhammad Husayn are strikingly different people. Fazaga is a well-respected American imam whose mosque in southern California became the target for a muscle-bound FBI informant posing as a personal trainer determined to find a congregant who wanted to bring armed jihad to the United States.<sup>1</sup> Husayn — better known as “Abu Zubaydah” — was born in Saudi Arabia and is currently held as an enemy combatant at Guantanamo Bay, famous both for his role facilitating the recruitment and training of would-be mujahideen in Afghanistan and for suffering extensive waterboarding (among other things) while in CIA custody.<sup>2</sup> But Fazaga and Abu Zubaydah have this in common: both pursued civil litigation concerning the legality of the U.S. government’s national security activities relating to terrorism, both encountered the potentially fatal obstacle known as the state secrets privilege, and both were before the Supreme Court during the October 2021 Term as a result.<sup>3</sup>

Supreme Court cases touching on the privilege are rare, and to see two taken up at once was remarkable.<sup>4</sup> The privilege enables the government to foreclose discovery or usage of information that might be critical to a lawsuit, and in some instances can result in outright dismissal of a case.<sup>5</sup> These are draconian consequences for private litigants

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<sup>1</sup> See Sanya Mansoor, “Who Else Is Spying on Me?” *Muslim Americans Bring the Fight Against Surveillance to the Supreme Court*, TIME (Sept. 16, 2021, 1:13 PM), <https://time.com/6097712/muslim-american-surveillance-supreme-court-sept-11> [<https://perma.cc/D7PP-9Q26>].

<sup>2</sup> See ALI SOUFAN WITH DANIEL FREEDMAN, THE BLACK BANNERS (DECLASSIFIED): HOW TORTURE DERAILED THE WAR ON TERROR AFTER 9/11, at 377–89 (2020).

<sup>3</sup> Compare *FBI v. Fazaga*, 142 S. Ct. 1051 (2022), with *United States v. Husayn (Zubaydah)*, 142 S. Ct. 959 (2022).

<sup>4</sup> The four earlier examples were *Totten v. United States*, 92 U.S. 105, 107 (1876), originating the idea that a claim might have to be dismissed because its subject matter — in that case an espionage contract — required secrecy; *United States v. Reynolds*, 345 U.S. 1, 9–10 (1953), establishing the modern metes and bounds of the state secrets privilege in connection with a discovery dispute; *Tenet v. Doe*, 544 U.S. 1, 8–11 (2005), holding that the very subject matter of a contract claim for espionage services implicated obligations of secrecy that required dismissal; and *General Dynamics Corp. v. United States*, 563 U.S. 478, 490 (2011), holding the same for a defense contractor’s claims.

<sup>5</sup> See Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249, 1253 (2007).

who may have legitimate claims — including claims against the government itself. In this sense, the privilege sits at the heart of a dilemma. On one hand, the United States aspires to the rule of law, with an adversarial system of civil litigation and judicial review playing critical roles in the pursuit of that aspiration. On the other hand, the United States maintains an array of national security enterprises — including military, diplomatic, and intelligence activities and agencies — that depend for their efficacy to some extent on the preservation of secrecy.<sup>6</sup> These two broad interests come into conflict when someone pursues litigation for redress of alleged harms committed by government agents in the course of national security activities.<sup>7</sup> Our system is chock full of doctrines and devices that mediate this conflict.<sup>8</sup> It is fair to say that they tilt, on the whole, decidedly in favor of preserving secrecy. The state secrets privilege is exhibit A for that proposition.

To be sure, civil suits are not the only mechanisms through which to pursue and encourage legal compliance in the national security setting. Other important mechanisms include internal safeguards of the executive branch itself (including ex ante and ex post review by general counsel offices, inspectors general, interagency committees, and specialized agencies);<sup>9</sup> oversight from congressional committees;<sup>10</sup> and leaks to the media (whether from whistleblowers or rivals) that might galvanize

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<sup>6</sup> See, e.g., Joshua Rovner, *The Blessings of Secrecy*, WAR ON THE ROCKS (Feb. 11, 2020), <https://warontherocks.com/2020/02/the-blessings-of-secrecy> [<https://perma.cc/H3A3-QL82>].

<sup>7</sup> See *Fazaga*, 142 S. Ct. at 1061; *Zubaydah*, 142 S. Ct. at 962.

<sup>8</sup> To name a few: Immunity doctrines abound. See, e.g., *Halperin v. Kissinger*, 807 F.2d 180, 183–88 (D.C. Cir. 1986) (describing qualified immunity in the context of a *Bivens* action alleging Fourth Amendment violations in the form of national security wiretaps). Standing might be hard to prove. See, e.g., *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 402–03 (2013) (finding that would-be plaintiffs challenging NSA surveillance activities lacked standing). Evidence might be exceedingly difficult to obtain as a practical matter. See, e.g., Kenneth Watkin, *The Search for Justice: Military Collection of Evidence on the Battlefield*, PKI GLOB. JUST. J. (July 22, 2020), <https://globaljustice.queenslaw.ca/news/the-search-for-justice-military-collection-of-evidence-on-the-battlefield> [<https://perma.cc/6H3D-7H2X>] (discussing difficulties that militaries themselves face with respect to battlefield evidence collection). Justiciability complications might arise. See HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 218–24 (1990) (discussing such arguments).

<sup>9</sup> See, e.g., GARRETT HATCH, CONG. RSCH. SERV., RL34385, *PRIVACY AND CIVIL LIBERTIES OVERSIGHT BOARD: NEW INDEPENDENT AGENCY STATUS* 6 (2012); Rebecca Ingber, *The Obama War Powers Legacy and the Internal Forces that Entrench Executive Power*, 110 AM. J. INT’L L. 680, 692 (2016) (describing internal executive branch legal-review mechanisms, some more formal in institutional structure than others); Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559, 1562 (2007); Margo Schlanger, *Offices of Goodness: Influence Without Authority in Federal Agencies*, 36 CARDOZO L. REV. 53, 116–17 (2014) (providing a typology and analysis of entities such as Privacy and Civil Liberties Oversight officers).

<sup>10</sup> See, e.g., L. BRITT SNIDER, *THE AGENCY AND THE HILL: CIA’S RELATIONSHIP WITH CONGRESS*, 1946–2004 (2008).

public opinion (and thus also the aforementioned executive and legislative mechanisms).<sup>11</sup> But even at their best, there is something missing from these devices in comparison to the prospect of a lawsuit that results in a judgment. Perhaps because of the centrality of courts and litigation in our culture and conscience, a judgment of wrongdoing in court arguably has the potential to land louder, to have greater demonstrative and cathartic effect. Doctrines that tend to foreclose this prospect may be necessary, but they should receive recurring scrutiny and retailoring in order to improve the chances that such harsh effects are sufficiently justified in light of ever-evolving technological, cultural, and strategic circumstances, not to mention lessons learned from experience. The two cases before the Court last Term — *United States v. Husayn (Zubaydah)*<sup>12</sup> and *FBI v. Fazaga*<sup>13</sup> — were opportunities for just such a thoughtful reconsideration, but neither ruling delivered on this potential.

*Zubaydah* was particularly well positioned for impact. The case presented the question whether an erstwhile state secret might lose its privileged status altogether, against the government's wishes, due to the ubiquity of public knowledge about the facts in question.<sup>14</sup> Put another way: Should the government really continue to reap the benefits of the privilege (including, in some cases, the ability to fend off litigation altogether, regardless of the merits of a person's claims) where everyone who cares about the matter knows full well what happened, based simply on a stubborn refusal by the government to own up to the matter in formal terms? In a world in which information about classified matters leaks with regularity, and where leaked secrets in any event become public thanks to the constantly expanding utility of open-source intelligence,<sup>15</sup> this question has long loomed large.

It is not surprising, perhaps, that the Court declined this chance to open the door wider for civil suits against the government for its national security activities, rejecting the notion of de facto waivers of the privilege. But what *is* surprising are the various doctrinal confusions that the Court introduced into the privilege's doctrinal framework — quite unnecessarily — in the course of reaching this conclusion. Given how rare the Court's interventions relating to the privilege have been, it is a shame that this one will leave the doctrinal details less, rather than more, clear.

*Fazaga* did at least settle an important question relating to the state secrets privilege: whether Congress had preempted the privilege in a

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<sup>11</sup> See, e.g., Avril Haines, *Fighting for Balance*, in NATIONAL SECURITY, LEAKS AND FREEDOM OF THE PRESS: THE PENTAGON PAPERS FIFTY YEARS ON 1, 32 (Lee C. Bollinger & Geoffrey R. Stone eds., 2021).

<sup>12</sup> 142 S. Ct. 959 (2022).

<sup>13</sup> 142 S. Ct. 1051 (2022).

<sup>14</sup> *Zubaydah*, 142 S. Ct. at 964.

<sup>15</sup> See, e.g., HAMILTON BEAN, NO MORE SECRETS: OPEN SOURCE INFORMATION AND THE RESHAPING OF U.S. INTELLIGENCE 2 (2011).

narrow but potentially impactful way when it created section 106 of the Foreign Intelligence Surveillance Act of 1978<sup>16</sup> (FISA).<sup>17</sup> The plain language of section 106 unquestionably covers the situation in which the government proposes to use FISA-derived evidence at trial and defendants move to suppress it on the ground that it was obtained illegally. Could section 106 do the same for a civil plaintiff suing the government for allegedly illegal electronic-surveillance activity, though? If so, section 106 might well turn out to be a font of litigation of a rare sort, opening the door to lawsuits contesting foreign-intelligence collection activities coming within FISA's purview. But the Supreme Court was having none of it; with unanimity but without a compelling argument, the Court slammed the door on such arguments.<sup>18</sup>

Taken together, *Zubaydah* and *Fazaga* were significant victories for the government. Those interested in vigorous enforcement of the legal boundaries governing America's national security activities are left to ponder alternatives. One option is to pursue expansion or enhancement of the many nonjudicial mechanisms of oversight and compliance associated with national security activities. Another is to revive the currently moribund project of statutory reform of the privilege itself.

Part I opens with a thumbnail sketch of the origins and evolution of the privilege, placing the new rulings in context by tracing the privilege's roots from the early Republic forward. This overview provides critical context for all that follows. Part II then explores *Zubaydah*, highlighting the extraordinary underlying facts of that case, the unlikely procedural path that led to the Court's decision, and the subtle but important problems with the Court's analysis. Part III turns to *Fazaga*, bringing the reader through the strange world of "Operation Flex," through the complexities of FISA's potential intersection with the privilege, and on to the Court's unanimous — yet quite debatable — analysis. Part IV concludes with observations about the implications of these decisions for the future of efforts to ensure that the nation's national security activities are subject to, not immune from, legal constraint.

#### I. THE ORIGINS AND EVOLUTION OF THE STATE SECRETS PRIVILEGE

Both to appreciate what might have occurred in these cases, and especially to bring a critical lens to bear on what did actually occur, it helps to begin with an overview of the state secrets privilege as things stood going into the Court's October 2021 Term. Hence the following thumbnail sketch of the privilege's history, nature, and friction points.

<sup>16</sup> Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended in scattered sections of 50 U.S.C.).

<sup>17</sup> *Fazaga*, 142 S. Ct. at 1060.

<sup>18</sup> *See id.* at 1055.

The privilege emerged in U.S. legal history in classic common law fashion, meaning in practical terms that it was brought forth through the combined creative efforts of judges and the treatise writers who distilled their works.<sup>19</sup> In the early nineteenth century, English authors of evidence treatises — the only games in town for American lawyers until the mid-nineteenth century — noted that English judges at times had excluded evidence on the ground that admission would risk harm to state interests due to the sensitivity of the information contained therein.<sup>20</sup> On this basis, the treatise authors identified a “matters of state” privilege alongside the more familiar ones, such as the attorney-client privilege.<sup>21</sup> The first major American treatise on evidence law built on this foundation, coining the “secrets of state” label.<sup>22</sup>

To this point, the actual American case law on this matter was gossamer thin. Hints and traces of the privilege were attributed to events that had unfolded in the prosecution of Aaron Burr, most notably, but beyond that there was little.<sup>23</sup> This is unsurprising, given both the limited scope of civil litigation against the government in those decades and likewise the limited size of what we might today call the national security establishment. Then came the Supreme Court’s 1876 ruling in *Totten v. United States*,<sup>24</sup> where the Court at first appeared poised to rule on whether President Abraham Lincoln had possessed the authority necessary to make binding oral contracts with espionage agents during the Civil War.<sup>25</sup> The Court focused instead on another question and asked whether it was proper for the estate of an alleged spy to try to bring a breach of contract claim regarding a contract that was itself supposed to be a secret.<sup>26</sup> The Court compared the situation to one in which a suit required exposure of information protected by attorney-client and doctor-patient privileges.<sup>27</sup> In a ruling that quite directly subordinated the potential rights of the plaintiff to the demands of secrecy, the Court held that the suit had to be dismissed, as the very subject matter of the action was itself a secret.<sup>28</sup>

The twentieth century brought with it ever more occasions in which lawsuits might clash with the government’s national security / secrecy

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<sup>19</sup> I tell the tale at great length in Chesney, *supra* note 5, at 1270–307.

<sup>20</sup> *Id.* at 1273–76 and sources cited therein.

<sup>21</sup> *Id.* at 1275–76 (quoting HENRY ROSCOE, A DIGEST OF THE LAW OF EVIDENCE IN CRIMINAL CASES WITH NOTES AND REFERENCES TO AMERICAN DECISIONS, AND TO THE ENGLISH COMMON LAW AND ECCLESIASTICAL REPORTS 148 (George Sharswood ed., 1836)).

<sup>22</sup> *Id.* at 1276 (emphasis omitted) (quoting 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 236, at 328 (10th ed. Boston, Little, Brown & Co. 1854)).

<sup>23</sup> *See id.* at 1272–77 (discussing *United States v. Burr*, 25 F. Cas. 30 (C.C.D. Va. 1807) (No. 14,692d)).

<sup>24</sup> 92 U.S. 105 (1876).

<sup>25</sup> *Id.* at 106.

<sup>26</sup> *Id.* at 105–06.

<sup>27</sup> *Id.* at 107.

<sup>28</sup> *Id.*

interests. As the sinews of war became more industrialized, for example, defense contractors clashed over intellectual property matters.<sup>29</sup> The postwar enactment of the Federal Tort Claims Act<sup>30</sup> was a particular boon to litigation arising out of accidents, moreover, as was the sheer immensity of America's national security establishment (particularly the U.S. military, with its massive size and range of activities that might result in accidents).<sup>31</sup>

Those last two considerations made possible the marquee Supreme Court case regarding the state secrets privilege: the 1952 Term's *United States v. Reynolds*.<sup>32</sup> Following the crash of a B-29 in Georgia, some of the victims' spouses brought a negligence action that eventually came to include a discovery dispute over access to the Air Force's postaccident investigative report.<sup>33</sup> After it became clear that the trial judge would require its disclosure, the government began asserting that the investigative report nonetheless had to be withheld lest there be an undue risk of public exposure of information relating to the "development of highly technical and secret military equipment" that had been on board that plane.<sup>34</sup> This set the stage for the Supreme Court to give the definitive doctrinal exposition of the privilege.

First, we have the *Reynolds* formalities, designed by Chief Justice Vinson in an apparent effort to ensure that privilege claims are not made lightly or at the whim of Justice Department litigators looking for leverage in a case.<sup>35</sup> To be successful, a state secrets privilege claim must be expressly made by the leader of the government agency that "has control over" the underlying subject matter, and only if the official attests to having personally considered the question.<sup>36</sup>

Second, we have the substantive test for whether to treat the information in question as privileged. The Court offered a decidedly generous standard (from the government's perspective). The privilege may attach, it explained, where "there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged."<sup>37</sup> That combination — matching a loosely calibrated metric of "reasonable danger" with a loosely bounded notion of military secrets — had the potential to enable the government to invoke the privilege successfully in a broad range of circumstances.

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<sup>29</sup> See Chesney, *supra* note 5, at 1281.

<sup>30</sup> Ch. 753, 60 Stat. 842 (1946) (codified as amended at 28 U.S.C. §§ 1346(b), 2671–2680).

<sup>31</sup> Chesney, *supra* note 5, at 1282–83.

<sup>32</sup> 345 U.S. 1 (1953).

<sup>33</sup> *Id.* at 2–3.

<sup>34</sup> *Reynolds v. United States*, 192 F.2d 987, 990 (3d Cir. 1951), *rev'd*, 345 U.S. 1 (1953); see also Chesney, *supra* note 5, at 1283.

<sup>35</sup> See *Reynolds*, 345 U.S. at 7–9.

<sup>36</sup> *Id.* at 7–8.

<sup>37</sup> *Id.* at 10.

Third, we have the question of deference. The bite of any such test depends not only on the notional scope of its conceptual boundaries but also on the extent to which judges might opt to give deference to the views of the government on whether a given fact pattern falls within that scope. Former Attorney General Robert Jackson had once argued that the courts must give *binding* deference to the executive branch when it came to assessing when production of investigative reports is contrary to public interests,<sup>38</sup> and in *Reynolds* the government advanced a similar claim as to the key predictive factual judgment woven into the test for applying the privilege.<sup>39</sup> Such claims are common in national security litigation, typically resting on twin claims with constitutional overtones: the executive branch is said to have a comparative institutional advantage over the judiciary with respect to the accuracy of such judgments (especially because of its access to the expertise of the military and intelligence officials), and it likewise is claimed to have greater comparative legitimacy (on the theory that Article II in various ways vests ultimate responsibility for national defense and foreign affairs in the Executive).<sup>40</sup> Notably, however, *Reynolds* rejected the idea of binding deference, with the majority emphasizing that the “court itself must determine whether the circumstances are appropriate for the claim of privilege”<sup>41</sup> and that “[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers.”<sup>42</sup>

Fourth, we have the question whether the trial judge, when faced with a privilege invocation, should insist upon an *ex parte*, *in camera* review of the details of the secrets in question before making a determination. The Court in *Reynolds* identified this as a particularly vexed question,<sup>43</sup> and it set forth a doctrinal rule that would turn out to be a font of difficulties.<sup>44</sup> Yes, the court *could* conduct such a review, but it should not actually do so if it could be avoided — and the less need the litigant had for the information in question, the more the court should err on the side of resolving the privilege invocation without requiring such a private review.<sup>45</sup>

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<sup>38</sup> Position of the Exec. Dep’t Regarding Investigative Reps., 40 Op. Att’ys Gen. 45, 46, 49 (1941).

<sup>39</sup> *Reynolds*, 345 U.S. at 6 (“On behalf of the Government, it has been urged that the executive department heads have power to withhold any documents in their custody from judicial view if they deem it to be in the public interest.”).

<sup>40</sup> See generally Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361 (2009).

<sup>41</sup> *Reynolds*, 345 U.S. at 8 (citing *Duncan v. Cammell, Laird & Co.* [1942] AC 624, 642).

<sup>42</sup> *Id.* at 9–10.

<sup>43</sup> See *id.* at 10.

<sup>44</sup> See, e.g., AM. BAR ASS’N, SECTION OF INDIVIDUAL RTS. & RESPS., REVISED REP. 166A, REPORT TO THE HOUSE OF DELEGATES 4–6 (2007) (“challeng[ing]” the *Reynolds* rule on whether judges at times can forgo *in camera* inspection).

<sup>45</sup> *Reynolds*, 345 U.S. at 10–11.

The danger of this approach materializes when the privilege is raised in connection with a particular document, and a question arises as to whether the document in fact contains information that is relevant to the privilege claim. That might sound cynical, but there is a reason for the observation: In *Reynolds* itself, the fatal flight had indeed involved classified radar equipment. But the investigative report in question did not actually refer to that equipment, notwithstanding the government's claims.<sup>46</sup> This should have been exposed early on through an ex parte, in camera review of the report by the judge. Alas, the Supreme Court in a failure of imagination seems not even to have considered the possibility of such a brazen misinvocation of the privilege (or, for that matter, the possibility that the report could simply be redacted). It wrote that the reviewing judge surely could see the importance of protecting the radar information, and that was that.<sup>47</sup> Consider this the original sin of *Reynolds*, a permanent reason for an asterisk in accounts of the Supreme Court's development of doctrinal rules for the privilege.

Fifth and finally, *Reynolds* confirmed the draconian consequences of successful privilege claims. No matter a litigant's need for the evidence in question, the Court wrote, the privilege is absolute when properly invoked.<sup>48</sup> Relying on *Totten*, the Court noted that litigation needs must give way entirely to the demands of secrecy once the privilege attaches, even if this proves fatal to a plaintiff's claims.<sup>49</sup>

With *Reynolds* on the books, it was now relatively clear — for better or worse — that civil litigants would have an exceedingly difficult time bringing claims in circumstances when critical evidence might qualify for the privilege, and especially where the very essence of their complaints might pertain to activities cloaked in the privilege. For a time, this was merely notional, as there just were not that many cases subject to the privilege.<sup>50</sup> Then came the 1970s, however, and a wave of media and congressional revelations about national security activities impacting U.S. citizens.<sup>51</sup> The occasions to sue suddenly were there, and with them came privilege invocations that confirmed the harsh effects of *Reynolds*.<sup>52</sup> And the same thing happened again in the post-9/11 period, as lawsuits relating to counterterrorism activities encountered inevitable state secrets objections.<sup>53</sup>

Ultimately, the high-visibility impact of the privilege on lawsuits arising out of deeply controversial post-9/11 counterterrorism programs

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<sup>46</sup> See LOUIS FISHER, IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE *REYNOLDS* CASE 165–66 (2006).

<sup>47</sup> See *Reynolds*, 345 U.S. at 10.

<sup>48</sup> *Id.* at 11.

<sup>49</sup> *Id.* at 11 & n.26 (citing *Totten v. United States*, 92 U.S. 105 (1876)).

<sup>50</sup> Chesney, *supra* note 5, at 1291.

<sup>51</sup> *Id.* at 1292–93.

<sup>52</sup> See *id.* at 1293–99.

<sup>53</sup> *Id.* at 1299–308.



galvanized attention to — and criticism of — the privilege.<sup>54</sup> With the arrival of the Obama Administration in 2009, in fact, it seemed possible that Congress might intervene with a statute designed to limit the privilege's impact.<sup>55</sup> Perhaps suits should never be dismissed directly à la *Totten*, on the ground that the very subject matter of a suit implicates the privilege. Perhaps judges should always conduct ex parte, in camera reviews of documents as to which the privilege has been invoked. And perhaps judges need to be encouraged not to give undue deference to the predictive judgments of the executive branch in the course of considering whether the information in question poses an undue risk of harm to national security.

The idea of such statutory interventions gave rise to an important separation of powers question: Did Congress have the authority to override *Reynolds* on such matters?<sup>56</sup> If the privilege was a mere creation of federal common law, then the answer plainly would be yes.<sup>57</sup> But what if the privilege is best understood as expressing judicial respect for executive branch prerogatives — that is, as rooted in various aspects of Article II?<sup>58</sup> In the latter case, it would not follow *automatically* that Congress could not adjust the metes and bounds of the privilege, but the question would have to be worked out in litigation.<sup>59</sup>

In the end, it turned out that the Obama Administration itself preferred not to go down the path of legislative reform and eventual judicial confrontation.<sup>60</sup> Rather than fight that battle, the administration announced new Justice Department procedures for invocation of the privilege, including such elements as requiring personal approval from the attorney general and affirmations of high benchmarks for that approval

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<sup>54</sup> See, e.g., FISHER, *supra* note 46, at xii; Laura K. Donohue, *The Shadow of State Secrets*, 159 U. PA. L. REV. 77, 78–79 (2010); Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 FORDHAM L. REV. 1931, 1931 (2007); William G. Weaver & Robert M. Pallitto, *State Secrets and Executive Power*, 120 POL. SCI. Q. 85, 108–12 (2005); Ben Wizner, *Shielded by Secrecy*, L.A. TIMES, Feb. 14, 2008, at A25; Editorial, *Balance of Powers*, S.F. CHRON., Feb. 3, 2008, at E6; Editorial, *Secrets and Rights*, N.Y. TIMES, Feb. 2, 2008, at A18.

<sup>55</sup> In 2008, a bill known as the State Secrets Protection Act began making its way through Congress for the first time. See S. 2533, 110th Cong. (2008). The departure of the Bush Administration and the arrival of the Obama Administration created political conditions more favorable to its passage. For an overview of the State Secrets Protection Act, see generally Robert M. Chesney, *Legislative Reform of the State Secrets Privilege*, 13 ROGER WILLIAMS U. L. REV. 443 (2008).

<sup>56</sup> See Chesney, *supra* note 55, at 448–50.

<sup>57</sup> See *id.* at 448 (noting that Congress has the constitutional authority to prescribe regulations concerning evidence in federal courts).

<sup>58</sup> See *id.* at 448–49 (noting the view that the privilege is rooted in the President's responsibilities as Commander in Chief and for national security).

<sup>59</sup> See *id.* at 450.

<sup>60</sup> Cf. Memorandum from Eric Holder, Att'y Gen., Dep't of Just., to Heads of Exec. Dep'ts, Agencies & Dep't Components 1 (Sept. 23, 2009), <https://www.justice.gov/archive/opa/documents/state-secret-privileges.pdf> [<https://perma.cc/87CR-JCJB>] (announcing to the heads of executive departments and agencies strict new guidelines that limit when the U.S. government can invoke the state secrets privilege in litigation).

to be granted.<sup>61</sup> Perhaps this was a real process improvement. Or perhaps it was mere window dressing. Either way, the fact remains that Congress thereafter took no action on the privilege. It seemed we would have to wait until the congressional stars realigned some day in the future before more substantial changes would become a reality, and before we would find out whether the privilege indeed has Article II roots of a sort that might defeat legislative reform.

Or at least that was how it seemed up until the Supreme Court announced it was going to hear the *Zubaydah* and *Fazaga* cases last year. The Court's perhaps-surprising willingness to hear those cases suddenly suggested very different possibilities. *Zubaydah* had the potential to blow a significant hole through the heart of the state secrets privilege, as the Court could have taken the occasion to say that the privilege was subject to de facto waiver in circumstances where enough leaking occurred so as to make it farcical to continue to insist that there remained a genuine secret at stake.<sup>62</sup> And *Fazaga* forced attention to the fact that Congress might *already* have attempted to override the privilege (albeit only as to certain cases), back in 1978, through an exceedingly obscure clause in a provision of the Foreign Intelligence Surveillance Act<sup>63</sup> — a conclusion that would then bring the Court face-to-face with the separation of powers questions associated with the privilege's underlying nature.<sup>64</sup>

For better or worse, none of these things materialized. What emerged, instead, is a pair of opinions the collective impact of which will be to further constrain the prospects for civil litigation to enforce legal boundaries on national security activities.

## II. *UNITED STATES V. HUSAYN (ZUBAYDAH)*: THE STATE SECRETS PRIVILEGE AS A VEHICLE FOR PRESERVING FOREIGN RELATIONS

### A. *Detention Site Blue*

Zayn al-Abidin Muhammad Husayn was born in Saudi Arabia in 1971 and grew up as a middle-class Palestinian expat.<sup>65</sup> Like many young men of his generation, in the 1980s he found inspiration in the struggle of the mujahideen against the Soviet Union in Afghanistan and eventually went there to take up arms.<sup>66</sup>

After recovering from significant combat injuries, he attended an al Qaeda-operated camp with hopes of formally joining the organization.<sup>67</sup>

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<sup>61</sup> See *id.* at 1–3.

<sup>62</sup> See *Zubaydah*, 142 S. Ct. at 964.

<sup>63</sup> See 50 U.S.C. § 1806(f).

<sup>64</sup> *Fazaga*, 142 S. Ct. at 1059.

<sup>65</sup> SOUFAN WITH FREEDMAN, *supra* note 2, at 377–78.

<sup>66</sup> *Id.* at 379.

<sup>67</sup> *Id.* at 380.

Al Qaeda declined, but Zubaydah stayed in the region, throwing himself into the world of financing, recruitment, training, and fraudulent identity documents that fueled the network of armed groups operating in Afghanistan in the 1990s.<sup>68</sup> He proved to have a knack for that work, ultimately becoming one of the key leaders of the Khaldan training camp, which was not an al Qaeda–operated camp but which did refer its graduates on for more advanced training with al Qaeda.<sup>69</sup> Zubaydah also periodically provided logistical services for al Qaeda members, made use of al Qaeda guesthouses, and had the benefit of al Qaeda’s protection when moving about Afghanistan.<sup>70</sup> Notably, Zubaydah specifically steered Khalid Sheikh Mohammed (KSM) to al Qaeda for help after KSM initially approached him with the outline for what became the 9/11 attacks.<sup>71</sup> Zubaydah was, moreover, an FBI criminal-investigative target because of his connections with the plot to bomb Los Angeles International Airport on New Year’s Eve 1999 and another plot the next year, which would have taken place in Jordan.<sup>72</sup>

Such suspected actions and connections, combined with Zubaydah’s own post-9/11 calls for the armed factions in Afghanistan to unify to fight the United States and its coalition partners, make it understandable that some U.S. government officials came to believe that Zubaydah was a senior al Qaeda leader in his own right.<sup>73</sup> They certainly explain why the U.S. government was eager to capture Zubaydah and learn what he might know about current plots and about the larger al Qaeda network and other armed groups in Afghanistan.<sup>74</sup>

In March 2002, surveillance of Zubaydah’s phone led U.S. officials to believe that Zubaydah might be at a particular apartment in Faisalabad, Pakistan.<sup>75</sup> U.S. and Pakistani personnel descended on the location, and a gunfight broke out.<sup>76</sup> Zubaydah, who was badly wounded with multiple gunshots, was taken captive.<sup>77</sup>

By this stage in the post-9/11 period, the U.S. government had committed to the position that a state of armed conflict existed with al Qaeda and the Taliban, and that captured members of those groups could

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<sup>68</sup> *Id.* at 373, 380. See generally STEVE COLL, *GHOST WARS: THE SECRET HISTORY OF THE CIA, AFGHANISTAN, AND BIN LADEN, FROM THE SOVIET INVASION TO SEPTEMBER 10, 2001* (2004).

<sup>69</sup> S. REP. NO. 113-288, at 21 n.60 (2014).

<sup>70</sup> SOUFAN WITH FREEDMAN, *supra* note 2, at 373–74.

<sup>71</sup> *Id.* at 388.

<sup>72</sup> *Id.* at 373.

<sup>73</sup> S. REP. NO. 113-288, at 21 n.60.

<sup>74</sup> SOUFAN WITH FREEDMAN, *supra* note 2, at 373–74; see also Scott Shane, *Inside a 9/11 Mastermind’s Interrogation*, N.Y. TIMES (June 22, 2008), <https://www.nytimes.com/2008/06/22/washington/22ksm.html> [<https://perma.cc/V6KS-A7KS>].

<sup>75</sup> See Shane, *supra* note 74.

<sup>76</sup> See *id.*

<sup>77</sup> See *id.*

either be held without charges for the duration of hostilities or be prosecuted for war crimes as appropriate.<sup>78</sup> It also had in place military detention facilities both within Afghanistan and at Guantanamo to facilitate this position.<sup>79</sup> But these were not the only disposition options on the table. The U.S. government anticipated capturing detainees who might be in an unusually strong position to reveal details about ongoing plots and other critical intelligence.<sup>80</sup> In such cases, some officials were inclined to use more aggressive forms of interrogation than might be possible in the context of military detention.<sup>81</sup> As a result, the government established a parallel detention-and-interrogation program to be administered by the CIA at secret locations to be established in various places around the globe.<sup>82</sup> These locations would become known as CIA “black sites.”<sup>83</sup> Zubaydah was the first “high-value” detainee to be routed into the new CIA program.<sup>84</sup>

Notwithstanding all of this, the team actually dispatched to conduct the initial interrogation of Zubaydah was not a CIA team employing the so-called Enhanced Interrogation Techniques,<sup>85</sup> but rather a team of FBI Special Agents employing standard law enforcement methods.<sup>86</sup> Special Agent Ali Soufan has written extensively about the experience.<sup>87</sup> He does not name the initial black-site location where it took place, but other sources report that it was in Thailand (at a rough location described by an anonymous former CIA official as a “chicken coop we remodeled”).<sup>88</sup> At any rate, Soufan recounts that Zubaydah was cooperative initially, providing information within an hour that helped disrupt at least one pending plot and then (following an emergency surgery

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<sup>78</sup> Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 12, 2001).

<sup>79</sup> On military detention facilities in Afghanistan, see Emma Graham-Harrison, *US Finally Closes Detention Facility at Bagram Airbase in Afghanistan*, THE GUARDIAN (Dec. 11, 2014, 1:29 PM), <https://www.theguardian.com/world/2014/dec/11/afghanistan-us-bagram-torture-prison> [<https://perma.cc/W6TH-LLN8>]. On the military detention facilities at Guantanamo, see Robert M. Chesney, *Leaving Guantánamo: The Law of International Detainee Transfers*, 40 U. RICH. L. REV. 657 (2006).

<sup>80</sup> See Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST (Nov. 2, 2005), <https://www.washingtonpost.com/archive/politics/2005/11/02/cia-holds-terror-suspects-in-secret-prisons/767fo160-cde4-41f2-a691-ba989990039c> [<https://perma.cc/Y2V6-6Q48>].

<sup>81</sup> See *id.*

<sup>82</sup> See *id.*

<sup>83</sup> *Id.*

<sup>84</sup> Adam Goldman, *The Hidden History of the CIA's Prison in Poland*, WASH. POST (Jan. 23, 2014), [https://www.washingtonpost.com/world/national-security/the-hidden-history-of-the-cias-prison-in-poland/2014/01/23/b77f6ea2-7c6f-11e3-95c6-0a7aa80874bc\\_story.html](https://www.washingtonpost.com/world/national-security/the-hidden-history-of-the-cias-prison-in-poland/2014/01/23/b77f6ea2-7c6f-11e3-95c6-0a7aa80874bc_story.html) [<https://perma.cc/DS95-2TXN>]. At the time, CIA officials believed Zubaydah to be a senior operational planner for al Qaeda. Cf. Priest, *supra* note 80 (referring to Zubaydah as “al Qaeda’s operations chief”).

<sup>85</sup> S. REP. NO. 113-288, at xi (2014).

<sup>86</sup> SOUFAN WITH FREEDMAN, *supra* note 2, at 375, 378–89.

<sup>87</sup> *Id.*

<sup>88</sup> Goldman, *supra* note 84.

that likely saved his life) revealing important information about KSM and his role orchestrating 9/11.<sup>89</sup>

This phase of the interrogation lasted less than two weeks. After ten days, a CIA team arrived, and with it came a plan to pivot immediately to a coercive interrogation model relying on sleep deprivation, nudity, and other harsh measures.<sup>90</sup> It proved ineffective, and after a time Soufan and his partner were permitted to resume some control over the process, employing rapport-based questioning to renewed good effect.<sup>91</sup> But that arrangement did not last. And eventually, after it became clear that the CIA personnel on site planned to place Zubaydah in a coffin for some kind of mock burial, the FBI team withdrew permanently.<sup>92</sup>

Meanwhile, by the end of 2002, the Agency was on the hunt for a better location than the Thailand site, and it appears that it found one in Poland.<sup>93</sup> Some three hours north of Warsaw, not far from Russia's Kaliningrad enclave, Poland's intelligence service had a two-story house in a secluded location.<sup>94</sup> They were willing to let the CIA use it (the CIA paid \$15 million a few months later), and by December 2002 Zubaydah was there.<sup>95</sup> The CIA's code name for the location apparently was Quartz.<sup>96</sup> Critically, however, the U.S. government to this day has never formally acknowledged the location of Quartz in Poland or the cooperation of Polish authorities. When the Senate Select Committee on Intelligence in 2014 produced a massive report on the CIA program, the publicly available portion of the report referred to this location strictly as "Detention Site Blue."<sup>97</sup>

The interrogation methods used by the CIA at Detention Site Blue appear to have gone beyond the ones initially used against Zubaydah in Thailand. They included a number that, alone or in combination, constituted torture, most obviously repeated waterboarding.<sup>98</sup> Zubaydah himself was waterboarded at least eighty-three times.<sup>99</sup> A memorandum from the Justice Department's Office of Legal Counsel concluded otherwise, however, paving the way for the Agency to proceed.<sup>100</sup>

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<sup>89</sup> SOUFAN WITH FREEDMAN, *supra* note 2, at 377–78, 383, 388.

<sup>90</sup> *Id.* at 393–96.

<sup>91</sup> *Id.* at 400–08.

<sup>92</sup> *Id.* at 420–23.

<sup>93</sup> Goldman, *supra* note 84.

<sup>94</sup> *Id.*

<sup>95</sup> *See id.*

<sup>96</sup> *Id.*

<sup>97</sup> S. REP. NO. 113-288, at 67 (2014).

<sup>98</sup> *Id.* at 118; *see also* Carol Rosenberg, *What the C.I.A.'s Torture Program Looked Like to the Tortured*, N.Y. TIMES (Nov. 6, 2021), <https://www.nytimes.com/2019/12/04/us/politics/cia-torture-drawings.html> [<https://perma.cc/EV6L-L7LV>].

<sup>99</sup> S. REP. NO. 113-288, at 118.

<sup>100</sup> *See* JOHN RIZZO, *COMPANY MAN: THIRTY YEARS OF CONTROVERSY AND CRISIS IN THE CIA 192–93* (2014).

Less than a year later, the Agency decided to change locations again.<sup>101</sup> By September 2003, Detention Site Blue was empty.<sup>102</sup> Zubaydah and others were moved onward to other black sites in Romania, Morocco, and Lithuania.<sup>103</sup> Then, in 2005, a story by Dana Priest in the *Washington Post* exposed the general outlines of the black-site program, including Zubaydah's detention.<sup>104</sup> In 2006, President Bush publicly acknowledged the CIA detention program while ordering detainees then in CIA custody to be transferred to military custody at Guantanamo.<sup>105</sup> In 2009, President Obama issued an executive order stating that the CIA should no longer operate any detention program.<sup>106</sup> Zubaydah remains at Guantanamo to this day, among the few dozen legacy cases of detention remaining from the first decade of the war with al Qaeda.<sup>107</sup>

### B. *Lawsuits and Investigations*

Lawyers acting for Zubaydah have not been idle in the years since his arrival at Guantanamo. In 2008, they initiated a habeas corpus petition challenging his ongoing military detention.<sup>108</sup> In 2010, they asked Polish authorities to open a criminal investigation against Polish officials who allegedly had participated in the operation of Detention Site Blue years before.<sup>109</sup> Polish prosecutors invoked the U.S.-Poland Mutual Legal Assistance Treaty<sup>110</sup> (MLAT) in hopes of securing evidence relevant to the investigation, but the United States declined to cooperate;<sup>111</sup> this first round of criminal investigation in Poland fizzled thereafter.<sup>112</sup> In 2013, Zubaydah's lawyers pivoted to the European Court of Human Rights (ECHR), targeting Poland itself for alleged violations of the European Convention on Human Rights in connection with Detention

<sup>101</sup> Goldman, *supra* note 84.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> Priest, *supra* note 80.

<sup>105</sup> See S. REP. NO. 113-288, at 159-60 (2014).

<sup>106</sup> Exec. Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 22, 2009).

<sup>107</sup> See Raymond Bonner, *A Guantanamo Detainee's Case Has Been Languishing Without Action Since 2008. The Supreme Court Wants to Know Why.*, PROPUBLICA (Oct. 7, 2021, 10:40 AM), <https://www.propublica.org/article/a-guantanamo-detainees-case-has-been-languishing-without-action-since-2008-the-supreme-court-wants-to-know-why> [https://perma.cc/BS66-QLXB]; see also *The Guantánamo Docket*, N.Y. TIMES, <https://www.nytimes.com/interactive/2021/us/guantanamo-bay-detainees.html> [https://perma.cc/8QY3-9SLQ].

<sup>108</sup> Petition for Writ of Habeas Corpus, *Husayn v. Gates*, No. 08-cv-01360 (D.D.C. Aug. 6, 2008). That petition remains pending to this day, and it is not clear from the public record why it has lingered so much longer than most, if not all, other Guantanamo habeas cases. See Bonner, *supra* note 107.

<sup>109</sup> *Zubaydah*, 142 S. Ct. at 965.

<sup>110</sup> Treaty Between the United States of America and the Republic of Poland on Mutual Legal Assistance in Criminal Matters, Pol.-U.S., July 10, 1996, T.I.A.S. No. 99-917.1.

<sup>111</sup> Letter from Brian H. Fletcher, Acting Solicitor General, U.S. Dep't. of Just., to Scott S. Harris, Clerk, U.S. Sup. Ct. (Oct. 15, 2021), [https://www.supremecourt.gov/DocketPDF/20/20-827/196599/20211015172617420\\_Letter%2020-827.pdf](https://www.supremecourt.gov/DocketPDF/20/20-827/196599/20211015172617420_Letter%2020-827.pdf) [https://perma.cc/6NKB-AQ28].

<sup>112</sup> See *Zubaydah*, 142 S. Ct. at 965.

Site Blue as well as the failed investigation.<sup>113</sup> The ECHR ultimately agreed, ruling among other things that it was “beyond reasonable doubt” that Zubaydah had been held in Poland and that his treatment amounted to torture.<sup>114</sup>

In response to the ECHR’s judgment, Poland duly reopened its criminal investigation.<sup>115</sup> It mounted another request for the U.S. government to provide evidence, and when that failed again, the investigators turned to Zubaydah and his lawyer for assistance.<sup>116</sup>

What help could they give? For one thing, they could attempt an end run around the limitations of the MLAT process by invoking 28 U.S.C. § 1782. Like the MLAT system, § 1782 is a tool of international judicial cooperation through which testimony and documentary evidence in the United States might be made available for use in a foreign legal proceeding.<sup>117</sup> Unlike the MLAT system, it is a broadly framed and generically available tool that can be employed by any “interested person” seeking to aid a foreign legal proceeding (expressly including “criminal investigations conducted before formal accusation”).<sup>118</sup>

Zubaydah accordingly filed a § 1782 application seeking to compel testimony and documents from James Mitchell and John Jessen, two men who played a critical role in developing and administering so-called “enhanced interrogation” techniques for the CIA.<sup>119</sup> The general thrust of the application was to gather evidence pertaining to three distinct categories of information: Detention Site Blue’s location, the details of what happened to Zubaydah at Detention Site Blue, and details explaining the role played in all of this by Polish personnel.<sup>120</sup> Fatefully, almost all the entries listed in the “Schedule of Documents to Be Produced” expressly reference Poland or mention Polish officials.<sup>121</sup>

Section 1782 expressly preserves all privileges,<sup>122</sup> and so it was no surprise when the government intervened to assert the state secrets privilege.<sup>123</sup> Following the *Reynolds* formalities,<sup>124</sup> the Director of the CIA submitted a declaration setting forth the reasons for believing that the information Zubaydah sought qualified for protection, focusing on the fact that the U.S. government has never officially acknowledged that

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<sup>113</sup> *Husayn (Abu Zubaydah) v. Poland*, App. No. 7511/13, ¶¶ 1–3 (Feb. 16, 2015), <https://hudoc.echr.coe.int/eng?i=001-146047> [<https://perma.cc/8XGM-JM4E>].

<sup>114</sup> *Id.* ¶¶ 419, 496.

<sup>115</sup> *Zubaydah*, 142 S. Ct. at 965.

<sup>116</sup> *Id.*

<sup>117</sup> *See* 28 U.S.C. § 1782(a).

<sup>118</sup> *Id.*

<sup>119</sup> *Zubaydah*, 142 S. Ct. at 964–65.

<sup>120</sup> *Id.* at 988 (Gorsuch, J., dissenting).

<sup>121</sup> *See id.* at 972–73 (majority opinion).

<sup>122</sup> 28 U.S.C. § 1782(a).

<sup>123</sup> *See Zubaydah*, 142 S. Ct. at 966.

<sup>124</sup> *Id.* at 967.

Detention Site Blue was in Poland.<sup>125</sup> Compelling Mitchell and Jessen to testify and produce documents on this point would be tantamount to an official acknowledgement, the government contended.<sup>126</sup> Such acknowledgement, the government then argued, would be quite harmful to the CIA's relationships with its foreign partners, who are told that the United States will not expose their cooperation.<sup>127</sup>

The district court bought this, but only up to a point.<sup>128</sup> It reasoned that details about the involvement of specific Polish personnel qualified for the privilege, but the court rejected the broader proposition that the privilege also should attach to the basic fact that a detention site was operated in Poland.<sup>129</sup> Still, this was enough for the government to win, for in the district court's view there was just no way to employ § 1782 discovery procedures without crossing the line into the forbidden operational details.<sup>130</sup>

The Ninth Circuit saw things differently, for two reasons. First, it concluded that whatever *had* been the case previously, the existence of a CIA-operated detention site in Poland was by now too widely known to permit the government to treat it as a secret protected by the state secrets privilege.<sup>131</sup> In other words, the fact that there still had been no formal acknowledgment by the government was not sufficient.<sup>132</sup>

This was a very significant holding. We live in a time when the ability of governments — of anyone, really — to maintain secrecy seems more limited than ever. The ongoing proliferation of information outlets made possible by the Internet (including burgeoning social media), combined with the increasing collective capacity of people to detect, document, and share information about events around the globe, produces a situation in which secret government activities might be more likely to become known to the public. The fact that U.S. government officials and personnel so frequently leak to the media — or, for the lucky ones, publish memoirs about their deeds and experiences — adds to the informal transparency of it all.<sup>133</sup> From detention sites to drone strikes, the post-9/11 period is packed with examples of not-so-secret secrets. Had

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<sup>125</sup> See *id.* at 966.

<sup>126</sup> See *id.*

<sup>127</sup> *Id.* at 968–69.

<sup>128</sup> See *id.* at 966.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Husayn v. Mitchell*, 938 F.3d 1123, 1134 (9th Cir. 2019).

<sup>132</sup> See *id.* at 1133.

<sup>133</sup> The nature and scope of previously secret information on post-9/11 national security activities, disclosed to and then published by authors of books chronicling those activities, is remarkable. See, e.g., BOB WOODWARD, *BUSH AT WAR*, at xi–xii (2002); BOB WOODWARD, *PLAN OF ATTACK*, at x–xi (2004); BOB WOODWARD, *STATE OF DENIAL* 495 (2006); BOB WOODWARD, *THE WAR WITHIN* 443 (2008); DANIEL KLAIDMAN, *KILL OR CAPTURE: THE WAR ON TERROR AND THE SOUL OF THE OBAMA PRESIDENCY*, at xiii (2012); DAVID SANGER, *CONFRONT AND CONCEAL: OBAMA'S SECRET WARS AND SURPRISING USE OF AMERICAN POWER* 435–36 (2012). Memoirs at times are similar. See, e.g., RIZZO, *supra* note 100, at 303–04.



the Ninth Circuit's de facto waiver theory held up, the impact on prospects for civil suits challenging the legality of national security activities would have been much wider.

The waiver theory was not the only basis for the Ninth Circuit's holding. Second, and in the alternative, the panel reasoned that testimony and documents supplied by Mitchell and Jessen would not in any event constitute forced admissions by the government itself,<sup>134</sup> since the men had been mere contractors.<sup>135</sup> This was an important point for this particular case, but not quite as important an insight in the larger context.

A dozen Ninth Circuit judges favored rehearing en banc, but in the numerous Ninth such numbers are not enough.<sup>136</sup> Yet it did not matter, really, for the Supreme Court granted certiorari and reversed.<sup>137</sup>

### C. *Sowing Seeds of Confusion*

The opinion in *Zubaydah* could have been relatively simple. That is, the Court could have simply stated its disagreement with the Ninth Circuit's de facto waiver concept, while also insisting that Mitchell and Jessen were functionally attributable to the government. And, to be clear, the opinion for the Court by Justice Breyer did both those things.<sup>138</sup> Indeed, it is worth pausing to underscore this central point: the Supreme Court in *Zubaydah* expressly rejected the Ninth Circuit's idea that the privilege at some point is lost simply by virtue of widespread public awareness of what had once been secret.<sup>139</sup> Why? It's not about secrecy at all, really, but rather about the reliability of promises of nondisclosure that our intelligence agencies frequently make to foreign partners in the course of bargaining for cooperation.<sup>140</sup> If it appears to those partners that such promises can be overcome through civil litigation in the event of sufficient public speculation about the United States' relationship with them, the Court reasoned, not only the country in question but others as well will be less inclined to cooperate next time.<sup>141</sup>

The majority did not put the point this way, but it might have: much as the Court in *Totten* prioritized enforcement of a promise of secrecy contained in an espionage employment contract,<sup>142</sup> so too did the Court in *Zubaydah* prioritize enforcement of a promise of secrecy in an espionage liaison agreement with a foreign service.<sup>143</sup>

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<sup>134</sup> *Husayn*, 938 F.3d at 1133.

<sup>135</sup> *Id.* at 1127.

<sup>136</sup> *Husayn v. Mitchell*, 965 F.3d 775, 781 (9th Cir. 2020).

<sup>137</sup> *Zubaydah*, 142 S. Ct. at 964.

<sup>138</sup> *See id.* at 968.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 968–69.

<sup>141</sup> *Id.*

<sup>142</sup> *See Totten v. United States*, 92 U.S. 105, 106 (1876).

<sup>143</sup> *See Zubaydah*, 142 S. Ct. at 968–69.

So much, then, for the Ninth Circuit's innovation and its potential to cut at least a modest-sized swath through the range of cases subject to the privilege. From here, however, the opinion in *Zubaydah* descended into a degree of complexity that likely will make it more difficult in the future for all parties to navigate state secrets cases.

There are two problems. The first has to do with the role of “necessity” in state secrets analysis.<sup>144</sup> The second concerns the consequences once the privilege is found to attach.

Consider first the question of how a litigant's need for the information in question should impact a court's review of a privilege claim. As noted above, this issue played a significant role in *Reynolds* itself.<sup>145</sup> And notwithstanding the original sin of *Reynolds* concerning the *application* of the necessity concept,<sup>146</sup> the Court's abstract account of the *doctrinal rule* on this point was simple enough: the litigant's need matters in the analysis when the reviewing judge is deciding how far to go in testing the government's claims. The greater the need, the greater the lengths the judge should go to in assessing the privilege claim.<sup>147</sup> But in *Zubaydah*, the issue proved to be much more complicated.

The problem flows in the first instance from a partial concurrence from Justice Thomas (joined by Justice Alito).<sup>148</sup> That opinion emphasized a conspicuously different approach to the role of necessity. In particular, Justice Thomas suggested that “Zubaydah's ‘dubious’ need for the discovery he s[ought] require[d] dismissal of his discovery application, regardless of the Government's reasons for invoking the state secrets privilege.”<sup>149</sup> Only after an initial “strong showing” of need, Justice Thomas wrote, should the court put the government to the test on justifying the privilege invocation.<sup>150</sup>

This approach seems plainly wrong as an account of *Reynolds* and might readily enough have been dismissed as such by the majority. But the majority's rejection of Justice Thomas's approach (and, to be clear, the majority did expressly reject it)<sup>151</sup> imported a layer of confusion of its own. Instead of simply stating that necessity should be considered as a calibration factor guiding the *process* employed by the judge when assessing the merits of the government's claim, the majority suggested a two-stage analysis in which the difference between the two stages is more than a little hard to parse. Assuming the *Reynolds* formalities

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<sup>144</sup> *Id.* at 967, 971–72.

<sup>145</sup> *Id.* at 967 (citing *United States v. Reynolds*, 345 U.S. 1, 11 (1953)).

<sup>146</sup> That is, notwithstanding the gross error in which the Court failed to consider the possibility that the postaccident investigative report might not actually contain any reference to the classified radar technology that was the basis for the government's privilege invocation. *See Reynolds*, 345 U.S. at 4–5.

<sup>147</sup> *Id.* at 11.

<sup>148</sup> *Zubaydah*, 142 S. Ct. at 973 (Thomas, J., concurring in part and concurring in the judgment).

<sup>149</sup> *Id.* at 974.

<sup>150</sup> *Id.* at 973 (quoting *Reynolds*, 345 U.S. at 11).

<sup>151</sup> *Id.* at 969–70 (majority opinion).

have been met, the majority said that the judge first should decide whether the circumstances warrant the privilege claim.<sup>152</sup> Then, in a supposedly distinct and subsequent step, the majority said that the judge should take up the issue of necessity and use that factor to calibrate the process of deciding “how deeply to probe the details of, and basis for, the Government’s privilege claim.”<sup>153</sup>

That second step sounds superfluous in light of the first step. As Justice Thomas observed in his concurrence, the majority did not explain how the ultimate object of the analysis at each step differs; as written, both appeared to ask in the end whether the test for the privilege has been satisfied.<sup>154</sup>

Presumably, the majority did in fact mean for readers to perceive some difference. It is possible, for example, that the majority simply meant to call at the first step for some form of prima facie review, to be followed as needed by a more probing assessment calibrated with reference to the litigant’s need for the information. If so, that could have been said in so many words. But even if said clearly, the fact remains that this two-step model is novel, an added layer of complexity beyond what *Reynolds* requested. And it imparts little obvious benefit; better to have left things as a single, integrated step.

And now we come to the second problem with the majority’s analysis. It is one that is brought out with striking force in a dissent by Justice Gorsuch (joined by Justice Sotomayor)<sup>155</sup> and in a partial concurrence by Justice Kagan.<sup>156</sup>

Having found that the privilege does indeed attach to the location of Detention Site Blue in Poland, a majority of the Justices concluded that the § 1782 action must be remanded with instructions to dismiss.<sup>157</sup> This outcome was in lieu of an available alternative: remanding the case for further proceedings in which the testimonial and documentary requests would be reframed in order to exclude all references to the location in Poland or to Polish personnel.

At first blush, the majority’s approach seems perfectly reasonable. The sole purpose of the § 1782 action was to service a Polish criminal investigation, after all, and hence any and all aspects of the discovery might seem inherently tainted, as it were, no matter how cautiously framed and no matter what code names might be used. How else could testimony and documents about the treatment Zubaydah experienced be relevant for the foreign action?

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<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 970 (citing *Reynolds*, 345 U.S. at 10–11).

<sup>154</sup> *See id.* at 977 (Thomas, J., concurring in part and concurring in the judgment).

<sup>155</sup> *Id.* at 998–99 (Gorsuch, J., dissenting).

<sup>156</sup> *Id.* at 983 (Kagan, J., concurring in part and dissenting in part).

<sup>157</sup> *Id.* at 972 (majority opinion).

But there is a problem with this analysis in this particular case. During oral argument, the government had been asked whether it would allow Zubaydah, himself, to simply write about his experiences at Detention Site Blue, in a document for use by Polish authorities.<sup>158</sup> In a letter to the Court following oral argument, the government stated clearly that, yes, Zubaydah could provide the Poles with such a declaration (subject to the usual security screening procedures).<sup>159</sup>

This should have led the majority to agree with Justices Sotomayor, Kagan, and Gorsuch regarding the right path forward at the end of the case. As noted above, the best justification for requiring dismissal rather than an opportunity to reframe the requests more narrowly (so as to avoid direct reference to Poland or Polish personnel) was that the very nature of the action meant that any response at all might be taken as tacit admission that Detention Site Blue was, in fact, in Poland. By that logic, however, the government should have been equally motivated to preclude Zubaydah from sending a declaration for use in the same Polish investigation, for such a declaration would be just as much a tacit admission that events transpired in Poland. That the government would permit such a filing would seem to waive resort to the tacit-admission move as to Mitchell and Jessen too.

But never mind all that. As Zubaydah's counsel observed after the opinion came out, the practical consequence of this particular disagreement is limited.<sup>160</sup> The dismissal following remand will not be with prejudice.<sup>161</sup> Soon, there will be a new § 1782 action, carefully framed to be agnostic as to the location of Detention Site Blue and the role of non-U.S. personnel there. The new filing will focus instead narrowly on what Mitchell and Jessen saw regarding the treatment of Zubaydah during a certain date range (one that Polish prosecutors presumably will have little trouble matching, later, with other evidence establishing when Detention Site Blue operated in Poland).

### III. *FBI v. FAZAGA*: DID CONGRESS PARTIALLY PREEMPT THE STATE SECRETS PRIVILEGE IN 1978?

#### A. *Operation Flex*

Standing before the congregation at the Islamic Center of Irvine to declare his conversion to Islam in 2006, the tall, muscle-bound man who called himself Farouk al-Aziz certainly looked the part of the fitness

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<sup>158</sup> Letter from Brian H. Fletcher, *supra* note 111.

<sup>159</sup> *Id.*

<sup>160</sup> See Joseph Margulies, *In US v. Husayn (Abu Zubaydah), the Supreme Court Calls Torture What It Is*, JUST SEC. (Mar. 11, 2022), <https://www.justsecurity.org/80649/in-us-v-husayn-abu-zubaydah-the-supreme-court-calls-torture-what-it-is> [<https://perma.cc/QEL8-PFTN>] (“[W]e don’t particularly care that there was a site in Poland. We care what happened to Abu Zubaydah between December 2002 and September 2003, regardless of where he was . . .”).

<sup>161</sup> *Zubaydah*, 142 S. Ct. at 972.

instructor he claimed to be.<sup>162</sup> But it was a sham. His real name was Craig Monteilh, and he was there at the behest of the FBI in hopes of stumbling across terrorism-related information.<sup>163</sup>

In the years following 9/11, the FBI (like the federal government writ large) operated on the assumption that al Qaeda and other terrorist groups had networks and emergent plots underway within the United States, and it adopted various strategies to smoke out and disrupt them.<sup>164</sup> One such strategy involved the deployment of undercover informants into Muslim communities.<sup>165</sup>

Such deployments entail familiar risks. The general idea, of course, is that an informant might become privy to a conversation that reveals someone's existing involvement in or inclination toward crime, thereby setting the stage either for an arrest or for further investigation. Not every informant will play this role passively, however. Some, if not most, will use conversational lures — hints or something stronger — in an effort to draw out such clues.<sup>166</sup> And lures at some ineffable point can begin to shade into something stronger — something coercive — that puts the informant into the role of *provocateur*. Thus the classic tension between detection and entrapment in the informant scenario.

Monteilh was no stranger to this game, it seems.<sup>167</sup> He would later claim to have posed in roles ranging from a Russian hitman to an Italian drug dealer.<sup>168</sup> With the look of a character from a *Fast and Furious* film,<sup>169</sup> he seemed an excellent fit for what the FBI had in mind for “Operation Flex” — inserting a supposed fitness trainer into various Orange County mosque communities as a new convert who might use workouts to develop ties to men there.<sup>170</sup>

Monteilh played his role to the hilt, pouring his time into prayers at the mosque and eventually forming friendships with some of the men there.<sup>171</sup> Over time, he began peppering his conversations with questions about jihad in general, and then more specifically about international affairs and the impact of post-9/11 U.S. actions on Muslims

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<sup>162</sup> See Matthew Heller, *Mr. Inconspicuous*, ORANGE COAST MAG. (Nov. 9, 2021), <https://www.orangecoast.com/features/mr-inconspicuous-craig-monteilh> [<https://perma.cc/EX4W-TR78>].

<sup>163</sup> See Mansoor, *supra* note 1.

<sup>164</sup> See, e.g., Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. ON LEGIS. 1, 26–36 (2005).

<sup>165</sup> See Heller, *supra* note 162.

<sup>166</sup> See *id.*

<sup>167</sup> See *The Convert*, THIS AM. LIFE, at 10:36 (Aug. 10, 2012), <https://www.thisamericanlife.org/471/the-convert-2012> [<https://perma.cc/64EQ-9HZ7>] (“The informant in this story is named Craig Monteilh, and like a lot of people who go undercover to catch criminals, he used to be a criminal himself.”).

<sup>168</sup> *Id.* at 11:08.

<sup>169</sup> See *id.* at 12:20 (“[Monteilh is] 6’2”, 260 pounds. It’s not fat. It’s lean body mass. [Monteilh] bench[es] 500 pounds. [Monteilh] ha[s] 21-and-1/2-inch arms.”).

<sup>170</sup> *Id.* at 12:35.

<sup>171</sup> *Id.* at 16:30.

abroad.<sup>172</sup> Ultimately, he even expressly suggested carrying out a bombing in the United States.<sup>173</sup> All the while, he was not only reporting on what people were saying but also recording it surreptitiously<sup>174</sup> — sometimes by placing recording devices around the mosque.<sup>175</sup> No one rose to the bait, however. In fact, his efforts eventually led some of the men to call the FBI to report a seemingly dangerous individual in their midst.<sup>176</sup> Eventually, the Islamic Center went so far as to obtain a restraining order barring Monteilh from its property, which seems to have largely ended Operation Flex.<sup>177</sup>

That might have been the end of the story, but Monteilh soon was under arrest for a seemingly unrelated matter, and he was infuriated that the FBI could not or would not intervene on his behalf.<sup>178</sup> He ended up in prison for a while, emerging around the time that the public was learning from another case that the FBI had used an undercover informant in an Orange County mosque.<sup>179</sup> Monteilh announced that he had been that informant, and the whole story began to emerge, including details of the extensive use of recording devices.<sup>180</sup> A lawsuit against the FBI followed, filed by a group of men including Yassir Fazaga, the imam of a mosque in Mission Viejo that Monteilh had targeted.<sup>181</sup>

The plaintiffs advanced a host of constitutional and statutory claims, including *Bivens* and statutory causes of action linked to the Establishment Clause, the Free Exercise Clause, the equal protection dimension of the Fifth Amendment Due Process Clause, the Fourth Amendment, the Religious Freedom Restoration Act, FISA, and various California tort concepts.<sup>182</sup> The government invoked the state secrets privilege as a ground for dismissal as to most of these claims.<sup>183</sup>

This was hardly the first time the government had invoked the state secrets privilege in hopes of fending off litigation concerning counterterrorism programs.<sup>184</sup> Much of the modern history of the privilege is

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<sup>172</sup> *Id.* at 23:26.

<sup>173</sup> *Id.* at 31:02.

<sup>174</sup> *Id.* at 19:20.

<sup>175</sup> Heller, *supra* note 162.

<sup>176</sup> *The Convert*, *supra* note 167, at 37:26.

<sup>177</sup> Heller, *supra* note 162.

<sup>178</sup> *See id.* (“The agency broke its promise to make the grand-theft charges go away, he says, forcing him to plead guilty and spend eight months in prison ‘for work done at the direction of the FBI.’”).

<sup>179</sup> *See id.* Monteilh served eight months and was released in August 2008. *Id.* On February 24, 2009, an FBI Special Agent testified in a bail hearing for Ahmadullah Niazi that an informant had infiltrated Niazi’s mosque and recorded him planning acts of terrorism. *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> Mansoor, *supra* note 1.

<sup>182</sup> *See* Fazaga v. FBI, 884 F. Supp. 2d 1022, 1033–34 (C.D. Cal. 2012).

<sup>183</sup> *Id.* at 1034.

<sup>184</sup> *See* Chesney, *supra* note 55, at 443 n.1 (citing Hepting v. AT&T Corp., 439 F. Supp. 2d 974 (N.D. Cal. 2006); El-Masri v. United States, 479 F.3d 296 (4th Cir. 2007), in both of which the government invoked the state secrets privilege).

in that vein, in fact.<sup>185</sup> Each time, the harsh trade-off at the heart of the privilege has been on full display.<sup>186</sup> The unvarnished truth illustrated by those cases is this: in order to preserve the formal posture of secrecy associated with a loosely and broadly defined set of national security activities, courts limit or even preclude the use of litigation to ensure those activities are lawful, leaving accountability to other mechanisms such as political and diplomatic pressures.<sup>187</sup>

Or at least that is how it all works as a default matter. But one question that has always lurked in the background is whether Congress could strike a different balance if it wished.<sup>188</sup> As noted above, we came somewhat close to finding out an answer to that question during the closing years of the Bush Administration and the beginning of Obama's time.<sup>189</sup> When the Obama Administration opted to adopt a policy reform in lieu of supporting legislative reform, it seemed we might never learn whether the courts would be willing (as a matter of separated powers) to recognize that Congress has sufficient authority to take such a step.<sup>190</sup>

As it turns out, though, there was an even subtler complexity to this question of congressional power. Perhaps Congress *already* had overridden the privilege, at least for certain specific scenarios relating to electronic surveillance.

### B. FISA Section 106

Enter the *Fazaga* lawsuit. Attorney General Eric Holder had submitted a formal invocation of the state secrets privilege as to several categories of information, including information touching on why an investigation may have been opened, who might be a target, what methods were being used, and what results were obtained.<sup>191</sup> Building on that foundation, the government moved for dismissal of (or, in the alternative, summary judgment on) most of the plaintiffs' claims on state secrets grounds.<sup>192</sup> The plaintiffs countered by invoking a provision of FISA — 50 U.S.C. § 1806(f), also known as FISA section 106(f).<sup>193</sup> According to the plaintiffs, Congress implicitly overrode the state secrets privilege when it enacted that provision.<sup>194</sup>

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<sup>185</sup> Cf. *id.* at 443–44 (“[T]he use of the privilege in connection with [counterterrorism programs] . . . has generated an unprecedented level of controversy, as reflected in litigation, in the media, in the work of interest groups, and in legal scholarship.” (footnotes omitted)).

<sup>186</sup> See Chesney, *supra* note 5, at 1263–70.

<sup>187</sup> See Chesney, *supra* note 55, at 446–47.

<sup>188</sup> See Chesney, *supra* note 5, at 1308–14.

<sup>189</sup> See *supra* note 55 and accompanying text.

<sup>190</sup> See *supra* notes 60–61 and accompanying text.

<sup>191</sup> Declaration of Eric H. Holder, Attorney General of the United States at 1–3, *Fazaga v. FBI*, 884 F. Supp. 2d 1022 (C.D. Cal. 2012) (No. 11-cv-00301).

<sup>192</sup> *Fazaga*, 884 F. Supp. 2d at 1034.

<sup>193</sup> *Id.* at 1037.

<sup>194</sup> *Id.*

To understand how that might be, it helps to begin with some context about FISA itself. Prior to 1978, there were no statutes purporting to regulate how the government collected foreign intelligence.<sup>195</sup> There was simply the Fourth Amendment and its prohibition on unreasonable searches. Few at the time thought this lack of statutory regulation had any implications for activity the Intelligence Community undertook against foreign targets outside the United States, but domestic collection of foreign intelligence — that is, collection targeting someone inside the United States or at least conducted by monitoring infrastructure within the United States — for obvious reasons was a different kettle of fish,<sup>196</sup> especially once the Supreme Court’s 1967 decision in *Katz v. United States*<sup>197</sup> shifted the scope of Fourth Amendment protections from a property-centric trespassory model to the more flexible reasonable-expectation-of-privacy test.<sup>198</sup> *Katz* extended the Fourth Amendment’s protections to the telephone-wiretapping scenario where criminal investigation was concerned, but with a footnote declining to consider the question of whether the answer would be different in the distinct context of wiretaps if they were conducted for “national security” purposes.<sup>199</sup>

The government had long permitted warrantless wiretapping in such cases, though the public had little inkling at the time.<sup>200</sup> In the aftermath of *Katz*, the Justice Department was obliged to defend that position publicly.<sup>201</sup> The question came to the Supreme Court in the so-called “*Keith* case,”<sup>202</sup> involving warrantless wiretapping of a purely domestic security threat (a group of antigovernment protesters who had bombed a CIA office in Michigan).<sup>203</sup> There, the Court held that some form of warrant was indeed required in such a case.<sup>204</sup> Though the Court expressly reserved decision on whether it would reach the same conclusion in a case involving foreign-intelligence collection, it was clear that the answer might turn out to be yes.<sup>205</sup> And when stunning revelations of warrantless surveillance emerged in the years that followed, it seemed the time had come at last for creating a system through which judges could review warrant-style applications for circumstances in

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<sup>195</sup> Cf. Bernard Horowitz, *FISA, the “Wall,” and Crossfire Hurricane: A Contextualized Legal History*, 7 NAT’L SEC. L.J. 1, 19 (2020) (describing the period of national reflection on foreign intelligence and Congress’s need to create an entirely new framework).

<sup>196</sup> See *id.* at 14–19 (explaining the doctrinal arc in differentiating contested domestic and uncontested foreign uses of surveillance).

<sup>197</sup> 389 U.S. 347 (1967).

<sup>198</sup> See *id.* at 353, 359.

<sup>199</sup> *Id.* at 358 & n.23.

<sup>200</sup> See Horowitz, *supra* note 195, at 14–15, 19.

<sup>201</sup> See, e.g., *id.* at 15 (explaining Justice White’s commentary in *Katz*, which explicitly placed the responsibility for wiretapping policies with the executive branch, and detailing the public “Mitchell doctrine” (citing *Katz*, 389 U.S. at 364 (White, J., concurring))).

<sup>202</sup> *Id.*; *United States v. U.S. Dist. Ct. (Keith)*, 407 U.S. 297 (1972).

<sup>203</sup> *Keith*, 407 U.S. at 299–300.

<sup>204</sup> *Id.* at 324.

<sup>205</sup> See *id.* at 321–24.



which the government wanted to use electronic surveillance against persons inside the United States who might be agents of foreign powers.<sup>206</sup> Thus the creation of the Foreign Intelligence Surveillance Act of 1978, or FISA.<sup>207</sup>

Most analysis of FISA focuses, understandably, on the particulars of what we might call the “front end” of the system: the rules that constitute the FISA Court and that provide for review and implementation of orders permitting electronic surveillance.<sup>208</sup> But the statute also addresses certain downstream considerations. Most notably, Congress appreciated that the fruits of foreign-intelligence wiretapping might sometimes be attractive to the government for use in a criminal prosecution.<sup>209</sup> Accordingly, FISA section 106 obliges the government to give defendants advance notice in such cases and expressly authorizes defendants to move to suppress such evidence.<sup>210</sup> Congress further anticipated that such a suppression motion might put the government in a bind, however. The usual practice in such a situation would involve equal access to the relevant information for the defense, after all, yet here the government might have a strong interest in preserving the secrecy of classified information used to persuade the FISA Court to grant the application in the first place (for example, the case for the FISA order might have been based on the fruits of other, highly fragile intelligence collection).<sup>211</sup> Congress could have let the chips fall where they may, knowing that the government might often opt for secrecy rather than prosecutorial success. Instead, though, Congress in FISA section 106(f) crafted a mechanism for resolving suppression motions in camera and even ex parte, should the attorney general produce a sworn filing arguing that to do otherwise would endanger national security.<sup>212</sup>

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<sup>206</sup> Katelyn Epsley-Jones & Christina Frenzel, *The Church Committee Hearings & the FISA Court*, PBS FRONTLINE (May 15, 2007), <https://www.pbs.org/wgbh/pages/frontline/homefront/preemption/churchfisa.html> [<https://perma.cc/NW3S-HD5C>].

<sup>207</sup> *Id.*

<sup>208</sup> *See, e.g.*, Horowitz, *supra* note 195, at 26–30 (detailing the focus of the initial cases analyzing FISA, especially highlighting the use of this evidence in criminal prosecutions).

<sup>209</sup> *See id.*

<sup>210</sup> In fact, even if the defendant for some reason opts not to make such a motion, FISA section 106 suggests that the judge sua sponte should pursue the procedures described in the text below. Section 106(f) opens by stating that such procedures shall be used “[w]henver a court or other authority is notified” of the government’s intent to offer FISA-derived information into evidence; the statute says the same is true if the defendant actually makes a suppression motion, but by saying that separately, the statute certainly implies that the review must occur even if the defendant does not ask for it. 50 U.S.C. § 1806(f).

<sup>211</sup> *See id.*

<sup>212</sup> *See* Horowitz, *supra* note 195, at 68 (explaining that the declaration is the “heart” of FISA procedures for review of national security–related information (quoting Memorandum from Fed. Bureau of Investigation, Nat’l Sec. L. Unit, Off. of Gen. Counsel, on Foreign Intelligence Surveillance Act Procedures to Ensure Accuracy to All Field Offices 1 (Apr. 5, 2001))); 50 U.S.C. § 1806(f).

The framework perhaps seems simple enough. But there is a catch. The language in section 106(f) describing when that procedure can be used is not necessarily limited to situations in which the government itself has brought on the clash (through its desire to use the fruits of electronic surveillance in evidence).<sup>213</sup> Quite separate from its reference to suppression motions, 106(f) also refers to situations in which an aggrieved person simply tries “to discover or obtain applications or orders or other materials relating to electronic surveillance.”<sup>214</sup>

One might speculate that this was meant to refer only to a prosecution scenario in which the government intends to use FISA-derived information as evidence anyway. But then it would be superfluous; separate language covers that scenario once the government gives the required notice.<sup>215</sup> The implication, therefore, is that 106(f) refers to other scenarios, ones in which the government has not yet elected to take on this risk. That could occur in a criminal case in which the defendant is simply guessing that there might have been a FISA order during the course of the investigation. Or it might even extend to a plaintiff who knows or believes that such surveillance occurred and now seeks to prove it through discovery in aid of a civil action that challenges the legality of such surveillance. The existence of a separate FISA provision expressly authorizing lawsuits in that scenario (FISA section 110) adds considerable weight to that interpretation.<sup>216</sup>

This brings us back at last to the lawsuit that Fazaga and others initiated in response to Operation Flex. It helps us understand why the government decided not to seek dismissal of the plaintiffs’ FISA and Fourth Amendment claims on state secrets grounds. Had it done so, one can readily imagine the court responding that Congress through FISA had made clear its intent for such claims to be adjudicated notwithstanding the privilege, albeit in the government-friendly, *ex parte*, in camera manner required by section 106(f). At the same time, it also suggests why the government *did* advance state secrets objections to the broader, non-FISA claims the plaintiffs asserted — for they were not obviously encompassed within FISA section 106.

This was precisely the question that District Judge Carney addressed in his ruling on the government’s motion. The government’s motion in this respect focused on the plaintiffs’ various religious-discrimination claims and state tort law claims. Judge Carney held that the plaintiffs pointed to “no authority for the proposition that FISA also preempts non-FISA claims,” adding that he could find nothing in the text of FISA

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<sup>213</sup> See 50 U.S.C. § 1806(f).

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* (providing for *ex parte* and in camera review “[w]henver a court or other authority is notified [that a federal, state, or local government intends to use FISA-derived information as evidence], or whenever a motion is made [to suppress that evidence]”).

<sup>216</sup> See *id.* § 1810.

or in caselaw to support such a broad interpretation.<sup>217</sup> With the privilege therefore in full effect, Judge Carney concluded, information essential to the litigation could not be presented in court, and thus dismissal of those claims was necessary.<sup>218</sup>

*C. The Ninth Circuit Opens the Door*

Almost eight years passed before a Ninth Circuit panel resolved the plaintiffs' appeal.<sup>219</sup> In an opinion by Circuit Judge Berzon, the panel disagreed with Judge Carney's analysis.<sup>220</sup> Characterizing the state secrets privilege as a creature of "common law, *not* constitutional law,"<sup>221</sup> Judge Berzon emphasized that Congress could indeed displace the privilege so long as the statute in question speaks "directly" to the subject matter in question; no express language of preemption was necessary.<sup>222</sup> Section 106(f), she reasoned, was sufficiently direct to achieve this result.<sup>223</sup>

This left the question whether the plaintiffs' claims came within the scope of 106(f). The panel held that the answer was yes, for either of two reasons. First, and somewhat surprisingly, Judge Berzon asserted that this was a situation in which the government had given notice of its intent to use evidence derived from electronic surveillance.<sup>224</sup> To be sure, the government had not initiated the litigation and thus was not proposing to use such evidence as part of a case-in-chief. But in the course of invoking the state secrets privilege, the government had made clear that such evidence might be part of its defense against the plaintiffs' claims, and in that sense, the court reasoned, the government had effectively announced its intention to use information of a kind that triggered section 106(f).<sup>225</sup>

This was an important interpretation of the statute. Under the reading the panel had rejected, the government could avoid adjudication under section 106(f) by choosing not to prosecute in the first place (or at least by opting not to offer the fruits of electronic surveillance into evidence). Under the reading embraced by the panel, in contrast, any plaintiff who could establish standing to bring an electronic-surveillance-related claim could force the issue. Assuming it wished to preserve the secrecy of the materials in question, the government's only options would be to proceed in the litigation without making any use of

<sup>217</sup> *Fazaga v. FBI*, 884 F. Supp. 2d 1022, 1037–38 (C.D. Cal. 2012).

<sup>218</sup> *See id.* at 1045–48.

<sup>219</sup> *Fazaga v. FBI*, 965 F.3d 1015 (9th Cir. 2020).

<sup>220</sup> *Id.* at 1025; *see also* Recent Case, *Fazaga v. FBI*, 916 F.3d 1202 (9th Cir. 2019), 133 HARV. L. REV. 1774, 1776 (2020).

<sup>221</sup> *Fazaga*, 965 F.3d at 1045.

<sup>222</sup> *Id.* at 1044 (emphasis omitted) (quoting *Kasza v. Browner*, 133 F.3d 1159, 1167 (9th Cir. 1998)).

<sup>223</sup> *Id.* at 1045.

<sup>224</sup> *Id.* at 1049.

<sup>225</sup> *Id.*

the protected materials (a circumstance that might render a proper defense impossible) or else litigate the claims with the benefit of the evidence using the section 106(f) process. The government no doubt would opt every time for the latter procedure, with its *ex parte*, *in camera* features weighing heavily in the government's favor. Yet the government would surely prefer to avoid litigation altogether.

Complicating matters, the Ninth Circuit concluded that the plaintiffs had triggered section 106(f) in a separate way. As noted above, there is language in section 106(f) suggesting that its procedures also must be used in the event that a party makes a motion compelling the government to produce materials relating to electronic surveillance. The panel concluded that the plaintiffs here had done exactly this, simply by including in their prayer for relief a request for an injunction compelling the government to “destroy or return” the fruits of unlawful surveillance conducted during Operation Flex.<sup>226</sup> This interpretation too suggested a broad ambit for forcing the government to litigate electronic-surveillance claims on the merits even when the state secrets privilege might otherwise have applied.

The government offered a fallback argument. Whatever the scope of the various section 106(f) triggers, it contended, that vehicle at most should be used to adjudicate claims arising directly or indirectly under FISA itself.<sup>227</sup> On this view, plaintiffs should be limited to using section 106(f) to pursue the right of action expressed in FISA section 1110, which at bottom amounts to no more and no less than the right to sue the government for conducting electronic surveillance in a scenario that is subject to FISA but not actually compliant with FISA (or other applicable statutes).<sup>228</sup>

The panel disagreed.<sup>229</sup> The section 1110 cause of action might indeed be narrow in that way, but the language of section 106(f) nowhere says that it is a vehicle just for those claims.<sup>230</sup> Section 106(f) procedures, in other words, are claim neutral.<sup>231</sup> What matters is whether the plaintiff or defendant has done something sufficient to trigger those procedures, and nothing more; the nature of a plaintiff's underlying cause of action is not part of the analysis, on this view.<sup>232</sup> And once the information in question is in the hands of the judge through 106(f), the court reasoned, there is no increased risk of harm from allowing the judge at that point to consider and resolve any and all claims.<sup>233</sup>

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<sup>226</sup> *Id.*

<sup>227</sup> *Id.* at 1051.

<sup>228</sup> *See id.*

<sup>229</sup> *Id.*

<sup>230</sup> *Id.* (citing 50 U.S.C. § 1806(f); H.R. REP. NO. 95-1283, pt. 1, at 91 (1978)).

<sup>231</sup> *Id.*

<sup>232</sup> *See id.*

<sup>233</sup> *Id.* at 1051–52.

The government sought rehearing en banc, but a divided Ninth Circuit denied the motion.<sup>234</sup> Not long thereafter, the Supreme Court granted certiorari and in March 2022 unanimously reversed the Ninth Circuit in an opinion written by Justice Alito.<sup>235</sup>

*D. The Supreme Court Closes the Door*

The opinion opened with some disappointing misdirection. As noted above, the Ninth Circuit's analysis hinged in significant part on hotly contested questions regarding the proper interpretation of section 106(f)'s triggers, ultimately endorsing broad interpretations of two of the 106(f) triggers. Justice Alito's opinion duly opened with a focus on that dispute, going to the trouble of laying out the contending interpretations regarding both trigger scenarios and giving the impression that the Court was about to weigh in with its view.<sup>236</sup>

Despite going to this trouble, however, the opinion at this point veered sharply away from those questions, offering no views on their merits.<sup>237</sup> There was no need, the Court claimed, because the case could be resolved on a different ground that would control no matter which interpretation of the 106(f) triggers was correct: contrary to the Ninth Circuit's conclusion, the Court unanimously held, section 106(f) does not actually preempt the state secrets privilege in the first place.<sup>238</sup> The case therefore ought to be remanded for consideration of the full sequence of state secrets privilege questions (that is: Does the privilege indeed attach to the information about Operation Flex? If so, should the court merely withhold covered information from discovery, or should it go further and dismiss some or all of the plaintiffs' claims due to their connection with such protected information?).<sup>239</sup>

The Court defended its conclusion with two alternative arguments. The first was straightforward, although lightly defended. Contrary to the Ninth Circuit's conclusion, the Court held that Congress cannot displace a common law privilege by implication but rather must use language clearly expressing such an intent.<sup>240</sup> Whatever else was true about section 106(f), it did not address the state secrets privilege in so many words and hence simply could not be read to displace it.<sup>241</sup>

<sup>234</sup> *Id.* at 1023.

<sup>235</sup> *Fazaga*, 142 S. Ct. at 1055–56, 1059.

<sup>236</sup> *See id.* at 1059–60.

<sup>237</sup> *See id.* at 1060.

<sup>238</sup> *Id.*

<sup>239</sup> *See id.* at 1063. For a district court opinion discussing these steps as it evaluates an assertion of the state secrets privilege, see *Fazaga v. FBI*, 884 F. Supp. 2d 1022, 1037 (C.D. Cal. 2012).

<sup>240</sup> *Fazaga*, 142 S. Ct. at 1060–61. The Court explained this reading in a mere four sentences that gestured to the presumption against repeal of the common law and the canon of constitutional avoidance — with those principles supported by a single citation each: *Norfolk Redevelopment & Housing Authority v. Chesapeake & Potomac Telephone Co. of Virginia*, 464 U.S. 30, 35 (1983); and *Jennings v. Rodriguez*, 138 S. Ct. 830, 842 (2018), respectively. *Fazaga*, 142 S. Ct. at 1060–61.

<sup>241</sup> *Fazaga*, 142 S. Ct. at 1060–61.

Critically, this analysis spared the Court from taking up the much-contested question whether the state secrets privilege in fact is merely a creature of common law or, instead, has constitutional foundations in Article II.<sup>242</sup> If a clear-statement requirement applied either way, after all, then there was no need to decide the nature of the privilege. And as a matter of constitutional avoidance, there certainly was no need to address the weighty question whether Congress actually possesses the power to override the privilege if it is based in the Constitution. Having nearly but not quite broken the surface in *Fazaga*, that question receded and likely will have to wait for some future congressional foray before courts will have reason to opine on it.

The Court could have stopped there, and probably should have, given what came next. But it went on to offer an alternative — and less persuasive — rationale for holding that section 106(f) does not override the privilege.

Recall that the Ninth Circuit, believing that statutory preemption of the privilege could occur by implication, found such an implied preemptive effect in section 106(f) because, in its view, the nature of 106(f) procedures was inherently incompatible with application of the privilege. There is something to be said for that point, even if the Ninth Circuit did not express it well. Consider a scenario in which a plaintiff otherwise capable of establishing standing makes a discovery motion calling for production of information associated with FISA surveillance. The plain language of section 106(f) demonstrates an unmistakable intent for the court in such a case to adhere to the section 106(f) framework.<sup>243</sup> But now consider the result if the state secrets privilege remains untouched by the existence of section 106(f). In response to the plaintiff's motion, there is little doubt that the government would respond by objecting to production of this classified information on grounds of that privilege — and that a court would be correct in most instances in taking the government's side, precluding production of the materials.

What use would section 106(f) be in that case? Nothing comes to mind. This result would seem to render a portion of section 106(f) nugatory as a practical matter, which is itself a disfavored outcome as a matter of statutory interpretation.<sup>244</sup> In which case, we would seem to

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<sup>242</sup> See Chesney, *supra* note 55, at 448–49 (noting the “sharp disagreement” about the “actual nature” of the state secrets privilege, *id.* at 448).

<sup>243</sup> See 50 U.S.C. § 1806(f) (noting that *ex parte* and *in camera* review may be triggered “whenever any motion or request is made by an aggrieved person . . . to discover or obtain . . . materials relating to electronic surveillance”).

<sup>244</sup> See Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 404 (1950) (“Every word and clause must be given effect.”).

have a Llewellyn-esque dueling-canons scenario, with little reason to prefer one over another.<sup>245</sup>

Perhaps this helps explain why the Supreme Court went on to offer a second and independent rationale for its holding. Even if Congress could preempt the state secrets privilege by implication, the Court argued, section 106(f) is not best understood as implying such an intent.<sup>246</sup>

The Court offered a series of reasons to support that characterization, but the list did not begin auspiciously. The Court's opening point in support of this claim centered around the fact that the majority of section 106(f) scenarios involve efforts by the government itself to introduce FISA-derived evidence in a prosecution.<sup>247</sup> In such circumstances, the Court pointed out, the government would never invoke the privilege, as doing so would be obviously self-defeating.<sup>248</sup> And that proposition certainly is true. Yet it also is irrelevant. The issue arises not because the government sometimes triggers section 106(f), but because section 106(f) sometimes is triggered instead by the nongovernment party — in which case the government very much can be expected to fight back using the privilege, if it can. This is so because, as noted above, section 106(f) can be triggered by a plaintiff who moves for the government to disclose information about electronic surveillance. That is the scenario — the only scenario — that matters for purposes of the implied preemption analysis.

Turning belatedly to that question, the Court next asserted that there simply is nothing inconsistent with a section 106(f) proceeding and permitting the government to invoke the state secrets privilege to forestall production of electronic-surveillance information.<sup>249</sup> The Court said this lack of consistency was so for three reasons. None are especially compelling.

The first rationale — which the Court declared the most important of the bunch — revolves around the distinct inquiries, and, in turn, distinct purposes, of the section 106(f) system and the state secrets privilege.<sup>250</sup> The Court pointed out that the purpose of the latter is to determine whether there would be undue risk to national security if certain information were used in litigation, whereas the purpose of the former is to assess the legality of the underlying electronic surveillance.<sup>251</sup> This

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<sup>245</sup> See *id.* at 401 (underscoring the existence of “two opposing canons on almost every [interpretive question]”).

<sup>246</sup> *Fazaga*, 142 S. Ct. at 1061.

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> *Id.* (citing *United States v. Reynolds*, 345 U.S. 1, 10 (1953); *Zubaydah*, 142 S. Ct. at 967; *Gen. Dynamics Corp. v. United States*, 563 U.S. 478, 484 (2011)). As for what the role of a 106(f) proceeding instead is, the Court pointed out that the statute specifies that the judge in a 106(f) proceeding is charged with determining whether the electronic surveillance in question was conducted lawfully. *Id.* at 1058 (citing 50 U.S.C. § 1806(f)).

is, indeed, a distinction between the two systems. But it is not clear why that distinction matters when we are trying to determine whether Congress intended for section 106(f) to prevent the government from resorting to the state secrets privilege. The case for 106(f) implicitly preempting the privilege does not logically depend on a claim that they serve the same functions (notwithstanding some loose language in the Ninth Circuit’s opinion to the effect that they are “animated by the same concerns”).<sup>252</sup> It depends, instead, on whether the plaintiff-driven prong of section 106(f) (that is, the scenario in which the plaintiff is moving for production of electronic-surveillance information against the government’s wishes) would be rendered nugatory if the government still possessed the ability in such proceedings to withhold that very information on state secrets grounds. It is hard to avoid that conclusion, in fact, and nothing in *Fazaga* actually suggests otherwise (or even addresses this nullifying consequence).

The closest the Court came to engaging with this point is when it pointed out that the Court has “never suggested that an assertion of the state secrets privilege can be defeated by showing that the evidence was unlawfully obtained.”<sup>253</sup> That is true; *Fazaga* was a case of first impression for the Court. Again, though, it is difficult to see why this should bear any analytical weight. The question is not whether the *Court* has suggested this result previously. The question is whether *Congress* was suggesting this when it created the section 106(f) mechanism.

Might the Court’s other reasons hold up better? The second reason proffered by the Court involved a second way in which section 106(f) and the state secrets privilege are distinct: the nature of the relief a party might expect when courts conduct analyses of these two mechanisms.<sup>254</sup>

Once again, it is odd to give any analytical weight to this comparison. Yes, the two mechanisms serve different ends. If anything, however, this distinction favors the implied-preemption reading. The privilege serves one purpose: it precludes use in litigation of certain protected information, no matter the consequences. Section 106(f), in contrast, just as obviously permits at least some *merits* consideration of certain protected information. These are not just distinct aims; they are in significant tension with one another, since invocation of the former normally would prevent adjudication of the latter. If anything, pointing this out enhances the case for interpreting section 106(f) as an implicit

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<sup>252</sup> *Id.* at 1061 (citing *Fazaga v. FBI*, 965 F.3d 1015, 1046 (9th Cir. 2020)). In a sense, they clearly *are* animated by the same concern: both include mechanisms whereby an executive branch official can intervene in litigation, in the name of preserving the secrecy of national security information, to prevent that information from becoming available to the public and even the other party. But to recognize this is not to say that section 106(f)’s possible preemptive effect depends on that similarity.

<sup>253</sup> *Id.*

<sup>254</sup> *See id.* at 1062.



attempt by Congress to override the privilege in this narrow, security-preserving setting.

The Court's third and last rationale emphasized yet another set of differences between section 106(f) and the state secrets privilege: there are procedural differences in the mechanisms through which the government invokes its secrecy interests in the two scenarios.<sup>255</sup> Once more, though, the distinction fails to make much logical difference. Yes, the privilege can be invoked "not just by the Attorney General but" also by "the head of the department which has control over the matter," whereas section 106(f)'s security procedures can be invoked only by the attorney general.<sup>256</sup> And, yes, the doctrine associated with the privilege encourages judges to not even look at the underlying documents (in those cases that actually have underlying documents) if it is possible to assess the risk to national security without doing so, whereas section 106(f) lacks that admonition.<sup>257</sup>

One shrugs; it simply is not clear why these observations matter, and the Court offered nothing else beyond them.<sup>258</sup> But there things came to rest nonetheless, and unanimously so.

It is now the law of the land that the government remains free to invoke the state secrets privilege even in the context of a section 106(f) proceeding. At a minimum, that means in practical terms that FISA litigants in most, if not all, cases will not be able to use discovery (or any other method) to compel production of information relating to electronic surveillance. This likely will be fatal to many a claim, as a practical matter, given its impact on the ability of a plaintiff in such a case to establish standing or withstand summary judgment.

On the other hand, one can imagine scenarios in which that outcome will not be the case — where the inability to access such classified information might not be fatal to a plaintiff's claims in light of other evidence. That is precisely why the stakes are so high when the government argues that some suits must be dismissed, irrespective of the evidence a plaintiff can assemble, because the "very subject matter" of a lawsuit implicates state secrets.<sup>259</sup> There is no question that such a justiciability bar exists at least for certain breach of contract claims involving contracts to perform espionage-related services.<sup>260</sup> Whether that bar can extend to other state secrets scenarios is a hotly contested question, and the Court in *Fazaga* might have engaged it. In the end, however, it passed on that question too, expressly punting the issue to

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<sup>255</sup> *Id.*

<sup>256</sup> *Id.* (quoting *Reynolds*, 345 U.S. at 8).

<sup>257</sup> *See id.* (citing *Reynolds*, 345 U.S. at 10).

<sup>258</sup> *See id.*

<sup>259</sup> *Id.*

<sup>260</sup> *See Totten v. United States*, 92 U.S. 105, 107 (1876).

the Ninth Circuit for further consideration. This was yet another reason to categorize *Fazaga* as a case of unexpectedly middling importance.

#### IV. PIVOTING TO CONGRESS?

Given the array of important questions left open by *Zubaydah* and *Fazaga*, it is possible we eventually will see another Supreme Court foray into the realm of the state secrets privilege. It seems unlikely that any such case will produce significant doctrinal change, though. The combination of *Zubaydah* and *Fazaga* makes clear that a majority of the current Justices are comfortable with the privilege's doctrinal status quo. Should a future circuit court decision again push the doctrine in an innovative, less government-friendly direction, we might then see the Court reengage, but only in a preservationist direction; there are no signs of doctrinal revolution on the horizon here. If significant change is to come at all, it will come from Congress.

As a predictive matter of what Congress might actually do, it is tempting to scoff at that prospect. As noted above, after all, the lone prior instance of significant congressional attention to this topic — in the form of the State Secrets Protection Act proposed initially in 2008 — fizzled after President Bush was replaced by President Obama and the Justice Department under Attorney General Holder promulgated modest reforms to internal executive branch vetting of privilege invocations.<sup>261</sup> And if we are speaking of a general reform of the privilege, along the lines of the 2008 bill, skepticism indeed seems warranted. But what if the reform were to be targeted, focusing on a particular area of government national security activity where the politics of the subject involve bipartisan skepticism of the government and a sense that the activity in question particularly impacts Americans, not just foreigners? That would be a different kettle of fish, all the more so if there just happened to be a reason Congress is likely to legislate on that general topic anyway.

As it happens, these ingredients all are present at this very moment in relation to electronic surveillance under FISA. Famously, a series of events during the Trump Administration — relentless general criticism of the so-called “Deep State,”<sup>262</sup> specific claims of politically motivated

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<sup>261</sup> See Memorandum from Eric Holder, Att’y Gen., Dep’t of Just., to Heads of Exec. Dep’ts, Agencies & Dep’t Components, *supra* note 60.

<sup>262</sup> See, e.g., Sophia Tesfaye, *Trump’s “Deep State” Conspiracy Theory Has Scrambled Real Concerns About Surveillance*, SALON (Oct. 10, 2019, 7:00 AM), <https://www.salon.com/2019/10/10/trumps-deep-state-conspiracy-theory-has-scrambled-real-concerns-about-surveillance> [<https://perma.cc/KTE2-HV7W>].

wiretapping,<sup>263</sup> and above all the Carter Page FISA fiasco<sup>264</sup> — spurred (or perhaps reflected) growing Republican distrust of the FBI and the NSA in general, and all things associated with FISA in particular. As a result, skeptics of those agencies and activities now can be found in substantial numbers in both major parties, and it has become difficult to predict how FISA-related legislation will fare.<sup>265</sup> Such bills must run a gauntlet of bipartisan skepticism, the difficulty of which is enhanced by the sheer complexity of FISA's many distinct authorities (not to mention the confounding fog of mistaken understandings and conflation that arises in such circumstances).<sup>266</sup> In a demonstration of the paralyzing consequences of these dynamics, Congress recently failed to renew relatively uncontroversial investigative authorities associated with FISA, following hearings and debates that often veered off into formally unrelated FISA topics.<sup>267</sup>

In 2023, Congress is all but certain to go another round with FISA, thanks to a sunset provision terminating what is known as FISA “Section 702” at the end of that year.<sup>268</sup> Section 702 is the shorthand for an important foreign-intelligence collection program developed after 9/11, one that existed first as a legally tenuous executive branch innovation but that Congress eventually (following the disruptive impact of exposure in a leak to the media) affirmatively authorized through new legislation expanding on the familiar FISA model.<sup>269</sup> The basic idea of Section 702 is to ensure corporate cooperation with the government in situations where there is a non-U.S. person outside the United States who is a foreign-intelligence target, and that person's communications might be passing through or even stored on the systems of a company subject to U.S. jurisdiction such as AT&T or Google.<sup>270</sup> Section 702

<sup>263</sup> See, e.g., Eileen Sullivan & Nicholas Fandos, *Trump Repeats Unconfirmed Claims of Campaign Spying*, N.Y. TIMES (May 23, 2018), <https://www.nytimes.com/2018/05/23/us/politics/trump-claims-spies-campaign.html> [<https://perma.cc/GVK8-8AXE>].

<sup>264</sup> See generally U.S. DEP'T OF JUST., OFF. OF THE INSPECTOR GEN., REVIEW OF FOUR FISA APPLICATIONS AND OTHER ASPECTS OF THE FBI'S CROSSFIRE HURRICANE INVESTIGATION 121–68, 197–228, 247–55 (2019), <https://www.justice.gov/storage/120919-examination.pdf> [<https://perma.cc/C9ZU-739S>].

<sup>265</sup> See Sarah Ferris et al., *Bipartisan Revolt Upends Vote to Reauthorize FISA*, POLITICO (May 27, 2020, 11:04 PM), <https://www.politico.com/news/2020/05/27/fisa-renewal-limbo-284025> [<https://perma.cc/59PU-W3AD>].

<sup>266</sup> See *id.*

<sup>267</sup> See Charlie Savage, *House Departs Without Vote to Extend Expired F.B.I. Spy Tools*, N.Y. TIMES (Mar. 27, 2020), <https://www.nytimes.com/2020/03/27/us/politics/house-fisa-bill.html> [<https://perma.cc/6CBH-EZ6S>].

<sup>268</sup> Martin Matishak, *Intelligence Community Gears Up For Surveillance Powers Renewal*, THE RECORD (Mar. 31, 2022), <https://therecord.media/intelligence-community-gears-up-for-surveillance-powers-renewal> [<https://perma.cc/2HMB-8MZ2>].

<sup>269</sup> See PRIV. & C.L. OVERSIGHT BD., REPORT ON THE SURVEILLANCE PROGRAM OPERATED PURSUANT TO SECTION 702 OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT 16–20 (2014), <https://documents.pclob.gov/prod/Documents/OversightReport/823399ae-92ea-447a-ab60-oda28b555437/702-Report-2.pdf> [<https://perma.cc/6DVL-VYCH>].

<sup>270</sup> See *id.* at 20–65.

creates a process whereby the government can compel such companies to turn over relevant records.<sup>271</sup> Once a year, the government must satisfy the Foreign Intelligence Surveillance Court that the NSA has developed a sufficiently reliable system for identifying whether a given foreign-intelligence collection target is a non-U.S. person located outside the United States, and that the government's handling of any resulting information will properly minimize the exposure of U.S.-person information incidentally collected along the way.<sup>272</sup> Once the court finds that the NSA's technical and managerial systems for these purposes are adequate, it grants the government the power to compel those companies to cooperate, somewhat in the fashion of a subpoena.<sup>273</sup>

The fruits of Section 702 collection have proven over time to be valuable from a foreign-intelligence perspective.<sup>274</sup> But the program remains controversial, in large part because (1) its scale ensures that no small amount of U.S.-person information ends up collected incidentally, and (2) the FBI at times will query the resulting database using U.S.-person identifiers, including for certain law enforcement purposes.<sup>275</sup> Critics depict this state of affairs as a backdoor circumventing the Fourth Amendment, and though Congress has imposed constraints on such U.S.-person queries of 702-derived information, the recurrence of compliance incidents ensures that controversy surrounding this practice continues.<sup>276</sup>

The last time Congress faced the question of whether to renew Section 702, in 2017, the factors described above gave rise to serious questions about whether Congress would, in the end, renew Section 702.<sup>277</sup> Ultimately it did, but with various reforms attached.<sup>278</sup> Heading into 2023, we can expect something along the same lines to occur. And though any such changes might be limited to Section 702, it also is possible they might apply more broadly to FISA-related electronic-surveillance activities, including situations like Operation Flex.

This brings us back to the state secrets privilege. Bearing in mind the outcome in *Fazaga* — finding that section 106 of FISA does not currently preempt the state secrets privilege — a skeptical Congress

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<sup>271</sup> See *id.* at 32.

<sup>272</sup> See *id.* at 26–31; 50 U.S.C. § 1881a(a).

<sup>273</sup> See PRIV. & C.L. OVERSIGHT BD., *supra* note 269, at 32.

<sup>274</sup> See *id.* at 104–10.

<sup>275</sup> See, e.g., Jennifer Stisa Granick & Ashley Gorski, *How to Address Newly Revealed Abuses of Section 702 Surveillance*, JUST SEC. (Oct. 18, 2019), <https://www.justsecurity.org/66622/how-to-address-newly-revealed-abuses-of-section-702-surveillance> [<https://perma.cc/KJ3B-YAYA>].

<sup>276</sup> See *id.*

<sup>277</sup> See, e.g., Spencer Ackerman & Sabrina Siddiqui, *Trump v US Intelligence: Growing Feud Puts NSA's Legislative Priority at Risk*, THE GUARDIAN (Mar. 7, 2017, 7:04 PM), <https://www.theguardian.com/us-news/2017/mar/07/trump-nsa-us-intelligence-prism-reauthorization> [<https://perma.cc/BY8G-XY9U>].

<sup>278</sup> See, e.g., Elizabeth Goitein & Robert S. Litt, *A Way Forward on Section 702 Queries*, LAWFARE (Feb. 20, 2018, 12:30 PM), <https://www.lawfareblog.com/way-forward-section-702-queries> [<https://perma.cc/H3CA-KT3C>].

looking for reforms to attach as conditions for Section 702 renewal might well take up the implicit challenge laid down by the Court in *Fazaga*, revising FISA to make clear an intent to subject claims of that kind to section 106 procedures notwithstanding the privilege. This is hardly a likely outcome, to be sure, but no other privilege-related scenario has a plausible prospect of success anytime soon.

Should Congress take this step, it is possible that the executive branch would contest Congress's constitutional authority to do so, forcing courts — including, perhaps, the Supreme Court — to engage on this question. If and when that time comes, judges and Justices alike should bear in mind that the common law account of the privilege's origins and the Article II account of the same are not mutually exclusive. The best description of the privilege's existence, after all, may well be that judges acting in common lawmaking mode over a period of many decades created the privilege for reasons that are, themselves, deeply rooted in the constitutional responsibilities assigned to the executive branch under the rubric of Article II (as opposed to being mere judicial policy preferences that just happen to closely track those foreign affairs and national defense authorities).<sup>279</sup> More significantly, however, judges and Justices should bear in mind too that attributing the privilege to Article II in part or even in whole by no means compels the conclusion that its parameters are unalterable by Congress. As then-Professor David Barron and Professor Martin Lederman have explained in the specific context of the Article II Commander in Chief Clause, the question of whether the executive branch enjoys some particular authority thanks to Article II is quite different from the question of whether such an authority is immune from being overridden by legislation in some ways (let alone being completely immune from legislative infringement).<sup>280</sup> It is true that Congress would not automatically prevail in the context of such clashing claims, but it would not automatically lose either.<sup>281</sup> And if the nature of Congress's intervention is merely to compel resort to section 106 procedures when a plaintiff sues the government for unlawful electronic surveillance, as opposed to a blanket override of the

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<sup>279</sup> Chesney, *supra* note 55, at 449 (“The best explanation, arguably, incorporates both perspectives. As a historical matter, there is little doubt that the privilege emerged as a common law evidentiary rule . . . . It does not follow, however, that the privilege has no constitutionally-required aspect. In at least some circumstances, for example, the state secrets privilege conceptually overlaps with executive privilege — a doctrine explicitly derived from constitutional considerations.” (footnotes omitted)).

<sup>280</sup> See David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb — Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 696–98 (2008); David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb — A Constitutional History*, 121 HARV. L. REV. 941, 946–48 (2008).

<sup>281</sup> Cf. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637–38 (1952) (Jackson, J., concurring).

privilege throwing such litigation into the ordinary adversarial process, it is not hard to imagine the Court ultimately upholding the statute.<sup>282</sup>

But enough of speculation. For the moment, in the aftermath of *Fazaga* and *Zubaydah*, the state secrets privilege stands as strong as it ever has. Unless and until the new and still-evolving politics surrounding our nation's national security activities produce legislative reforms, the courts will continue to have only a limited role in policing the legal boundaries of those activities.

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<sup>282</sup> That is not to say that it clearly would be constitutional for Congress to compel the government to embrace section 106 procedures when it has been sued, as opposed to when it is prosecuting. *Cf.* Chesney, *supra* note 55, at 450 (“At a minimum, Congress should have authority to regulate the process through which assertions of the privilege are adjudicated,” but “[w]hether Congress should be able to override the privilege once it attaches — for example, by compelling the executive branch to choose between conceding liability in civil litigation and disclosure of privileged information in a public setting — is far less clear.”).