
A LABEL COVERING A “MULTITUDE OF SINS”:
THE HARM OF NATIONAL SECURITY DEFERENCE

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INTRODUCTION

The decisions last Term in *United States v. Husayn (Abu Zubaydah)*¹ and *FBI v. Fazaga*² perpetuate the Supreme Court’s practice of insulating national security abuses from meaningful judicial review. I agree with Professor Robert Chesney that these decisions reflect a status quo orientation toward the state secrets privilege and reinforce deference to the executive branch in the name of national security.³ But Chesney’s analysis understates both the problems with these decisions and the harm of judicial deference, especially for racialized communities long construed as national security threats.

Abu Zubaydah shields foreign intelligence agencies’ covert cooperation with the U.S. government even when those agencies know or suspect that their cooperation will facilitate egregious human rights violations. Cooperation for such purposes deserves no protection from U.S. courts, and U.S. promises to keep such cooperation secret undermine the nation’s credibility, rather than honoring its word. *Fazaga* holds that a provision of the Foreign Intelligence Surveillance Act of 1978⁴ (FISA) authorizing a court to review in camera the legality of surveillance does not displace the state secrets privilege. While permitting the challenge to Federal Bureau of Investigation (FBI) surveillance to survive another day in that case, the decision stymies efforts to contest

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¹ 142 S. Ct. 959 (2022). Although the Supreme Court’s opinion refers to “Zubaydah,” that is neither the name nor the adopted name of the respondent in that case, who goes by “Abu Zubaydah.” Both parties referred to him as Abu Zubaydah in their briefs to the Court, as had the Ninth Circuit below. See *Husayn v. Mitchell*, 965 F.3d 775, 778 (9th Cir. 2020); Brief for the United States at 2, *Abu Zubaydah* (No. 20-827); Brief on the Merits for Respondents Abu Zubaydah & Joseph Margulies at 2, *Abu Zubaydah* (No. 20-827). It is not clear why the Supreme Court changed his name (and therefore the case title). I am grateful to Hafsa Tout, a Michigan Law graduate who shared with me her law review note on the cases, for insisting on referring to the respondent as Abu Zubaydah, even if it does not follow the Supreme Court’s nomenclature. Though it is not the worst failure of the ruling, it is also a shame that the Court misidentified the individual before it.

² 142 S. Ct. 1051 (2022).

³ Robert Chesney, *The Supreme Court, 2021 Term — Comment: No Appetite for Change: The Supreme Court Buttresses the State Secrets Privilege, Twice*, 136 HARV. L. REV. 170, 171–72 (2022).

⁴ Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended in scattered sections of 18 and 50 U.S.C.).

surveillance, especially where plaintiffs do not have independent evidence that they've been surveilled. Moreover, several Justices' comments at oral argument suggest they are willing to dismiss litigation based on state secrets in a broader fashion than the Court has previously endorsed.⁵

At a time when the United States should be ending its two-decade-long global war on terror, these decisions further empower the vast and largely unchecked national security state. This Response discusses what these decisions get wrong, how they fit within a larger pattern of Supreme Court decisions blocking judicial review of security policies, and why these developments matter for human rights, racial justice, and democracy. Part I addresses the decisions themselves, while Part II places them in the context of the Court's recent rulings on national security and executive power.

I. THE CORE PROBLEMS WITH *ABU ZUBAYDAH* AND *FAZAGA*

A. United States v. Abu Zubaydah

Abu Zubaydah, whom the CIA waterboarded over eighty times and buried alive for hundreds of hours based on the false claim that he was a senior al Qaeda lieutenant, sought to subpoena the testimony of two CIA contractors for use by a Polish court investigating the potential complicity of Polish officials.⁶ Chesney criticizes the Supreme Court for introducing "doctrinal confusions" into state secrets law in its decision upholding the government's assertion of the privilege.⁷ While I agree that the Court's decision muddled doctrine, the problem with the decision goes far beyond lack of clarity. The bigger issue is that *Abu Zubaydah* shields disclosure of U.S. collaboration with foreign intelligence agencies even when that collaboration is for the specific purpose of violating human rights.

As Chesney notes, much of the argument over *Abu Zubaydah* turned on this question: Is a secret still a secret if the whole world knows?⁸ If numerous sources, including the President of Poland in office at the time of the relevant events, have confirmed that there was a CIA detention site in Poland, can the U.S. government still claim it would harm national security for it to confirm (even implicitly) the existence of that black site in Poland?⁹ The majority said yes, that "sometimes information that has entered the public domain may nonetheless fall within

⁵ See *infra* pp. 67–69.

⁶ *Abu Zubaydah*, 142 S. Ct. at 963–65; *id.* at 986 (Gorsuch, J., dissenting).

⁷ Chesney, *supra* note 3, at 172.

⁸ *Id.*

⁹ *Husayn (Abu Zubaydah) v. Poland*, App. No. 7511/13, ¶ 234 (July 24, 2014), <https://hudoc.echr.coe.int/eng#%7B%22itemid%22%3A%22001-146047%22%7D> [<https://perma.cc/5GJM-G9WA>]

the scope of the state secrets privilege.”¹⁰ In other words, the state secrets privilege could be used to avoid confirmation by the government or its private contractors of widely known facts that would seem not to meet the definition of a “secret” at all. Justice Gorsuch, joined by Justice Sotomayor, countered in dissent that “[t]here comes a point where we should not be ignorant as judges of what we know to be true as citizens.”¹¹

The majority accepted the government’s claim that allowing the CIA contractors to testify could harm national security because any official acknowledgment of cooperation with Poland would breach the trust needed for secret relationships with foreign intelligence agencies.¹² According to the majority, “to confirm publicly the existence of a CIA site in Country A, can diminish the extent to which the intelligence services of Countries A, B, C, D, etc., will prove willing to cooperate with our own intelligence services in the future.”¹³ Even when there is public information revealing such cooperation, a “former CIA insider’s confirmation” would still be harmful because “it leaves virtually no doubt as to the veracity of the information that has been confirmed.”¹⁴

While it seems reasonable that, in some cases, the government’s official acknowledgment of facts otherwise in the public domain might alienate a foreign government by removing any doubt about their truth, it’s hard to see that risk here, in a case where the former President of that country has admitted those facts and voluminous other evidence confirms them.¹⁵ Given the Court’s rejection of a waiver of the state secrets privilege on these facts, it will be hard to establish waiver in future cases relying on widespread public disclosure of an erstwhile secret. Compounding the problem, four concurring Justices signaled an even more deferential attitude toward the government’s assertions. Justices Thomas and Alito would have required a litigant to prove a need for the information in question before a court scrutinized the government’s assertion of state secrets,¹⁶ changing the recognized approach,¹⁷ and Justices Kavanaugh and Barrett emphasized that “a

(quoting former President of Poland Aleksander Kwaśniewski) (“Of course, everything took place with my knowledge. The President and the Prime Minister agreed to the intelligence co-operation with the Americans, because this was what was required by national interest.”).

¹⁰ *Abu Zubaydah*, 142 S. Ct. at 968.

¹¹ *Id.* at 985 (Gorsuch, J., dissenting).

¹² *Id.* at 968–69 (majority opinion) (quoting Appendix to the Petition for a Writ of Certiorari at 130a–132a, 135a–136a, *Abu Zubaydah* (No. 20-827)).

¹³ *Id.* at 969.

¹⁴ *Id.*

¹⁵ *See id.* at 964–65.

¹⁶ *Id.* at 974 (Thomas, J., concurring in part and concurring in the judgment).

¹⁷ *See United States v. Reynolds*, 345 U.S. 1, 11 (1953) (assessing litigant’s showing of necessity to determine how rigorously a court should probe the government’s assertion of state secrets, not as a precondition for the court to assess that assertion at all); *see also Abu Zubaydah*, 142 S. Ct. at 969–70.

court's review from start to finish must be deferential to the Executive Branch."¹⁸

As problematic as this deference is in buttressing the state secrets privilege, the bigger issue is that the decision recognized no exception to promises of secrecy made to foreign governments when the purpose is to enable egregious human rights violations or other clear violations of international law. It is one thing for the Court to protect from disclosure, in general, clandestine cooperation between intelligence agencies. It is quite another for the Court to respect confidentiality in a case where that cooperation facilitated torture.

In 2014, after reviewing extensive evidence, the European Court of Human Rights concluded not only that the evidence “established beyond reasonable doubt” that Abu Zubaydah was detained at a CIA facility in Stare Kiejkuty, Poland,¹⁹ but also that Polish authorities bore some responsibility for Abu Zubaydah's mistreatment. The European Court concluded that “Poland knew of the nature and purposes of the CIA's activities on its territory” and that, given contemporaneous information about U.S. abuse of terrorism detainees, “Poland ought to have known that, by enabling the CIA to detain such persons on its territory, it was exposing them to a serious risk of treatment” violating human rights.²⁰

Neither the CIA nor foreign intelligence agencies should have any expectation of confidentiality in U.S. courts for cooperation designed to enable blatantly unlawful acts. International law unequivocally bans torture²¹; multiple international human rights covenants prohibit it,²² international humanitarian and criminal law designates it a war crime,²³ and customary international law recognizes the prohibition on torture

¹⁸ *Abu Zubaydah*, 142 S. Ct. at 983 (Kavanaugh, J., concurring in part).

¹⁹ *Husayn (Abu Zubaydah) v. Poland*, App. No. 7511/13, ¶ 419 (July 24, 2014), <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-146047%22%5D%7D> [<https://perma.cc/5GJM-G9WA>].

²⁰ *Id.* ¶ 444. The court did not find that the Polish government knew of the details of Abu Zubaydah's mistreatment during the time of his detention. *Id.*

²¹ The Court acknowledged that the treatment Abu Zubaydah endured constituted torture. *See Abu Zubaydah*, 142 S. Ct. at 964.

²² *See, e.g.*, International Covenant on Civil and Political Rights art. 7, Dec. 16, 1966, T.I.A.S. No. 92-908, 999 U.N.T.S. 171 (“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, T.I.A.S. 94-1120.1, 1465 U.N.T.S. 85 (defining torture, prohibiting torture, and committing to the prevention of torture).

²³ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 50, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (designating torture as a “grave breach[]” of the Geneva Conventions); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 85, ¶ 5, June 8, 1977, 1125 U.N.T.S. 3 (designating “grave breaches of these instruments” as war crimes); Rome Statute of the International Criminal Court art. 7, ¶¶ 1(f), 2(e), July 1, 2002, 2187 U.N.T.S. 3 (designating torture as a crime against humanity and defining torture); *id.* art. 8, ¶ 2(a)(ii) (designating torture as a war crime).

as having achieved the status of a preemptory norm.²⁴ U.S. law should not honor promises of secrecy designed to facilitate torture or similar violations.²⁵ If a foreign agency cooperates with U.S. agencies with actual or constructive knowledge that their actions are enabling blatant U.S. human rights violations, they cooperate at their peril. In such a case, we should want the “intelligence services of Countries A, B, C, D, etc.” to refuse cooperation, and our legal doctrine should reflect that. We should never again want to see fifty-four foreign countries participate in a secret CIA detention and “extraordinary rendition” program involving the torture of human beings.²⁶

Other areas of the law balance the protection of confidentiality with countervailing interests in preventing crime or seeking truth. The best example of this is the crime-fraud exception to the attorney-client privilege, which makes exceptions to the “seal of secrecy” between a lawyer and a client where communications aim to facilitate a future crime or fraud.²⁷ The privilege does not protect, for instance, a criminal defendant’s jailhouse call to his lawyer seeking help to murder a witness.²⁸ Nor should the state secrets privilege bar the disclosure of inter-governmental cooperation undertaken to help the CIA torture detainees.

The U.S. government’s position in *Abu Zubaydah*, vindicated by the majority decision, reflects a skewed understanding of the value of trust between nations. The CIA interrogation program violated multiple international covenants prohibiting torture that the United States had

²⁴ See Int’l Law Comm’n, Rep. on the Work of Its Seventy-First Session, U.N. Doc. A/74/10, at 207 (2019) (noting that the International Law Commission has previously referred to the “prohibition of torture” as having *jus cogens* status in its deliberations on the draft articles on responsibility of states for internationally wrongful acts). The Vienna Convention on the Law of Treaties defines a preemptory norm in international law, or *jus cogens*, as “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331.

²⁵ As the Court recognized, the U.S. government acknowledged that the use of certain enhanced interrogation techniques amounted to torture. See *Abu Zubaydah*, 142 S. Ct. at 964 (citing Office of the Press Secretary, *Press Conference by the President*, THE WHITE HOUSE: PRESIDENT BARACK OBAMA (Aug. 1, 2014, 2:45 PM), <https://obamawhitehouse.archives.gov/the-press-office/2014/08/01/press-conference-president> [<https://perma.cc/qq9f-cxda>]).

²⁶ See OPEN SOC’Y JUST. INITIATIVE, GLOBALIZING TORTURE: CIA SECRET DETENTION AND EXTRAORDINARY RENDITION 61–118 (2013) (identifying fifty-four countries that participated in “CIA secret detention and extraordinary rendition operations in various ways,” *id.* at 61).

²⁷ *United States v. Zolin*, 491 U.S. 554, 563 (1989) (quoting *Clark v. United States*, 289 U.S. 1, 15 (1933); *O’Rourke v. Darbishire* [1920] AC 581 (HL) 604 (appeal taken from Eng.)). Liza Goitein of the Brennan Center for Justice has noted the analogy to the crime-fraud exception in making a similar argument about the invocation of state secrets in the *Abu Zubaydah* case. See Elizabeth Goitein, *The State Secrets Sidestep: Zubaydah and Fazaga Offer Little Guidance on Core Questions of Accountability*, 2021–2022 CATO SUP. CT. REV. 193, 209 (2022); Jen Patja Howell, *The Lawfare Podcast: The Supreme Court Rules on State Secrets*, LAWFARE, at 25:27 (Mar. 25, 2022, 5:01 AM), <https://www.lawfareblog.com/lawfare-podcast-supreme-court-rules-state-secrets> [<https://perma.cc/U84F-EK5S>].

²⁸ See *United States v. Lentz*, 524 F.3d 501, 525 (4th Cir. 2008).

ratified.²⁹ Yet, in *Abu Zubaydah*, the government — with the Court’s endorsement — honored promises of secrecy made in the dead of the night to facilitate torture above the public commitments not to torture that the United States made to nations and people around the world. The implication seems to be that “America’s word” matters to our security when we promise to conceal the cooperation of foreign governments in our abuses but not when we promise to refrain from such abuses in the first place.³⁰

B. *Fazaga v. FBI*

In *Fazaga*, the Supreme Court held that a provision of FISA authorizing a court to review *ex parte* and *in camera* the legality of surveillance does not displace the state secrets privilege.³¹ Despite ruling for the government, the decision does not end the plaintiffs’ case, because they can still argue on remand that their religious discrimination claims should move forward even if certain material is privileged.³² But the decision makes it harder for others who suspect illegal surveillance even to initiate legal challenges, and the oral argument in the case suggests a Court that will protect government secrecy at the expense of accountability.

As an initial matter, it is important to recognize the significance of the *Fazaga* litigation beyond the state secrets issue. While torture and indefinite detention symbolize the war on terror’s human rights failures

²⁹ The United States has ratified the following international agreements prohibiting torture: the Geneva Convention Relative to the Treatment of Prisoners of War art. 87, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; the International Covenant on Civil and Political Rights art. 7, *supra* note 22; and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 2, *supra* note 22.

³⁰ One might object that, since the Polish prosecution for which Abu Zubaydah sought discovery aimed to determine the complicity of Polish government officials in his torture, *see Abu Zubaydah*, 142 S. Ct. at 965–66 (2022), the Supreme Court could not reject the state secrets claim on the basis that cooperation with Poland facilitated torture since that would assume facts not yet proven. In other scenarios involving the scope of privilege claims, however, the Court has confronted and managed similar challenges. For instance, in *United States v. Zolin*, 491 U.S. 554 (1989), the Court asked whether the “applicability of the crime-fraud exception must be established by ‘independent evidence’ (*i.e.*, without reference to the content of the contested communications themselves), or, alternatively, whether the applicability of that exception can be resolved by an *in camera* inspection of the allegedly privileged material.” *Id.* at 556. The Court ruled that a court could use *in camera* review to determine whether the crime-fraud exception applied upon a threshold showing establishing a reasonable belief that such review “may yield evidence that establishes the exception’s applicability.” *Id.* at 574–75. The attorney-client privilege and state secrets privilege are not identical in purpose or scope, and I do not argue for a direct application of the standards in the former context to the latter. But the broader point is that, given independent evidence of the commission of torture (which the U.S. government has acknowledged) and constructive knowledge on the part of the Polish government, the Court could reasonably have ruled that ordinary reasons for shielding clandestine intelligence cooperation from disclosure should not apply here.

³¹ *See* *FBI v. Fazaga*, 142 S. Ct. 1051, 1057–60 (2022).

³² Indeed, they have already done so. *See* Plaintiffs’ Supplemental Brief at 18–19, *Fazaga v. FBI*, No. 13-55017 (9th Cir. June 30, 2022).

abroad, the racial and religious profiling of U.S. Muslims has had devastating effects at home. In *Fazaga*, a confidential informant posing as a convert to Islam befriended southern California Muslims, secretly recorded hundreds of hours of conversations, and attempted to bait them with talk of jihad.³³ He later swore under oath that FBI officials told him that Islam threatened national security and instructed him to surveil Orange County Muslims at large, “not terrorists, spies, or even ordinary criminals.”³⁴

In describing the circumstances that led to this case, Chesney describes informants as sometimes crossing the line between passive observation and active coercion.³⁵ That’s true, but it’s important to emphasize that the plaintiffs are challenging the FBI’s conduct, not the actions of a rogue informant. Indeed, U.S. Muslim communities have repeatedly argued both that the FBI has indiscriminately surveilled their communities³⁶ and that it has used informants to induce and coerce young people into supporting violent plots they would never have embraced on their own.³⁷ The allegation that these problems stem from policy, not just individual “bad apples,” gains force from the breadth of the FBI’s authority: the agency’s own guidelines, for instance, authorize agents to conduct “assessments” of potential criminal activity without *any* factual predication, including through tasking informants, and allow agents to use race as a factor in investigations.³⁸

In fact, the informant in *Fazaga* is not the only former insider who has acknowledged taking part in unrestrained, sweeping investigations of Muslim communities. Terry Albury, who served for sixteen years in the FBI in the San Francisco Bay Area and Minneapolis, described at length to a reporter how he and other agents routinely surveilled Muslim

³³ See *Fazaga*, 142 S. Ct. at 1058; Brief for the Respondents at 11, *Fazaga* (No. 20-828).

³⁴ Brief for the Respondents, *supra* note 33, at 10 (paraphrasing the declarations of the FBI informant, Craig Monteilh).

³⁵ Chesney, *supra* note 3, at 190 (“Not every informant will play this role passively, however. . . . Monteilh was no stranger to this game”)

³⁶ See Amna Akbar, *Policing “Radicalization,”* 3 U.C. IRVINE L. REV. 809, 854–68 (2013) (describing how the FBI mapped the locations and activities of Muslim communities, deployed hundreds of informants in these communities, solicited intelligence through community-outreach programs, and conducted wide-scale “voluntary interviews” of people in these communities).

³⁷ See HUM. RTS. WATCH, *ILLUSION OF JUSTICE: HUMAN RIGHTS ABUSES IN US TERRORISM PROSECUTIONS* 26–30 (2014).

³⁸ See FBI, *DOMESTIC INVESTIGATIONS AND OPERATIONS GUIDE* §§ 4.3.1, 4.3.3.2.1, 4.3.3.2.2, 5.1, 5.9.1 (2016). The Obama Administration’s 2014 racial profiling guidance, applicable to the FBI and other federal agencies, only partly qualifies this use of race. See U.S. DEP’T OF JUST., *GUIDANCE FOR FEDERAL LAW ENFORCEMENT AGENCIES REGARDING THE USE OF RACE, ETHNICITY, GENDER, NATIONAL ORIGIN, RELIGION, SEXUAL ORIENTATION, OR GENDER IDENTITY* 1–2 (2014). That guidance bars the use of race, ethnicity, religion, and similar factors in “routine or spontaneous law enforcement decisions,” *id.* at 1, but continues to permit the use of such factors “to the extent that there is trustworthy information, relevant to the locality or time frame, that links persons possessing a particular listed characteristic to an identified criminal incident, scheme, or organization, a threat to national or homeland security, a violation of Federal immigration law, or an authorized intelligence activity,” *id.* at 2.

institutions, failed to end investigations despite finding no threat, and pressured people into becoming informants.³⁹ Albury eventually leaked FBI documents to the media because, he said: “There is this mythology surrounding the war on terrorism . . . that has given agents the power to ruin the lives of completely innocent people based solely on what part of the world they came from, or what religion they practice, or the color of their skin. And I did that”⁴⁰

So quite apart from its effect on state secrets doctrine, the *Fazaga* litigation matters because it offers a rare shot at accountability. The scope of FBI counterterrorism practices has stakes not just for Muslim communities but also for others increasingly subject to the expanded focus on “domestic terrorism.”⁴¹ For instance, some have challenged the FBI’s use of informants to infiltrate antigovernment militias as entrapment.⁴² Black activists protesting police violence, Indigenous activists resisting oil pipelines, and immigration activists, among others, have faced FBI surveillance.⁴³ Cases like *Fazaga* matter not because they question the conduct of individual intelligence operatives but because they contest the manner in which federal security agencies identify threats and conduct surveillance, especially with respect to racial and religious minorities.

While allowing the *Fazaga* plaintiffs’ claims to survive another day, the Supreme Court’s decision hobbles other civil lawsuits contesting unlawful surveillance. One reason is that plaintiffs in most cases, unlike *Fazaga*, depend on information in the government’s possession to prove that unlawful surveillance has occurred.⁴⁴ Most cases don’t have the

³⁹ See Janet Reitman, “I Helped Destroy People,” N.Y. TIMES MAG., Sept. 5, 2021, at 22–27.

⁴⁰ *Id.* at 47.

⁴¹ As I write elsewhere, white supremacist violence and other forms of right-wing violence require concerted attention, but expanding the terrorism frame in response would exacerbate existing pathologies with that frame. See Shirin Sinnar, *Hate Crimes, Terrorism, and the Framing of White Supremacist Violence*, 110 CALIF. L. REV. 489, 543–57 (2022). One concern with expanding counterterrorism is the risk that increased surveillance will target racially subordinated communities and activists contesting racial or socioeconomic hierarchies. See *id.* at 552–57.

⁴² See Mitch Smith, *Prosecutors Face Distrust in Second Try to Prove Plot to Kidnap Michigan’s Governor*, N.Y. TIMES (Aug. 10, 2022), <https://www.nytimes.com/2022/08/10/us/gretchen-whitmer-kidnapping-retrial.html> [<https://perma.cc/Z4PU-K8CG>].

⁴³ See Michael German, *The FBI Targets a New Generation of Black Activists*, BRENNAN CTR. FOR JUST. (June 26, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/fbi-targets-new-generation-black-activists> [<https://perma.cc/B2JF-PQDP>]; Sam Levin, *Revealed: FBI Terrorism Taskforce Investigating Standing Rock Activists*, THE GUARDIAN (Nov. 28, 2017, 12:42 AM), <https://www.theguardian.com/us-news/2017/feb/10/standing-rock-fbi-investigation-dakota-access> [<https://perma.cc/3AZ4-YPJA>]; Sam Levin, *US Officials Accused of Spying on Border Activists*, THE GUARDIAN (Jan. 6, 2021, 6:58 PM), <https://www.theguardian.com/us-news/2019/jul/23/us-surveils-border-activists-and-blocks-their-work-lawsuit-says> [<https://perma.cc/HB7Z-VZY2>].

⁴⁴ See, e.g., *Jewel v. NSA*, No. C 08-04373, 2019 WL 11504877, at *10–11 (N.D. Cal. Apr. 25, 2019), *aff’d*, 856 Fed. App’x 640 (9th Cir. 2021) (holding that plaintiffs challenging an NSA post-9/11 bulk surveillance program could not establish standing because they could not show that their communications were intercepted or that a favorable finding would redress their injuries); Al-

benefit of a whistleblower willing to testify to the sprawling surveillance he has conducted or witnesses who know for sure that they were surveilled. Thus, for most cases, the holding that FISA doesn't displace the state secrets privilege prevents litigants from accessing evidence they need to demonstrate standing and establish the elements of their prima facie case.⁴⁵

A second reason for concern is that several Justices expressed skepticism at the oral argument about the *Fazaga* plaintiffs' core contention: that the version of the state secrets privilege at issue under *United States v. Reynolds*⁴⁶ allows only for the exclusion of privileged evidence from a case, rather than the wholesale dismissal of a case.⁴⁷ The plaintiffs argue that there are two distinct versions of the state secrets privilege.⁴⁸ While one version can bar litigation altogether where the very subject matter of a lawsuit implicates state secrets, such as in disputes over government contracts,⁴⁹ the more common version (*Reynolds*) results in continuation of the litigation, but with the privileged evidence simply excluded.⁵⁰ The *Fazaga* plaintiffs argue that only the second version of state secrets is at issue in their case and that the litigation should continue because they can prove the illegality of surveillance with nonprivileged information, such as the informant's own statements and recordings.⁵¹ As such, they are not seeking any classified evidence to prove their claims.⁵²

The problem is that the government argues that it cannot *defend* itself against the discrimination claims without revealing the real reasons for, and targets of, the FBI investigation.⁵³ If a court agrees that

Haramain Islamic Found., Inc. v. Bush, 507 F.3d 1190, 1193–94, 1205 (9th Cir. 2007) (holding that U.S. Muslim charity could not establish standing without relying on an inadvertently disclosed “top secret” document over which the government asserted the state secrets privilege).

⁴⁵ Note that, even when courts have employed the FISA procedures for ex parte, in camera review of classified evidence under a theory that FISA displaces the state secrets privilege, that did not guarantee that the state secrets privilege would not bar further litigation. See, e.g., *Jewel*, 2019 WL 11504877, at *3–4, *11 (finding, despite “extensive *in camera* review” pursuant to FISA procedures, that “making any particularized determination on standing in order to continue with this litigation may imperil the national security,” *id.* at *11).

⁴⁶ 345 U.S. 1 (1953).

⁴⁷ Brief for the Respondents, *supra* note 33, at 26–27.

⁴⁸ See Plaintiffs' Supplemental Brief, *supra* note 32, at 8–9; see also Brief for the Respondents, *supra* note 33, at 24–25 (“This Court's cases establish two ‘quite different’ state-secrets doctrines.” *Id.* at 24 (quoting *Gen. Dynamics Corp. v. United States*, 563 U.S. 478, 485 (2011))).

⁴⁹ See *Totten v. United States*, 92 U.S. 105, 107 (1876) (forbidding maintenance of a lawsuit in a case arising out of an espionage agreement with the government); *Tenet v. Doe*, 544 U.S. 1, 9, 11 (2005) (reaffirming *Totten* and describing that case as holding that “lawsuits premised on alleged espionage agreements are altogether forbidden,” *id.* at 9); *Gen. Dynamics*, 563 U.S. at 485–86 (applying *Totten* and *Tenet*, not *Reynolds*, to a case involving the Court's “common-law authority to fashion contractual remedies in Government-contracting disputes,” *id.* at 485).

⁵⁰ See *Reynolds*, 345 U.S. at 11–12.

⁵¹ See Plaintiffs' Supplemental Brief, *supra* note 32, at 1–3.

⁵² See *id.* at 5–6, 21–22.

⁵³ See Supplemental Brief for Federal Appellees at 2, *Fazaga v. FBI*, No. 12-56867 (9th Cir. Sept. 19, 2022).

the government's evidence is privileged, the question is whether it can dismiss the case entirely in anticipation of the government's professed inability to mount a full defense or whether it should allow the litigation to proceed without that evidence.⁵⁴ Unfortunately, several appellate courts have dismissed cases in such circumstances, despite the Supreme Court's differentiation of the two privileges and a long history of courts previously treating the narrower privilege as resulting only in the exclusion of evidence.⁵⁵

Thus, absent intervention by the Court, lower courts will continue to dismiss legal challenges to surveillance, torture, and other human rights violations at an early stage where the government argues that the need to protect state secrets may hinder it from establishing a valid legal defense. At oral argument in *Fazaga*, several members of the Court expressed concern about letting a case go forward where privileged information might support the defense, especially where individual defendants who had no power over the privilege, like the FBI agents here, would arguably suffer from the exclusion of the government's evidence.⁵⁶

Only Justice Gorsuch expressed support for the plaintiffs' position that, when the government asserts state secrets to bar evidence in its defense, it should either get to keep the material secret but accept a potential legal judgment against it, or disclose the material and defend the case.⁵⁷ Justice Gorsuch noted that, as the doctrine has developed in lower courts, the government can now effectively sidestep the decision

⁵⁴ The plaintiffs' fallback argument was that, even if some cases might result in dismissal because of the government's inability to defend itself without the privileged evidence, the dismissal should not occur at the pleadings stage but only after further development of the case through discovery or an ex parte, in camera review of the evidence. See Transcript of Oral Argument at 75–76, *FBI v. Fazaga*, 142 S. Ct. 1051 (2022) (No. 20-828), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/20-828_i3dj.pdf [<https://perma.cc/GSA4-WL6F>].

⁵⁵ See, e.g., *Wikimedia Found. v. NSA*, 14 F.4th 276, 282–83, 289, 302–05 (4th Cir. 2021); *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1079–80, 1085–89 (9th Cir. 2010); *Molerio v. FBI*, 749 F.2d 815, 820–21 (D.C. Cir. 1984); *Tenenbaum v. Simonini*, 372 F.3d 776, 777–78 (6th Cir. 2004). For a historical discussion of how courts' dismissals of cases under the state secrets privilege departed from past practice, see Brief of Professor Laura K. Donohue as Amicus Curiae in Support of Neither Party at 21–29, *Fazaga* (No. 20-828).

⁵⁶ See Transcript of Oral Argument, *supra* note 54, at 74–75 (statement of Breyer, J.) (suggesting that he did not know how he would resolve the dilemma); *id.* at 84–85 (statement of Alito, J.) (saying it would be the “Star Chamber,” *id.* at 85, if individual defendants were found to have violated First Amendment rights through a judge's in camera review); *id.* at 128 (statement of Barrett, J.) (suggesting that if individual defendants could not defend themselves against discrimination claims, but could not get claims dismissed, it would make them “sitting ducks”).

⁵⁷ *Id.* at 42–43. In *Abu Zubaydah*, Justice Sotomayor also signed onto Justice Gorsuch's dissent in which he described the state secrets privilege as leading to the exclusion of evidence but the continuation of a trial with other evidence. See *United States v. Husayn (Abu Zubaydah)*, 142 S. Ct. 959, 995 (2022) (Gorsuch, J., dissenting).

of whether to “accept[] a tort judgment [or] keep[] a secret.”⁵⁸ He observed: “[I]n a world in which the national security state is growing larger every day, that’s quite a power.”⁵⁹

The *Fazaga* Court expressly refused to decide the circumstances in which the invocation of state secrets could lead to dismissal of a case. But the sympathy toward the government’s position, alongside the *Abu Zubaydah* majority and concurring opinions, suggests a Court comfortable with broad counterterrorism powers, at least as they have been applied to Muslims.

II. NATIONAL SECURITY DEFERENCE

The state secrets decisions fortify a wall of prior Supreme Court decisions blocking scrutiny of national security activities. I agree with Chesney’s conclusion that these decisions will further restrain efforts to “enforce legal boundaries on national security activities.”⁶⁰ But that is not all. The increasing deference toward national security conduct especially matters because of the Court’s selectively expansive interpretation of what constitutes national security and its increasing willingness to limit executive power outside the national security domain as defined by the Court.

Although the Court ruled against the Bush Administration in several post-9/11 cases involving the detention of terrorism suspects,⁶¹ since then it has nearly always deferred to the executive branch when the latter invokes national security.⁶² In these cases, the Court recites both formal and functional reasons to reject rigorous review, arguing that the Constitution allocates foreign relations and national security judgments to the “political branches” or that judges lack the competence to second-guess executive judgments. This “national security deference” operates at three levels: sometimes the Court bars judicial review of legal challenges altogether,⁶³ sometimes it reviews cases but under an especially

⁵⁸ See Transcript of Oral Argument, *supra* note 54, at 43.

⁵⁹ *Id.*

⁶⁰ Chesney, *supra* note 3, at 179.

⁶¹ See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004) (plurality opinion); *Hamdan v. Rumsfeld*, 548 U.S. 557, 567 (2006); *Boumediene v. Bush*, 553 U.S. 723, 732–33 (2008).

⁶² See, e.g., *Trump v. Hawaii*, 138 S. Ct. 2392, 2408–09 (2018); *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1861 (2017); *Holder v. Humanitarian L. Project*, 561 U.S. 1, 33–36 (2010).

⁶³ See, e.g., *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 401–02 (2013) (holding that human rights groups lacked standing to challenge newly authorized foreign intelligence surveillance program because they couldn’t establish that the government would surveil them).

lenient legal standard,⁶⁴ and sometimes it defers to the government's factual claims even while claiming to apply a conventional legal test.⁶⁵

A. *Expanding National Security in Rolling Back Bivens*

Outside the state secrets decisions, the Court has most recently doubled down on national security deference in several cases that gut the ability to sue federal officials for damages for constitutional violations (*Bivens*⁶⁶ claims). Five years ago, the Court invoked national security deference to prohibit Muslim immigrants detained after 9/11 from suing high-level government officials for harsh and discriminatory conditions of confinement.⁶⁷ Two years ago, the Court refused to allow a *Bivens* claim against a Border Patrol agent who shot a fifteen-year-old Mexican boy across the U.S.-Mexico border because, it said, the conduct of border agents “unquestionably has national security implications.”⁶⁸ This past Term, in *Egbert v. Boule*,⁶⁹ the Court went still further. It precluded a U.S. citizen from suing a border agent for excessive force allegedly used against him on his own property within U.S. borders and expressly forbade constitutional damages claims against *any* Border Patrol agent.⁷⁰ The Court declared: “Because ‘[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention,’ we reaffirm that a *Bivens* cause of action may not lie where, as here, national security is at issue.”⁷¹

These decisions come close to eviscerating *Bivens*, preventing plaintiffs in a variety of contexts from suing federal officials for damages for constitutional violations. *Egbert* creates an almost impossible standard for litigants to meet to maintain a *Bivens* action by holding that, as long as there is “[e]ven a single sound reason” to think that Congress might be better placed than a court to decide whether to create a damages

⁶⁴ See, e.g., *Trump v. Hawaii*, 138 S. Ct. at 2417–23 (upholding Trump Administration policy barring nationals of several Muslim-majority countries from entering the United States and citing national security and immigration context in refusing to consider whether the government's stated justification for the travel ban was the real reason, despite President Trump's record of anti-Muslim statements).

⁶⁵ See, e.g., *Humanitarian L. Project*, 561 U.S. at 7–8, 16–17 (sustaining statutory prohibition on provision of material support to designated foreign terrorist organizations in part because of deference to the government's factual claim that all support for terrorist groups facilitated violence). The classic piece on this form of national security deference is Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361 (2009).

⁶⁶ *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). The *Bivens* Court recognized an implied cause of action for damages for constitutional violations by federal agents in a Fourth Amendment illegal entry case. See *id.* at 389.

⁶⁷ *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1861 (2017) (rejecting *Bivens* claims in part because legal challenges related to post-9/11 response would require “inquiry into sensitive issues of national security”).

⁶⁸ *Hernández v. Mesa*, 140 S. Ct. 735, 747 (2020); see *id.* at 740.

⁶⁹ 142 S. Ct. 1793 (2022).

⁷⁰ *Id.* at 1805–06.

⁷¹ *Id.* at 1804–05 (citation omitted).

remedy, a court should refuse the action.⁷² That reasoning would seem to preclude *Bivens* claims well beyond the context of border enforcement or national security, because surely anyone with any legal background can conjecture *some* reason that Congress might better decide the question.

In the process of gutting *Bivens*, the Court also applied a loose understanding of “national security” that threatens to expand the range of factual scenarios that might trigger national security deference, even beyond *Bivens*. *Egbert*, in particular, involved neither terrorism, nor diplomatic conflicts, nor intelligence or military matters traditionally defined as national security. In characterizing *all* legal disputes involving border agents as related to national security, *Egbert* made two moves. First, it equated the agency’s mission of stopping the illegal entry of people and goods with national security.⁷³ Second, it applied deference at the *wholesale* level to all the agency’s activities, rather than the facts of any particular dispute.⁷⁴

But consider for a moment the size and scope of Border Patrol’s activities. It is one of the nation’s largest law enforcement agencies, with over 20,000 agents,⁷⁵ many of whom work well inside U.S. borders.⁷⁶ The Trump Administration deployed the Border Patrol Tactical Unit to clamp down on protests against police violence in Portland, surveil the funeral of George Floyd in Texas, and assist immigration agents with arresting undocumented people in sanctuary cities.⁷⁷ In the vast border regions near Canada and Mexico, Border Patrol agents frequently conduct joint operations with local and state police, and a Border Patrol sharpshooter killed the school gunman in Uvalde, a town seventy-five miles from the Mexico border.⁷⁸ This surveillance and policing of

⁷² *Id.* at 1803 (quoting *Nestlé USA, Inc. v. Doe*, 141 S. Ct. 1931, 1937 (2021) (plurality opinion)). In case a lower court didn’t get the point that it should just about never create a damages remedy, the Court told us that “in most every case” there will be a “rational reason to think” that Congress should make the decision, precluding a *Bivens* action. *Id.*

⁷³ *See id.* at 1804–05.

⁷⁴ *See id.* at 1806.

⁷⁵ Press Release, ACLU, Documents Obtained by ACLU Reveal Border Patrol Agents Were Authorized to Use Deadly Force at George Floyd’s Burial (Oct. 1, 2020), <https://www.aclu.org/press-releases/documents-obtained-aclu-reveal-border-patrol-agents-were-authorized-use-deadly-force> [<https://perma.cc/KYU2-RG7E>] (“[Border Patrol] is the largest law enforcement agency in the country . . .”); *Border Patrol Overview*, U.S. CUSTOMS & BORDER PROT. (Aug. 24, 2021), <https://www.cbp.gov/border-security/along-us-borders/overview> [<https://perma.cc/JU8J-KJ9G>].

⁷⁶ Jennifer M. Chacón, *Border Exceptionalism in the Era of Moving Borders*, 38 FORDHAM URB. L.J. 129, 141 (2010) (describing increasing number of fixed immigration checkpoints and subsequent increase in border searches in the interior of the United States).

⁷⁷ Eileen Sullivan, *Border Patrol Tactical Unit Has at Times Played High-Profile Role*, N.Y. TIMES (May 27, 2022), <https://www.nytimes.com/2022/05/28/us/politics/border-patrol-ualde.html> [<https://perma.cc/FF52-53CJ>]; Press Release, *supra* note 75.

⁷⁸ Sullivan, *supra* note 77; *see* ELEANOR DOERMANN ET AL., FORKS HUM. RTS. GRP. & FRED T. KOREMATSU CTR. FOR LAW & EQUAL., SEATTLE UNIV. SCH. OF L., TERROR

undocumented people and those protesting police brutality primarily targets Black and Brown communities already racialized as threats to public safety.⁷⁹ By ruling out *Bivens* suits against *any* Border Patrol agent on the notion that the agency’s mission relates to national security, the Court threatens to extend the deference accorded to “national security” to wide swaths of law enforcement activities, with a particular impact on people of color.

B. *Selective Deference to Executive Power*

While expansive in that respect, the Court’s protection for executive power is notably selective. The Court’s support for national security deference stands in marked contrast to its curtailment of administrative authority in other areas of social and economic regulation. Just months before *Abu Zubaydah* and *Fazaga*, the Court undercut the Biden Administration’s efforts to halt evictions during the pandemic⁸⁰ and impose a vaccine requirement on employers.⁸¹ Shortly thereafter, it hampered the Administration’s ability to address climate change.⁸² In these cases, the Court announced a new (or reformulated) “major questions” doctrine that would require a clear statement from Congress before interpreting a statute to authorize an agency to regulate in an area of broad “economic and political significance.”⁸³ Although all three cases stemmed from crises with exceedingly high stakes for human life — the

IN TWILIGHT: THE REAL-LIFE LEGACY OF U.S. BORDER PATROL ON THE OLYMPIC PENINSULA OF WASHINGTON STATE 1–3 (2013) (describing “heavy involvement of Border Patrol in routine local police matters, and heavy involvement of local law enforcement agencies in primary immigration enforcement,” resulting in “blurred and distorted” distinctions between them, *id.* at 3). Thank you to Professor Jennifer Chacón for pointing out these examples.

⁷⁹ See, e.g., *Profile of the Unauthorized Population: United States*, MIGRATION POL’Y INST., <https://www.migrationpolicy.org/data/undocumented-immigrant-population/state/US> [<https://perma.cc/L6GX-5U7D>] (identifying ninety-six percent of the undocumented population in the United States as having been born in Mexico and Central America, the Caribbean, South America, Asia, or Africa, suggesting that the undocumented population is predominantly nonwhite); Tanya Golash-Boza & Pierrette Hondagneu-Sotelo, *Latino Immigrant Men and the Deportation Crisis: A Gendered Racial Removal Program*, 11 *LATINO STUD.* 271, 281–82 (2013) (“Overwhelming and conclusively, selective law enforcement has selected Latino and Black Caribbean working class men.” *Id.* at 282.); *United States v. Carrillo-Lopez*, 555 F. Supp. 3d 996, 1005–06 (D. Nev. 2021) (concluding that U.S. criminal reentry statute “disparately impacts Mexican and Latinx defendants,” *id.* at 1005, in part based on U.S. Border Patrol data showing that overwhelming majority of individuals apprehended are Mexican).

⁸⁰ See *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485, 2490 (2021) (per curiam).

⁸¹ See *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab.*, 142 S. Ct. 661, 666 (2022) (per curiam).

⁸² See *West Virginia v. EPA*, 142 S. Ct. 2587, 2616 (2022).

⁸³ *Id.* at 2608 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)); *Ala. Ass’n of Realtors*, 141 S. Ct. at 2489 (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)); *Nat’l Fed’n of Indep. Bus.*, 142 S. Ct. at 665 (quoting *Ala. Ass’n of Realtors*, 141 S. Ct. at 2489).

pandemic and climate change — the Court imposed sharp limits on the Executive’s power to respond.⁸⁴

As it stands, the Court’s selective deference enables the government to act against traditional national security targets (whether states or people racialized as terrorists, illegal immigrants, or other foreign threats) but limits its ability to address urgent and unprecedented social and economic problems.⁸⁵ This is despite the fact that several oft-cited functional reasons for national security deference — such as the scale of threats or the need for speed or flexibility in responding to them — arguably apply to climate change and fast-moving pandemics.⁸⁶

This selective deference to the executive branch incentivizes administrations (especially Democratic ones) to define a greater range of problems as emergencies and invoke national security powers to address them, with all the attendant risks of that approach.⁸⁷ Since the 1980s and especially since the end of the Cold War, scholars and activists have pushed for wider understandings of “security” that decenter military affairs and specifically include public health and environmental threats.⁸⁸ An administration granted broad deference on national security issues

⁸⁴ For a critical analysis of the major questions doctrine as announced in these cases, see Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4165724 [<https://perma.cc/349K-LY42>].

⁸⁵ Professors Timothy Meyer and Ganesh Sitaraman argue that the major questions doctrine will collide with national security programs with respect to the Executive’s authority to levy economic sanctions, which is based on broad grants of statutory authority. Timothy Meyer & Ganesh Sitaraman, *The National Security Consequences of the Major Questions Doctrine*, 122 MICH. L. REV. (forthcoming 2023) (manuscript at 1–2), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4181908 [<https://perma.cc/7SBE-YCSF>]. They argue that the Court will likely try to categorize some set of issues as “foreign” and therefore outside the scope of the major questions doctrine, but that this approach will likely fail because of the difficulty in drawing the line between the two. *See id.* (manuscript at 22–28). I agree that sharp lines between “domestic” and “foreign” affairs are incoherent but do not expect that the unworkability of the doctrine will prevent the Court from drawing either that distinction or an ostensibly narrower carve-out for national security. Indeed, as Professors Daniel Deacon and Leah Litman have argued, the major questions doctrine has already been implemented in politicized ways and invites further reliance on political and ideological judgments. *See* Deacon & Litman, *supra* note 84 (manuscript at 42–45).

⁸⁶ For a discussion of the scholarly debate on national security deference and a listing of relevant sources, see Shirin Sinnar, *Procedural Experimentation & National Security in the Courts*, 106 CALIF. L. REV. 991, 999–1001 (2018).

⁸⁷ *See, e.g.*, Elizabeth Goitein, *Emergency Powers Are Not the Answer on Abortion or Climate Change*, BRENNAN CTR. FOR JUST. (July 21, 2022), <https://www.brennancenter.org/our-work/analysis-opinion/emergency-powers-are-not-answer-abortion-or-climate-change> [<https://perma.cc/N8R4-D8XK>].

⁸⁸ *See* J. Benton Heath, *Making Sense of Security*, 116 AM. J. INT’L L. 289, 318–19 (2022) (describing conception of “widened security,” *id.* at 319, since the 1980s and increasing arguments for treating climate change and pandemics as security threats); Laura K. Donohue, *The Limits of National Security*, 48 AM. CRIM. L. REV. 1573, 1706–09 (2011) (describing post–Cold War expansion of concept of national security).

but constrained from regulating in other areas will be tempted to invoke security if it cannot enact its policy agenda through Congress.⁸⁹

Rather than license these wider invocations of security, however, the Court is likely to double down on national security deference but restrict its definition of security to protect the Court's broader deregulatory agenda. With respect to new threats, like pandemics or climate change, the Court might once again intone old warnings that "national-security concerns must not become a talisman used to ward off inconvenient claims — a 'label' used to 'cover a multitude of sins.'"⁹⁰ Ironically, while national security deference empowers the executive branch by limiting court review, the Court's power to decide *what counts* as security ultimately empowers the Court itself.

The old warnings about the threat of broad national security invocations are right, whether applied to traditional invocations of security or the new ones favored by progressives.⁹¹ What is problematic, however, is the Court's selective expansion and constriction of executive power to allow harsh law enforcement and security actions on the one hand while disabling administrative authority to solve social and economic problems on the other. Within the context of the Supreme Court's recent rulings, *Abu Zubaydah* and *Fazaga* do not just signify a status quo approach to state secrets but a broader pattern of licensing national security agencies' overreach while undercutting the administrative state.

⁸⁹ See Lisa Friedman et al., *Trying to Salvage His Climate Agenda, Biden Weighs Remaining Options*, N.Y. TIMES (July 19, 2022), <https://www.nytimes.com/2022/07/19/climate/biden-climate-emergency.html> [<https://perma.cc/6F79-SXAQ>] (describing President Biden's consideration of emergency powers to respond to climate change); Elizabeth Goitein, Opinion, *Biden Used "Emergency Powers" To Forgive Student Debt? That's a Slippery Slope*, WASH. POST (Sept. 1, 2022, 5:17 PM), <https://www.washingtonpost.com/opinions/2022/09/01/biden-student-debt-emergency-powers-are-slippery-slope/> [<https://perma.cc/M22R-USLZ>] (describing Biden Administration's use of 2003 law allowing Education Secretary to modify student loan terms during national emergencies).

⁹⁰ *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1862 (2017) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 523 (1985)).

⁹¹ See Heath, *supra* note 88, at 318–19.