NOTE

DIVIDED LOYALTIES, UNDIVIDED DEFERENCE: THE IMBALANCE BETWEEN SECRECY AND TRANSPARENCY WHEN APPLYING THE STATE SECRETS PRIVILEGE

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INTRODUCTION

The doctrine of separation of powers is well grounded in the United States Constitution.[1] It not only allows each branch of the government to act on its own but also allows them to serve as a check on each other's powers.[2] Judicial review of executive actions forms an important part of this doctrine. However, national security is one arena in which the judiciary often refuses to perform its duty of oversight and, instead, defers to the executive branch because the executive is better equipped to resolve those

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1 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 593 (1952).

2 *Id.* ("To that end [the Founders of this Nation] rested the structure of our central government on the system of checks and balances. For them the doctrine of separation of powers was not mere theory; it was a felt necessity.")

issues.[3] Nonetheless, problems arise when such judicial deference comes at the cost of shutting the courtroom doors on individuals trying to redress violations of their constitutional rights.

Since the 9/11 attacks, the executive branch has repeatedly invoked the state secrets privilege as the basis for dismissing cases "challenging the legality of its conduct in the war on terror."[4] The two realms where the privilege has been invoked the most are the government's extraordinary rendition programs and the National Security Agency's ("NSA") foreign intelligence surveillance programs.[5] The executive has sometimes invoked the privilege prior to discovery on the question of standing. As a result, plaintiffs are unable to put forth evidence required to show their standing. This has posed various constitutional concerns including, but not limited to, the Fourth Amendment rights against unreasonable search and seizures,[6] the First Amendment rights to freedom of speech, association, and religion,[7] and the Fifth Amendment right to equal protection of the law.[8]

To clarify, the purpose of this Note is not to critique the state secrets privilege doctrine altogether. Where actual national security concerns are present, a proper invocation of the privilege is imperative. However, problems arise when the privilege is *improperly* invoked or where the government's conduct itself lies at the center of the case. An improper invocation of the privilege then acts as a shield and blocks judicial oversight of peoples' fundamental rights. It is in these situations where an imbalance is created—between secrecy on one hand, and transparency and

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[3] *See* Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249, 1288 (2007) (noting that "[j]udges in general cannot be expected to have the requisite expertise, experience, and knowledge necessary to make fine-grained decisions regarding the national security implications of disclosure. . ."). This idea of executive deference is different from the Chevron deference, an administrative law principle, which does not apply in the state secrets privilege context. *See* Chevron USA, Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, (1984); Amy L. Stein, *A Statutory National Security President*, 70 FLA. L. REV. 1183, 1203-1220, (2018) (discussing the inapplicability of the *Chevron* deference to a President acting under express statutory authority and in the name of national security because the President is not considered an agency governed by the Administrative Procedures Act).

[4] Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 FORDHAM L. REV. 1931, 1935 (Mar. 2007). *See generally* Daniel R. Cassman, *Keep It Secret, Keep It Safe: An Empirical Analysis of the State Secrets Doctrine*, 67 STAN. L. REV. 1173 (2015). *But see* Frost, *supra* note 4, at 1938 n.30 (arguing that "the frequency of the privilege's assertion might have more to do with the number of cases challenging executive branch activity than a particular administration's policy regarding use of the privilege").

[5] *See* Frost, *supra* note 4, at 1931. (describing the extraordinary rendition program is a program "under which the executive removes suspected terrorists to foreign countries for interrogation.").

[6] *See* U.S. CONST. amend. IV.

[7] *See* U.S. CONST. amend. I.

[8] *See* U.S. CONST. amend. V.

accountability on the other hand. The judiciary ends up giving undivided deference to the executive branch and the case is dismissed in its entirety.

Congress enacted the Foreign Intelligence Surveillance Act ("FISA") "to provide judicial and congressional oversight of foreign intelligence surveillance activities" and to make sure that the executive does not misuse its electronic surveillance powers to invade peoples' privacy while disguising such activity as in the name of national security.[9] However, there is no mention of the state secrets privilege anywhere in the FISA, which shows that Congress did not intend to displace the privilege.[10] Nevertheless, both the state secrets privilege and the procedures laid down in FISA fundamentally conflict with each other, which has led to interpretative inconsistencies.

The state secrets privilege needs legislative reform. Congress must step in and enact legislation that clarifies the privilege's scope. Congress can regulate the state secrets privilege because it has the authority to legislate in the arena of national security and access to information. This is because the control of national security information does not rest solely with the President. Moreover, courts must ensure that they are allowing the executive to invoke the state secrets privilege correctly and are not broadening the privilege's application while performing their judicial roles. Courts should further ensure that their decisions are in consonance with the overarching principle of the separation of powers doctrine.

I. STATE SECRETS PRIVILEGE: A TOOL IN THE TOOLKIT

A. United States v. Reynolds

As was held in the renowned case of *United States v. Reynolds*, the state secrets privilege is a doctrine that allows the government to prevent the disclosure of confidential and sensitive information "if there is a reasonable danger that such disclosure would harm the national security of the United States."[11] Over the years, there has been considerable disagreement about the underlying nature of the doctrine. While some treat it as merely an evidentiary rule rooted in common law, others describe it as a constitutional rule grounded in the President's Article II powers.[12]

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[9] The Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801 *et seq.* (1978). [hereinafter FISA].

[10] Sanchitha Jayaram & Edward C. Liu, FBI v. Fazaga: *Supreme Court Unanimously Holds That FISA Does Not Displace the State Secrets Privilege*, CONG. RSCH. SERV. (Sept. 1, 2022).

[11] Edward C. Liu, *The State Secrets. Privilege and Other Limits on Litigation Involving Classified Information*, CONG. RSCH. SERV., (May 28, 2009); *see also* United States v. Reynolds, 345 U.S. 1, 10 (1953).

[12] *See* United States v. Nixon, 418 U.S. 683, 710-11 (1974) (noting that unlike other, qualified executive privileges, the state secrets privilege concerns "areas of Article II duties in which the courts have traditionally shown the utmost deference to Presidential responsibilities"

In *Reynolds,* three civilian observers were killed when a B-29 aircraft caught fire and crashed during a test flight.[13] Their widows sued the Air Force for negligence under the Federal Tort Claims Act and requested the official accident investigation report.[14] The government objected and invoked its executive privilege.[15] The district court rejected the government's claim of privilege and ordered it to produce the report.[16] The Court of Appeals for the Third Circuit affirmed,[17] and the government filed a writ of certiorari before the Supreme Court.[18]

The Supreme Court reversed the Third Circuit's decision and observed that the government holds a well-grounded evidentiary privilege that protects military and state secrets.[19] The Court observed, "[t]he privilege belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party. . .There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer."[20] The state secrets privilege applies if the government satisfies the court "from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged."[21] In such a case, "even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake."[22] After considering the totality of the circumstances, the Court concluded that because the plane's mission was to test "secret electronic equipment," there was a reasonable danger that the accident investigation report contained references that, if exposed, would endanger national security.[23]

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and to the extent that it "relates to the effective discharge of a President's powers, it is constitutionally based"); El Masri v. United States, 479 F.3d 296, 303 (4th Cir. 2007) (observing that "although the state secrets privilege was developed at common law, it performs a function of constitutional significance, because it allows the executive branch to protect information whose secrecy is necessary to its military and foreign-affairs responsibilities."). *See also* Anthony John Trenga, *What Judges Say and Do in Deciding National Security Cases: The Example of the State Secrets Privilege*, Harv. Nat. Sec. L. J., 18, (2018).

13 *Reynolds*, 345 U.S. at 2-3.

14 *Id.* at 2-3.

15 *Id.* at 3

16 *Id.* at 5.

17 Reynolds v. United States, 192 F.2d 987 (3d Cir. 1951). ("[A] claim of privilege against disclosing evidence relevant to the issues in a pending lawsuit involves a justiciable question, traditionally within the competence of the courts, which is to be determined in accordance with the appropriate rules of evidence, upon the submission of the documents in question to the district judge for his examination.")

18 *Reynolds*, 345 U.S. at 1.

19 *Id.* at 7.

20 *Id*. at 7-8.

21 *Id.* at 10.

22 *Id.* at 11.

23 *Id.* at 10.

Reynolds promulgated a "reasonable danger" standard for invoking the state secrets privilege.[24] If there is a reasonable danger that state secrets are a stake, the government is entitled to utmost deference without regard for the countervailing public interest in disclosure.[25] Moreover, the issue of whether the state secrets privilege could be a ground for pre-discovery dismissal was never raised in *Reynolds*. Rather, the Court went so far as to say that whenever the privilege applies, courts should not "jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers."[26] In other words, whenever the privilege applies, the court should not facilitate "an in-camera review of the documents in question to judge whether they must stay secret."[27]

While *Reynolds* was the first time the Supreme Court recognized the state secrets privilege doctrine, the precursor to *Reynolds* was the 1876 case of *Totten v. United States*.[28] *Reynolds* and *Totten* are separate doctrines that function differently.[29] In *Totten,* the Court made no mention of the state secrets privilege.[30] The Court's reasoning was based on the "traditional notions of confidentiality" rather than any "possible harm to national security."[31] The Court described various kinds of privileged relationships—spousal, doctor and patient, lawyer-client—and extended the principle of confidentiality to a government contract for secret services.[32] *Totten* holds for the non-justiciability of secret government contracts, which is distinct

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[24] Matthew N. Kaplan, *Who Will Guard the Guardians? Independent Counsel, State Secrets, and Judicial Review*, 18 NOVA L. REV., 1787, 1821 (1994).

[25] *Id.*

[26] *Reynolds*, 345 U.S. at 10.

[27] Beatrix Geaghan-Briener, *Rethinking the State Secrets Privilege After the War on Terror*, COLUM. UNDERGRAD. L. REV., (June 20, 2022) https://www.culawreview.org/journal/rethinking-the-state-secrets-privilege-after-the-war-on-terror; Faaris Akremi, Note, *Does Justice 'Need to Know'? Judging Classified State Secrets in the Face of Executive Obstruction*, 70 STAN. L. REV., 973, 990 (2018).

[28] Totten v. United States, 92 U.S. 105 (1876). The issue in this case was whether a federal court could review an espionage employment contract if the trial of the action would lead to disclosure of confidential materials. The majority opinion of the court, authored by Justice Field, noted, "public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential and respecting which it will not allow the confidence to be violated."

[29] Gen. Dynamics Corp. v. United States, 563 U.S. 478, 485 (2011).

[30] Justin Florence & Matthew Gerke, *National Security Issues in Civil Litigation: A Blueprint for Reform*, *in* LEGISLATING THE WAR ON TERROR: AN AGENDA FOR REFORM 252, 258 (Benjamin Wittes ed., 2009).

[31] *Id.* at 257. The court held an espionage employment agreement to be unenforceable in a court of law since enforcing it would render it non-secret. ("the secrecy which such contracts impose precludes any action for their enforcement. The publicity produced by any such action would itself be a breach of contract of that kind, and thus defeat a recovery.")

[32] *Id.* at 258.

from the common law evidentiary nature of the state secrets privilege.[33] The doctrine has become unnecessarily complicated over time, as courts have conflated the state secrets privilege with the *Totten* principle.[34] Nevertheless, the Supreme Court has reaffirmed the *Totten* principle in later cases and it continues to be good law.[35]

B. The Standard for Asserting the State Secrets Privilege

With the arrival of the Obama Administration in 2009, the Attorney General of the United States issued the Department of Justice ("DOJ") Policies and Procedures Governing Invocation of the State Secrets Privilege ("2009 Memorandum").[36] The 2009 Memorandum aimed to provide greater accountability and reliability in the invocation of the state secrets privilege in litigation.[37] According to the DOJ, to invoke the state secrets privilege, a government department or agency must show that the assertion of the privilege is necessary to "protect information the unauthorized disclosure of which reasonably could be expected to cause significant harm to the national defense or foreign relations of the United States."[38] In other words, the invocation of the state secrets privilege "must be narrowly tailored to produce the least negative effect on the rights of litigants."[39]

The 2009 Memorandum also stated that the DOJ will not defend an invocation of the privilege in order to (1) conceal violations of the law, inefficiency, or administrative error; (2) prevent embarrassment to a person, organization, or agency of the United States government; (3) restrain competition; or (4) prevent or delay the release of information the release of which would not reasonably be expected to cause significant harm to national security.[40] This limitation to the privilege stems from the Watergate era when the Supreme Court in *United States v. Nixon* observed

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33 D.A. Jeremy Telman, *On the Conflation of the State Secrets Privilege and the Totten Doctrine*, 3 NAT'L. SEC. L. BR., 1, 2 (2012).

34 Florence & Gerke, *supra* note 30, at 253.

35 *See* Tenet v. Doe, 544 U.S. 1, 9 (2005) (reaffirming *Totten* and holding that "lawsuits premised on alleged espionage agreements are altogether forbidden"); Gen. Dynamics Corp. v. United States, 563 U.S. 478, 485 (2011) (applying *Totten* to a fixed-price contract with the U.S. Navy).

36 Memorandum from the Att'y Gen. to the Heads of Exec. Dep't of Justice Heads of Exec. Dep'ts and Agencies, Policies and Procedures Governing Invocation of the State Secrets Privilege (Sept. 23, 2009), https://www.justice.gov/sites/default/files/opa/legacy/2009/09/23/state-secret-privileges.pdf [hereinafter 2009 Memorandum].

37 *Id.*

38 *Id.*

39 John Feffer & Robert Pallitto, *Obama and State Secrets,* INSTITUTE FOR POLICY STUDIES (last visited Oct. 11, 2023), https://ips-dc.org/obama_and_state_secrets/.

40 2009 Memorandum, *supra* note 36.

that the privilege "cannot be invoked to cover criminal behavior" or used to "justify a broad doctrine of executive immunity from judicial oversight."[41]

On September 30, 2022, Attorney General ("AG") Merrick Garland issued a Supplement to the 2009 Memorandum.[42] The additional procedures require the heads of all executive departments or agencies seeking to invoke the state secrets privilege in litigation to "submit to the Assistant AG for the Division responsible for the litigation, a formal request to defend invocation of the privilege, together with a declaration by the department or agency head based on personal consideration of the matter."[43] The supplemental procedures also require that, after the AG has approved the use of the privilege, the agency or department requesting the privilege has a continued obligation to "confirm[] at appropriate intervals throughout the pendency of the litigation that the invocation continues to satisfy the standards set forth in Section l(a) of the [2009 Memorandum]."[44]

While these policies and procedures do offer some guidance, they do not create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the government.[45] Moreover, the standard stated in the memorandum does not authorize or require an assessment of whether the information that the government seeks to prevent from disclosure "indicates unlawful government conduct."[46]

C. Pre-Discovery Dismissal of Lawsuits

Sometimes, after the government has asserted the state secrets privilege, the court dismisses the entire lawsuit. This often happens when the "very subject matter" of the lawsuit is a state secret.[47] It is also consistent with the *Reynolds* framework, which allows the judge to "dismiss a case before viewing *in camera* any supposedly confidential information."[48] There are three situations where a valid invocation of the state secrets privilege might result in the dismissal of the whole lawsuit: first, when the plaintiff is unable to make out a prima facie case without

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41 United States v. Nixon, 418 U.S. 683, 715-16 (1974); Briana Rose Morgan, The Power to Conceal; Executive Power and the State Secrets Privilege 66 (Dec. 17, 2005) (Ph.D. dissertation, Georgetown University), https://repository.library.georgetown.edu/bitstream/handle/10822/1040717/Morgan_georgetown_0076D_13159.pdf?isAllowed=y&sequence=1.

42 Memorandum from the Att'y Gen. to the Dep't of Justice Heads of Exec. Dep'ts and Agencies, Supplement to Policies and Procedures Governing Invocation of the State Secrets Privilege (Sept. 30, 2022) available at https://www.justice.gov/ag/page/file/1539346/download [hereinafter 2022 Memorandum].

43 *Id.*

44 *Id.*

45 *Id.*

46 Elizabeth Goitein, *The State Secrets Sidestep: Zubaydah and Fazaga Offer Little Guidance on Core Questions of Accountability*, CATO SUP. CT. REV., 193, 220 (2022).

47 *Id.* at 198.

48 John Ames, *Secrets and Lies: Reynolds' Partial Bar to Discovery and the Future of the State Secrets Privilege*, N.C. J. INT'L L. 1067, 1068 (2013).

using the privileged evidence; second, when the defendant cannot mount their defense without using the privileged evidence; and third, when the "privileged information is so central to the case that any attempt to disentangle it from non-privileged evidence might fail, leading to the inadvertent disclosure of the privileged evidence."[49]

In all these cases, the court dismisses the lawsuit before identifying any relevant evidence through discovery.[50] Instead, the government makes a prediction "as to what the evidence in the case will be."[51] This is problematic since the court assesses the government's state secrets privilege argument solely on a "prediction about the evidence in the case, uninformed by actual evidence itself."[52] Moreover, even if the court does identify any relevant evidence, it does not determine whether that evidence qualifies as privileged.[53] Even in *Reynolds*, the Court had dismissed the case prior to discovery.[54] Later, when the accident report was declassified, it turned out that the report contained no references to the secret equipment being tested.[55] Hence, the evidence at issue was not privileged information and the Court fooled itself into believing that it was.[56]

The third situation, also called the "mosaic theory,"[57] broadened the *Reynolds* framework that resulted in courts dismissing cases solely because of "the presence of privileged information."[58] The government has asserted the mosaic theory in several Freedom of Information Act ("FOIA") cases.[59] The Supreme Court affirmed the mosaic theory in the case of *CIA v. Sims*.[60] In *Sims*, the Court held that the Central Intelligence Agency ("CIA") could "withhold information about controversial government-sponsored psychological experiments in response to [FOIA] requests."[61] This is because "the requested information would reveal intelligence

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49 *See* Mohamed v. Jeppesen Dataplan, 614 F.3d 1070, 1083 (9th Cir. 2010).

50 Goitein, *supra* note 46, at 200.

51 *Id.*

52 *Id.* at 201.

53 *Id.*

54 *Id.* at 199.

55 *Id.* at 204.

56 *Id.*

57 *See* Todd Garvey & Edward C. Liu, *The State Secrets Privilege: Preventing the Disclosure of Sensitive National Security Information during Civil Litigation*, CONG. RSCH. SERV., at 5 (2011) (noting that the "mosaic theory" is based on "the principal that federal judges are not properly equipped to determine which pieces of information, when taken together, could result in the disclosure of the very thing the privilege is designed to protect") (internal quotations omitted).

58 Ames, *supra* note 48, at 1080. John Ames also suggested that the "mosaic theory" is nothing but really *Totten* in disguise. *Id.* at 1088.

59 Ctr. for Nat'l Sec. Stud. v. U.S. Dep't of Just., 331 F.3d 918, 924 (D.C. Cir. 2003); North Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198, 227 (3d Cir. 2002); Detroit Free Press v. Ashcroft, 303 F.3d 681, 709 (6th Cir. 2002).

60 C.I.A. v. Sims, 471 U.S. 159 (1985).

61 Christina E. Wells, *CIA v. Sims: Mosaic Theory and Government Attitude*, 58 ADMIN. L. REV. 845, 846 (2006).

sources related to national defense, which were specifically protected from disclosure under the National Security Act of 1947."[62] The rationale behind the mosaic theory is that the government may withhold otherwise inconsequential information because it might prove harmful if merged with other information known by another actor like a hostile intelligence agency.[63] In simpler words, there is a possibility that "hostile intelligence agencies can piece together puzzles from smaller bits of information."[64]

II. OPEN SECRETS: THE CASE OF ABU ZUBAYDAH

Does a secret remain a secret if the whole world knows about it?[65] To answer this question, we must first define what a "secret" is. A secret refers to the "national security information or material which requires a substantial degree of protection and shall be applied only to such information as the unauthorized disclosure of which could reasonably be expected to cause serious damage to the national security."[66] Executive Order 13526 ("EO 13526") defines "classified information" as "information that has been determined . . . to require protection against unauthorized disclosure."[67] Section 1.1(c) of EO 13526 also states that "classified information shall not be declassified automatically as a result of any unauthorized disclosure of identical or similar information."[68] This means that the U.S. government may "maintain official secrecy over information that is open to the public."[69] Just because information that is currently classified appears in the public domain "does not preclude initial or continued classification."[70] For the information to be declassified, it must first be officially disclosed or acknowledged "by an official Government source."[71]

The Supreme Court discussed the issue of "open secrets" in *United States v. Zubaydah*.[72] In *Zubaydah*, the CIA allegedly detained Abu

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62 *Id.*

63 *Sims*, 471 U.S. at 178. ("Foreign intelligence services have both the capacity to gather and analyze any information that is in the public domain and the substantial expertise in deducing the identities of intelligence sources from seemingly unimportant details").

64 Wells, *supra* note 61, at 847.

65 Shirin Sinnar, *A Label Covering A "Multitude of Sins": The Harm of National Security Deference*, 136 HARV. L. REV. F. 59,60 (2022).

66 41 C.F.R. § 105-62.101(b) (2023); Executive Order 13526, 75 Fed. Reg. 707, 707-08 (Jan. 5, 2010).

67 Executive Order 13526, 75 Fed. Reg. 707, 727 § 6.1(i) (Jan. 5, 2010).

68 *Id.* at 707 § 1.1(c).

69 Amanda Jacobsen, *Open Secrets in U.S. Counter-Terrorism Policy*, *in* THE LONG DECADE: HOW 9/11 CHANGED THE LAW 250 (David Jenkins, Amanda Jacobsen & Anders Hendriksen eds., 2014), available at https://academic.oup.com/book/12628/chapter/162548068.

70 14 C.F.R. § 1203.401 (2023) ("[S]uch [unauthorized] disclosure requires an immediate reevaluation to determine whether the information has been compromised to the extent that downgrading or declassification is indicated.").

71 *Id.*

72 Unites States v. Zubaydah, 142 S.Ct. 959 (2022).

Zubaydah, a former associate of Osama Bin Laden, at a CIA detention site in Poland.[73] CIA contractors employed a combination of enhanced interrogation techniques against Zubaydah, which included waterboarding, wall standing, sleep deprivation, cramped confinement, facial hold and facial slap (insult slap).[74] Zubaydah's lawyers filed a lawsuit challenging his detention and sought to compel testimony and documents from two CIA contractors, Mitchell and Jessen, regarding the "enhanced-interrogation program" that they devised.[75] The district court dismissed Zubaydah's discovery request by allowing the executive to invoke the state secrets privilege.[76]

However, the Ninth Circuit reversed and held that even though much of the information sought by Zubaydah was protected from disclosure by the state secrets privilege, the privilege did not apply to publicly known information.[77] Accordingly, discovery into the existence of the CIA black site in Poland, the conditions of confinement and interrogation at that facility, and Zubaydah's treatment at that location could continue forward.[78]

On March 3, 2022, the Supreme Court reversed the Ninth Circuit's judgment, accepted the government's invocation of the state secrets privilege, and dismissed Zubaydah's suit. The Court analyzed how the *Reynolds* framework applied to information that was already in the public domain. It noted that "sometimes information that has entered the public domain may nonetheless fall within the scope of the state secrets privilege" and thus, even though the location of Zubaydah's detention site was known to the world, public knowledge did not render that information unprivileged.[79] This is because the absence of an official confirmation or denial by the government left open "the possibility that the so-called public knowledge might be untrue."[80] Because any formal acknowledgement by

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[73] *Id.* at 963.

[74] Office of the Ass't. Att'y Gen., Memorandum for John Rizzo, Interrogation of Al Qaeda Operative, (August 1, 2002), available at https://www.justice.gov/sites/default/files/olc/legacy/2010/08/05/memo-bybee2002.pdf.

[75] *Id.* at 8. Zubaydah's lawyers filed a discovery application pursuant to 28 U.S.C. § 1782, which allows a party to a foreign legal proceeding to apply to a U.S. court to seek discovery of evidence for use in the foreign legal proceeding. *Zubaydah*, 142 S. Ct. at 964-65.

[76] *Zubaydah*, 142 S. Ct. at 959.

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

[78] *Id.* at 1134. Discovery into these facts could continue forward because they were discovered and widely reported due to investigations performed by journalists and nongovernmental organizations. *Id.* at 1127, 1134.

[79] *Zubaydah,* 142 S.Ct. at 968; *see also* Jennifer K. Elsea, *Abu Zubaydah and the State Secrets Doctrine*, Cong. Rsch. Serv. (June 16, 2022); *see also* Exec. Order No. 13,526, 75 C.F.R. 705, § 1.1(c) (2009).

[80] Elsea, *supra* note 79; *Zubaydah*, 142 S.Ct. at 970 ("Here, the Government has not confirmed or otherwise officially acknowledged the existence of a CIA detention site in Poland and it has explained why, under these circumstances, confirmation of that information could reasonably be expected to significantly harm national security interests"). The U.S. Govt. has never officially acknowledged that the detention site was in Poland.

Mitchell and Jessen in their testimonies would be attributable to the U.S. government, the Court noted that any such attempt by the government to officially confirm or deny the information in question "could damage the CIA's clandestine relationships with foreign authorities."[81]

Justice Gorsuch and Justice Sotomayor dissented and observed that "the events in question took place two decades ago and have long been declassified."[82] According to them, the majority's argument that deposing the CIA contractors might lead to an inadvertent disclosure of the location of the activities was not sufficient to justify the dismissal of the entire lawsuit.[83] They further argued that the government, by preventing the disclosure of the testimony in question, was avoiding "embarrassment for past misdeeds."[84]

The Ninth Circuit in *Zubaydah* noted that because the information in question was publicly known, it amounted to a *de facto* waiver of the state secrets privilege.[85] Had the Supreme Court upheld the Ninth Circuit's *de facto* waiver theory, "the impact on prospects for civil suits challenging the legality of national security activities would have been much wider."[86] However, here, the Supreme Court focused more on the promise of secrecy that U.S. intelligence agencies make to their foreign intelligence partners.[87] This line of reasoning is very similar to how the Court in *Totten* prioritized the enforcement of a promise of non-disclosure in an espionage employment contract.[88] However, the government's concern that "foreign intelligence services might be less willing to cooperate with the CIA in the future if they thought the CIA would betray its confidences" failed for the sole reason that there were "no confidences left to betray."[89]

The Court's rejection of a *de facto* waiver of the privilege indicates the judiciary's "deferential attitude" towards the government's assertions.[90] However, the problem embedded in such deference is the judiciary's ignorance of alleged violations of fundamental rights and international law, and at the same time, the judiciary's prioritization of the "clandestine

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81 *Zubaydah*, 142 S. Ct. at 969.

82 *Id.* at 985.

83 *Id.*

84 *Id.* at 1001.

85 Robert Chesney, *No Appetite for Change: The Supreme Court Buttresses the State Secrets Privilege, Twice*, 136 HARV. L. REV. 170, 185 (2022).

86 *Id.* at 185-86.

87 *See Zubaydah*, 142 S. Ct. at 968 (observing that "sensitive relationships with other nations are based on mutual trust that the classified existence and nature of the relationship will not be disclosed").

88 Chesney, *supra* note 85, at 186.

89 Goitein, *supra* note 46, at 209 (arguing that "whatever reputational harms Poland might suffer as a result of its cooperation with the CIA, and whatever adverse consequences might flow from the lifting of the veil, have happened already.").

90 Sinnar, *supra* note 65, at 61.

cooperation between intelligence agencies."[91] Another problem with such judicial deference is how it completely relies on the "executive official's affidavits without reviewing the actual evidence."[92]

In his article, Robert Chesney argues that the Supreme Court in *Zubaydah* has introduced "doctrinal confusions" into the application of the state secrets privilege.[93] According to Chesney, the Court in *Zubaydah* "emphasized a conspicuously different approach to the role of necessity" in assessing state secrets privilege claims as compared to the original *Reynolds* framework.[94] Instead of simply stating that the judge should factor in "necessity" in the process of assessing the government's privilege claim, the majority in *Zubaydah* stated that the judge "first should decide whether the circumstances warrant the privilege claim" and then, using necessity as a factor, decide "how deeply to probe the details of, and basis for, the government's privilege claim."[95] Chesney argues that this two-step model "is novel" and adds a "layer of complexity beyond what *Reynolds* requested."[96] I believe that Chesney is correct in arguing that the second step "imparts little obvious benefit" and "sounds superfluous in light of the first step."[97] This is because, ultimately, both steps want the court to answer the same question, i.e. whether the government's claim satisfies the rules of privilege.

III. STATE SECRETS AND WARRANTLESS SURVEILLANCE

A significant amount of the world's communications traffic passes either through the United States or the United Kingdom.[98] This "home-field advantage" allows both states' intelligence agencies to tap into fiber-optic cables and "intercept traffic flowing into and across their countries."[99] In 2013, the Edward Snowden files revealed that the NSA operated global mass surveillance programs that not only intercepted communications while in transit over the internet but also collected communications from various internet companies like Google, Facebook, and Yahoo.[100] The

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91 *Id.* at 62. *See also* 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).

92 Goitein, *supra* note 46, at 203.

93 Chesney, *supra* note 85, at 172.

94 *Id.* at 187.

95 *Id.* at 187-88; *Zubaydah*, 142 S. Ct. at 967.

96 Chesney, *supra* note 85, at 188.

97 *Id.*

98 Ewen Macaskill & Gabrielle Dance, *NSA Files Decoded: What the revelations mean for you*, THE GUARDIAN, (Nov. 1, 2013), available at https://www.theguardian.com/world/interactive/2013/nov/01/snowden-nsa-files-surveillance-revelations-decoded.

99 *Id.*

100 Danny O'Brien, *Who Speaks for the Billions of Victims of Mass Surveillance? Tech Companies Could*, ELECTRONIC FRONTIER FOUNDATION, (Oct. 30, 2017), available at https://www.eff.org/deeplinks/2017/10/tech-companies-could-fight-non-us-surveillance.

former is termed as "Upstream" surveillance whereas the latter is termed as "Downstream" surveillance.[101] Over the years, there have been several attempts to challenge the constitutionality of NSA's foreign surveillance programs.[102] One such attempt to challenge the Upstream surveillance program was recently dismissed by the United States Court of Appeals for the Fourth Circuit on the grounds of the state secrets privilege.[103]

A. Legal Framework: FISA and Executive Order 12333

The FISA, originally passed in 1978 and amended in 2008 by the FISA Amendments Act ("FAA"), has been used as the legal basis under which the NSA authorizes some of its foreign surveillance programs. Section 702 of the FAA allows the United States government to "compel providers of electronic communications services to assist the Government in acquiring foreign intelligence information concerning non-US persons located outside the United States."[104] The underlying purpose behind Section 702 is to "protect the United States and its allies from hostile foreign adversaries, including terrorists, proliferators, and spies, and to inform cybersecurity efforts."[105] Section 702 also allows the AG and the Director of National Intelligence ("DNI") to engage in warrantless electronic surveillance and collect foreign intelligence information for many purposes, including any information relating to "the conduct of the foreign affairs of the United States."[106]

While Section 702 surveillance takes place on U.S. soil and targets foreigners, Executive Order 12333 ("EO 12333") "authorizes warrantless electronic surveillance that largely takes place outside the United States."[107] EO 12333 is not regulated by the FISA. Hence, whether Section 702 or EO 12333 governs a particular surveillance program depends on where the collection of foreign intelligence information takes place.[108] EO 12333

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101 Craig Timberg, *NSA Slide shows surveillance of undersea cables*, WASHINGTON POST, (July 10, 2013), available at https://www.washingtonpost.com/business/economy/the-nsa-slide-you-havent-seen/2013/07/10/32801426-e8e6-11e2-aa9f-c03a72e2d342_story.html

102 Clapper v. Amnesty International USA, 568 U.S. 398 (2013) (holding that plaintiffs did not have standing under Article III of the U.S. Constitution because no injury occurred); Jewel v. NSA, 673 F.3d 902 (2019) (holding that "the very issue of standing implicates state secrets").

103 Wikimedia Foundation v. NSA, 14 F.4th 276 (2021).

104 FISA, § 1881a; *See also* Office of General Counsel, FISA Amendments Act of 2008 Summary Document, (Dec. 23, 2008), available at https://www.eff.org/files/2014/06/30/fisa_amendments_act_summary_document_1.pdf.

105 Director of National Intelligence, Section 702 Overview, available at https://www.dni.gov/files/icotr/Section702-Basics-Infographic.pdf.

106 50 U.S.C. § 1801(e).

107 Ashley Gorski, *Summary of U.S. Foreign Intelligence Surveillance Law, Practice, Remedies, and Oversight*, AM. CIV. LIB. UN. FOUN., (Aug. 30, 2018); Exec. Order 12333, 46 FR 59941, (Dec. 4, 1981).

108 Elizabeth Goitein, *Biden Administration's New 'Signals Intelligence' Rules Leave Door Open to Bulk Surveillance*, BRENNAN CENTER FOR JUSTICE, (Nov. 1, 2022) available at

allows the government to collect both content and metadata in bulk.[109] While EO 12333 includes limitations on "how the government may use information collected in bulk," those limitations are "less restrictive" than those stated in the Presidential Policy Directive 28 ("PPD 28").[110] To conclude, Section 702 and EO 12333 together give the U.S. government "extraordinary access to the private communications and data of persons around the world."[111]

§ 1806 of the FISA governs the use of information that is collected from the foreign electronic surveillance programs conducted pursuant to the FISA.[112] § 1806(c) and (d) state that the federal or state government must give notice to an "aggrieved person" whose data was intercepted if the government intends to "use or disclose [such data] in any trial, hearing, or other proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States."[113] § 1806(e) states that an "aggrieved person" may move to suppress any data obtained from electronic surveillance that was "unlawfully acquired" or was otherwise not compliant with FISA.[114] According to § 1806(f), whenever an aggrieved person makes a motion to discover materials relating to or derived from electronic surveillance and the Attorney General files an affidavit under oath that disclosure of such materials would harm the national security of the United States, "the court must review materials relating to the surveillance *in camera* and *ex parte*" to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted.[115]

As noted above, the protections afforded to the American people under FISA only apply if the person shows that they are an "aggrieved plaintiff." An aggrieved plaintiff is any person who was the target of electronic surveillance or had their communications or activities surveilled.[116] The limited application of FISA to only "aggrieved plaintiffs" becomes

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https://www.brennancenter.org/our-work/analysis-opinion/biden-administrations-new-signals-intelligence-rules-leave-door-open-bulk.

109 Bulk collection is the collection of data that does not have a specific surveillance target.

110 Presidential Policy Directive, Signals Intelligence Activities, (Jan. 17, 2014) available at https://obamawhitehouse.archives.gov/the-press-office/2014/01/17/presidential-policy-directive-signals-intelligence-activities. § 2 of PPD 28 states that bulk data may be used only to detect and counter: (1) espionage and other threats and activities directed by foreign powers or their intelligence services against the United States and its interests; (2) threats to the United States and its interests from terrorism; (3) threats to the United States and its interests from the development, possession, proliferation, or use of weapons of mass destruction; (4) cybersecurity threats; (5) threats to U.S. or allied Armed Forces or other U.S or allied personnel; and (6) transnational criminal threats, including illicit finance and sanctions evasion related to the other purposes named in this section.

111 Gorski, *supra* note 107, at 2.

112 50 U.S.C. § 1806(f).

113 50 U.S.C. § 1806(c) & (d).

114 50 U.S.C. § 1806(e).

115 50 U.S.C. § 1806(f).

116 50 U.S.C. § 1801(k).

problematic when the evidence that the plaintiff requires to show they are aggrieved is itself subject to the state secrets privilege.[117] This happened in *Jewel v. NSA*, where the plaintiffs filed a class action lawsuit against the government for conducting warrantless dragnet surveillance of US citizens, with the assistance of telecommunication companies, without a court order or warrant.[118] The plaintiffs alleged constitutional violations of the Fourth Amendment. However, the Ninth Circuit dismissed the suit and held that "the very issue of standing implicates state secrets."[119] In June 2022, the Supreme Court refused to grant certiorari to the plaintiffs in *Jewel* following its decision in *FBI v. Fazaga*.

B. FBI v. Fazaga*: FISA Does Not Displace the State Secrets Privilege*

Recent developments in case law have focused on a pressing legal issue: whether the procedures laid down under FISA displace the state secrets privilege? In *Fazaga*, the Federal Bureau of Investigation ("FBI") paid Monteilh, an informant, and sent him to Orange County, California to gather information as part of Operation Flex.[120] Monteilh posed as a convert to Islam and "indiscriminately gathered names, telephone numbers, and email addresses as well as information on the religious and political beliefs of hundreds of Muslim Americans who were exercising their constitutional right to religious freedom."[121] The plaintiffs filed a suit in the District Court for the Central District of California claiming that the FBI unlawfully targeted Muslim community members. The court dismissed their claims by accepting the FBI's argument that further litigation could reveal state secrets.[122] On appeal, the Ninth Circuit reversed and held that FISA's procedures displaced the state secrets privilege when the plaintiffs qualify as "aggrieved."[123] The Ninth Circuit observed that the state secrets privilege is an evidentiary rule, not a constitutional rule, and since the plaintiffs in *Fazaga* had sufficient evidence to show that they were "aggrieved," the only remaining question was whether the targeted surveillance was lawfully conducted.[124]

In March 2022, the Supreme Court unanimously overturned the Ninth Circuit's judgment in *Fazaga* and held that FISA does not override the state secrets privilege.[125] While the Supreme Court admitted that the plaintiffs

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117 *See Jewel*, 673 F.3d at 902.

118 *Id.*

119 *Id.*

120 FBI v. Fazaga, 142 S.Ct. 1051 (2022).

121 *Court Cases:* FBI v. Fazaga, Am. Civ. Lib. Un., (Apr. 5, 2022) 8/31/23, https://www.aclu.org/cases/fbi-v-fazaga.

122 Fazaga v. FBI, 884 F.Supp.2d 1022, 1039 (C.D. Cal. 2012).

123 Fazaga v. FBI, 965 F.3d 1015, (9th Cir. 2020).

124 *Id.* at 1066.

125 *Fazaga*, 142 S.Ct. at 1060.

had standing, i.e., that they qualified as "aggrieved" under FISA, it held that the state secrets privilege required the dismissal of the suit.[126] Firstly, the Court observed that §1806(f) of the FISA and the state secrets privilege operate separately.[127] It noted that both the doctrines could "coexist" and "nothing about the operation of [§1806(f)] is at all incompatible with the state secrets privilege,"[128] As Justice Alito stated, the lack of any statutory reference to the state secrets privilege in FISA strongly indicated that Congress did not intend to "eliminate, curtail, or modify" the privilege when it enacted §1806(f) and accordingly, 1806(f) operated differently from the state secrets privilege.[129]

Secondly, the Court stated that "the state secrets privilege will not be invoked in the great majority of cases in which §1806(f) is triggered."[130] This is because 1806(f) "is most likely to come into play when the Government seeks to use FISA evidence in a judicial or administrative proceeding and the Government will obviously not invoke the state secrets privilege to block disclosure of information that it wishes to use."[131] Lastly, the Court highlighted the differences between §1806(f) proceedings and the proceedings that involve assertions of the state secrets privilege and noted that both the statute and the privilege "(1) require courts to conduct different inquiries, (2) authorize courts to award different forms of relief, and (3) direct the parties and the courts to follow different procedures."[132]

The Supreme Court erred when it concluded that the state secrets privilege does not conflict with §1806(f) of the FISA. This is because the statute and the privilege "require the courts to do different things when faced with the same threshold circumstance—namely, information that could harm national security if disclosed through litigation."[133] In other words, both the statute and the privilege apply to the same type of information; what differs is how the court responds to each claim.[134] Therefore, both the statute and the privilege are "fundamentally incompatible."[135]

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126 *Id. Jewel* can be distinguished from *Fazaga* in this respect. In *Jewel*, the evidence that the plaintiffs needed to show that they were "aggrieved" was itself subject to the state secrets privilege. While the plaintiffs had evidence to prove that NSA was collecting metadata of US citizens, they did not have adequate evidence to show that the government collected "their" metadata. Accordingly, the plaintiffs did not have standing. On the other hand, in *Fazaga* the plaintiffs had sufficient standing to show that were aggrieved under FISA.

127 *Id.* at 1062.

128 *Id.* at 1061.

129 *Id.* at 1062.

130 *Id.* at 1061.

131 *Id.*

132 *Id.*

133 Goitein, *supra* note 46, at 221.

134 *Id.*

135 *Id.*

The Supreme Court in *Fazaga* nullified the "only mechanism by which aggrieved persons can affirmatively challenge FISA surveillance."[136] It also failed to honor Congress's intent behind enacting FISA: "to provide a check on the executive's abusive use of electronic surveillance in the name of national security."[137] The congressional intent behind FISA shows that "the Congress intended to give the courts a role in regulating foreign intelligence surveillance."[138] Accordingly, "courts should continue to act as the gatekeepers of evidence, even where state secrets are at stake, to avoid being over deferential to the executive and disrupting the separation of powers principle."[139]

One of the arguments that the government put forward in *Fazaga* was that § 1806(f) cannot displace the state secrets privilege because doing so would interfere with the President's Article II powers.[140] However, even if we accept the assertion that the privilege is entirely constitutional, that argument is an incorrect interpretation of *Youngstown Sheet & Tube Co. v. Sawyer*, which permitted Congress to restrict the President's exercise of Article II authority unless that authority rests solely with the President.[141] Here, the control of national security information does not rest solely with the President. Rather, it comes under the shared power category "as is evident from the many laws Congress has passed on this subject over the past century."[142]

C. Wikimedia v. NSA*: End of Upstream Surveillance?*

On March 10, 2015, the American Civil Liberties Union ("ACLU") filed a complaint against the NSA, the DOJ, and the Office of the DNI in the United States District Court for the District of Maryland challenging the constitutionality of NSA's Upstream Surveillance program.[143] The ACLU, while representing the Wikimedia Foundation and eight other organizations as plaintiffs, claimed that the Upstream surveillance program exceeded the scope of the authority that Congress provided in Section 702 of the FAA

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136 Brief of the Brennan Ctr. for Just., Due Process Inst., Elec. Priv. Info. Ctr. et al. as Amici Curiae Supporting Respondents Yassir Fazaga et. al. at 24, 142 S.Ct. 1051 (2022) (No. 20-828), https://www.supremecourt.gov/DocketPDF/20/20-828/193954/20210928151159646_210200a%20Amicus%20Brief%20for%20efiling.pdf.

137 Christina Ferreiro, *Fazaga v. FBI: Putting the Force Back in the Foreign Intelligence Surveillance Act*, UNIV. OF MIAMI RACE & SOC. JUST. L. REV., 76, 99, (Nov. 2020).

138 *Id.* at 101.

139 *Id.* at 100.

140 *See* El Marsi v. Tenet, 479 F.3d 296, 303 (4th Cir. 2007); *See also* Lucas Scarasso, *Constitutional or Common Law: Examining the Potential Groundings of the State Secrets Privilege in the American Legal System after* Fazaga v. Federal Bureau of Investigation, UNIV. OF ILL. L. REV. ONLINE, 123, 127 (2019).

141 Goitein, *supra* note 46, at 202.

142 *Id.* The Classified Information Procedures Act (CIPA), the Freedom of Information Act (FOIA), and the FISA are some notable examples.

143 *Id.*

and thus violated the First and Fourth Amendments of the United States Constitution.[144] However, the court granted the government's motion to dismiss the complaint stating that the plaintiffs lacked Article III standing to challenge NSA's surveillance program.[145]

On appeal, the Fourth Circuit reversed in part and held that only the Wikimedia Foundation had sufficient legal standing to permit the case to be remanded back to the district court.[146] According to the Fourth Circuit, Wikimedia Foundation had "extensive public evidence about Upstream surveillance to show that some of [Wikimedia's] trillions of communications are being seized and searched by the NSA."[147] On remand, the district court dismissed the case again after the defendants invoked the state secrets privilege doctrine. The court observed that there was a reasonable danger that complying with plaintiff's discovery requests will "expose matters which should not be divulged in the interest of national security."[148]

The Wikimedia Foundation appealed to the Fourth Circuit again and alleged that the NSA is acquiring all communications on a chokepoint cable that it is monitoring.[149] The Fourth Circuit, while affirming the district court's decision, noted that further litigating Wikimedia's claim would also "reveal the very information that the government is trying to protect: how Upstream surveillance works and where it is conducted . . . a fact that is a state secret."[150] In August 2022, the Wikimedia Foundation filed a writ of certiorari before the United States Supreme Court, which the Court denied on February 21, 2023.[151]

While the NSA may have a legitimate interest in intercepting and monitoring the communications of people who pose threats to national security, it does not have a legitimate interest in monitoring everyone's communications.[152] By monitoring everyone's communications, the Upstream surveillance program has a "palpable chilling effect on all these communications, making it harder for the plaintiffs to gather information

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144 Wikimedia Found. v. Nat'l Sec. Agency, 143 F. Supp. 3d 344 (D. Md. 2015), *aff'd in part, vacated in part, remanded*, 857 F.3d 193 (4th Cir. 2017).

145 Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. § 1806(f).

146 Wikimedia Found. v. Nat'l Sec. Agency, 857 F.3d 193 (4th Cir. 2017).

147 *Court Cases: Wikimedia v. NSA - Challenge to Upstream Surveillance*, Am. Civ. Liberties Union (Feb. 21, 2023), https://www.aclu.org/cases/wikimedia-v-nsa-challenge-upstream-surveillance.

148 Wikimedia Found. v. Nat'l Sec. Agency/Cent. Sec. Serv., 427 F. Supp. 3d 582, 610 (D. Md. 2019), *aff'd but criticized,* 14 F.4th 276 (4th Cir. 2021).

149 Wikimedia Found. v. Nat'l Sec. Agency/Cent. Sec. Serv., 14 F.4th 276, 280 (4th Cir. 2021), *cert. denied*, 143 S. Ct. 774 (2023).

150 *Id.* at 304

151 Wikimedia Found. v. Nat'l Sec. Agency/Cent. Sec. Serv., 143 S.Ct. 774 (Mem) (2023).

152 Jameel Jaffer, Jimmy Wales, & Lila Tretikov, *Transcript of "Ask Me Anything" on the* Wikimedia v. NSA Lawsuit, Just Security (Mar. 20, 2015), https://www.justsecurity.org/wp-content/uploads/2015/03/WalesTretikovJafferAMATranscript.pdf.

and share it with the general public."[153] This makes it all the more important that any invocation of the state secrets privilege by the government be examined critically. Even if the FISA does not displace the state secrets privilege, as was held in *Fazaga*, courts should not apply the privilege "to bar a ruling on Article III standing."[154]

There are several reasons why the Supreme Court, had it granted cert in *Wikimedia*, should not apply the state secrets privilege to rule on Article III standing. A ruling on Article III standing (1) would not "reveal—and indeed does not depend on—whether Wikimedia's communications were actually ingested into the government's databases;" (2) would not "expose any detailed information about the methods of the Upstream surveillance program, or the government's scanning and ingestion practices;" and (3) would not "reveal technological capabilities, retention, examination, specific targets, investigations, or other actually sensitive information." [155]

The Supreme Court in *Fazaga* only held that FISA does not displace the state secrets privilege. It failed to decide the correct interpretation of § 1806(f). Hence, it is worthy to mention the "split" between how the Fourth and the Ninth Circuits have interpreted this provision. In *Wikimedia*, the Fourth Circuit held that "§ 1806(f) is relevant only when a litigant challenges the admissibility of the government's surveillance evidence."[156] On the other hand, the Ninth Circuit in *Fazaga* had noted that "§ 1806(f) procedures are to be used when any aggrieved person affirmatively challenges, in any civil case, the legality of electronic surveillance or its use in litigation, whether the challenge is under FISA itself, the Constitution, or any other law."[157] While the latter interpretation is consonant with the congressional intent, the interpretative split still exists. The *Wikimedia* case would have been a good opportunity for the Supreme Court to resolve this circuit split and decide on the correct interpretation of § 1806(f).

IV. CORRECTING THE IMBALANCE WITH REFORMS

There is a pressing need to balance the executive's interest in preventing the improper disclosure of state secrets with the judiciary's interest in ensuring transparency and justice. One possible way to do that

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153 Nadine Strossen, *Beyond the Fourth Amendment: Additional Constitutional Guarantees That Mass Surveillance Violates*, 63 DRAKE L. REV., 1143, 1155 (2015).

154 Brief of Ctr. for Democracy & Tech. et al. as Amici Curiae Supporting Plaintiff-Appellant, Wikimedia Foundation v. NSA, No. 20-1191 (4th Cir., 2020), https://www.aclu.org/sites/default/files/field_document/19._amicus_brief_iso_appellant_-_center_for_dem_tech_new_americas_open_tech_institute_7.8.20.pdf

155 *Id.*

156 Wikimedia Found. v. Nat'l Sec. Agency/Cent. Sec. Serv., 14 F.4th 276, 294 (4th Cir. 2021), *cert. denied*, 143 S. Ct. 774 (2023).

157 Fazaga v. Fed. Bureau of Investigation, 965 F.3d 1015 (9th Cir. 2020), *rev'd and remanded,* 142 S. Ct. 1051 (2022).

would be to reform the state secrets privilege. As already discussed above, just because the state secrets privilege is attributable to Article II does not mean that Congress cannot alter its scope and application. Congress can regulate the state secrets privilege because it has the authority to legislate in the arena of national security and access to information. In any case, the "Necessary and Proper Clause" of the Constitution authorizes Congress to use all appropriate means to execute the exercise of federal power.[158]

Since Congress has never made a clear statement on the scope and application of the privilege, it must issue a clear statement "specifying how the state secrets privilege should be applied."[159] In 2008, and later in 2013-14 and 2015-16, there were attempts to enact the State Secrets Protection Act ("SSPA"), a bipartisan legislation sponsored by both Democratic and Republican members, which provided guidance to courts in deciding the assertions of the state secrets privilege.[160] However, the SSPA did not "garner widespread congressional support at the time."[161] Perhaps, the present moment would be a good opportunity for Congress to legislate and address the existing imbalance. Any proposed legislation should not only prohibit courts from making a *prediction* about the evidence in question, but also prohibit courts from dismissing lawsuits pre-discovery, i.e., before any relevant evidence is identified.[162] Moreover, any proposed legislation should set in place security procedures to ensure that secrets are not leaked during litigation.[163]

The executive should also ensure that the DOJ's 2009 Memorandum and the 2022 Supplement Memorandum are being properly enforced. Where the government invokes the state secrets privilege and the case raises "credible violations of government wrongdoing," courts must ensure that "the plaintiff's right to confrontation and her full due process rights to marshal evidence to vindicate her claim" are not compromised.[164]

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158 U.S. Const. art. 1, § 8, cl. 18, available at https://www.law.cornell.edu/constitution-conan/article-1/section-8/clause-18/the-necessary-and-proper-clause-overview.

159 Jayaram & Liu, *supra* note 10, at 3; Ashley Gorski, *The Biden Administration's SIGINT Executive Order, Part II: Redress for Unlawful Surveillance*, JUST SECURITY (Nov. 4, 2022), https://www.justsecurity.org/83927/the-biden-administrations-sigint-executive-order-part-ii/.

160 State Secrets Protection Act H.R. 5607, 110th Cong. (2008); State Secrets Protection Act H.R. 3332, 113th Cong. (2013-14); State Secrets Protection Act H.R. 4767, 114th Cong. (2015-16).

161 Claire Finkelstein, *How the State Secrets Doctrine Undermines Democracy*, BLOOMBERG LAW, (Mar. 28, 2022), https://news.bloomberglaw.com/us-law-week/how-the-state-secrets-doctrine-undermines-democracy

162 Statement of Senator Patrick Leahy (D-Vt.), INTRODUCTION OF THE STATE SECRETS PROTECTION ACT, (Feb. 11, 2009), https://www.leahy.senate.gov/press/leahy-specter-feingold-kennedy-introduce-state-secrets-legislation

163 *Id.*

164 Timothy Bazzle, *Shutting the Courthouse Doors: Invoking the State Secrets Privilege to Thwart Judicial Review in the Age of Terror*, 23 GEO. MASON U.C.R. L. J. 29 (2012).

With respect to warrantless surveillance, a second possible way to reinstate the imbalance is for Congress to amend the FISA.[165] The amendment would address the Supreme Court's holding in *Fazaga* and clarify that the FISA procedures displace the state secrets privilege. At the same time, Congress should also specify whether "FISA's in camera, ex parte review procedures apply to claims involving EO 12333 surveillance."[166] Since Congress will be considering the question of reauthorization of Section 702 in 2023, it will be a good opportunity for Congress to consider reforming the FISA procedures.[167]

Congress should try its best to make this process as adversarial as possible. In that regard, Congress may look at the Classified Information Procedures Act ("CIPA") as a model for guidance.[168] CIPA is a procedural statute that "provides mechanisms to resolve the trade-offs that arise in connection with the use of classified information in criminal prosecutions."[169] Congress enacted CIPA because it thought that the state secrets privilege could not apply in criminal trials. Since CIPA limits itself to criminal cases, Congress could consider the possibility of enacting a civil CIPA even though the government has long opposed the idea.[170] A civil CIPA would help the parties for whom the privileged evidence is vital to the success of their case—because it would allow the courts to order, wherever possible, "nonprivileged substitutes for privileged evidence, such as redacted versions, summaries, or admissions of fact that steer clear of privileged information."[171] Congress also needs to step in and regulate the kind of information that may be classified because the executive often uses its classification authority to classify "mundane information" for "erroneous reasons."[172]

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165 There have been previous attempts to amend the FISA. For example, Congress enacted the USA Freedom Reauthorization Act and the Protect Our Civil Liberties Act. However, none of these enactments addressed the problems that the state secrets privilege creates. Instead, they focus on "proactively limiting use of government surveillance". *See* Meghan Pugh, *Privacy? What Privacy?: Reforming the State Secrets Privilege to Protect Individual Privacy Rights from Expansive Government Surveillance*, BELMONT L. REV., 265, 285, (2021).

166 Gorski, *supra* note 159.

167 *Id.*

168 Harry Graver, *The Classified Information Procedures Act: What It Means and How It's Applied*, LAWFARE BLOG, (Nov. 20, 2017), https://www.lawfareblog.com/classified-information-procedures-act-what-it-means-and-how-its-applied#:~:text=CIPA%20is%20a%20critical%20law,out%20of%20the%20wrong%20hands.

169 *Id.*

170 HOUSE PERM. SELECT COMM. ON INTEL., 104TH CONG., IC21: THE INTELLIGENCE COMMUNITY IN THE 21ST CENTURY (Staff Study 1996), available at https://www.govinfo.gov/content/pkg/GPO-IC21/html/GPO-IC21-13.html ("[S]ome have suggested the creation of procedures similar to CIPA for use in civil matters. Those opposed to this approach believe it is unworkable and unnecessary and would erode the viability of the state secrets privilege. Interagency review under the JICLE has concluded that there is no need for civil CIPA").

171 Goitein, *supra* note 46, at 225.

172 Morgan, *supra* note 41, at 174.

Moving forward, the judiciary also has a vital role to play in remedying the imbalance between secrecy and transparency. Courts must go back and interpret *Reynolds* in its true sense. They must not blindly defer to the executive's assertion of the state secrets privilege. Instead, they should assess the evidence in question and then make an informed determination as to whether the privilege applies. At the same time, courts should make sure that they do not conflate *Reynolds* with *Totten*. Judges should rule on state secret privilege claims in consonance with the overarching principle of the separation of powers doctrine. Perhaps, granting cert in *Wikimedia* would be a good starting point for the judiciary.

CONCLUSION

The post 9/11 invocations of the state secrets privilege have stirred a debate about the scope of the doctrine and the role that courts should play in determining the validity of such invocation. While *Reynolds* laid the underpinning of the existing state secrets privilege jurisprudence, the Supreme Court, while deciding *Reynolds*, could not have imagined the political scenarios that would emerge in the post 9/11 era. Although the state secrets privilege is a judicially articulated doctrine developed through common law, it also discharges a function of "constitutional significance."[173] The judicial discourse in the development of this doctrine shows that the privilege is absolute and is not subject to balancing against competing interests.[174]

The absolute nature of the state secrets privilege raises the problem of ensuring governmental accountability under the rule of law. If we were to compare and balance three competing interests—"security, justice for individual litigants, and democratic accountability"—the current state of the law is titled towards security, which makes sense to some extent.[175] The executive has an overarching duty to uphold and defend the United States Constitution, which includes protecting the national security. However, in situations "where the legality of government conduct is itself at issue," it may be appropriate to explore alternatives that ensure governmental accountability.[176]

After the Supreme Court's decisions in *Fazaga* and *Zubaydah*, "the state secrets privilege stands as strong as it ever has."[177] However, both *Fazaga* and *Zubaydah* "offer little guidance on core questions of accountability."[178] Thus, there exists a serious risk that the privilege turns

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173 El Marsi v. Tenet, 479 F.3d 296, 303 (4th Cir. 2007).

174 United States v. Reynolds, 345 U.S. 1, 11 (1953) (noting that even the most compelling showing of necessity will not supersede a claim of privilege when military secrets are at stake).

175 Chesney, *supra* note 3, at 1314.

176 *Id.*

177 Chesney, *supra* note 85, at 207.

178 Goitein, *supra* note 46, at 193.

into an automatic shield that prevents judicial review of government conduct, "an outcome the Supreme Court pointedly and emphatically rejected in *Reynolds*.[179] *Fazaga* has already clarified that FISA does not displace the state secrets privilege and it is unlikely that the Court in *Wikimedia* will overturn the *Fazaga* judgment. However, even if FISA does not displace the state secrets privilege, courts should not apply the privilege to bar a ruling on Article III standing.

Discerning the right balance between protecting civil liberties and defending national security has been a major challenge in the post 9/11 years. One of the ways to tackle this challenge is to undertake meaningful legislative reform of the state secrets privilege doctrine. Congress can regulate the state secrets privilege because it has the authority to legislate in the arena of national security and access to information. Doing so would not restrict the President's Article II powers since the President's authority in this arena is not exclusive. Unless Congress specifically takes legislative action, courts will keep giving utmost deference to the executive branch and the imbalance between secrecy and transparency will continue to persist.

[179] Br. of Amici Curiae Prof. Erwin Chemerinsky et. al. in Support of Hepting and Urging Affirmance at 25-26, Hepting v. AT&T Corp., Nos. 06-17132, 06-17137 (9th Cir. 2007), available at https://www.eff.org/files/filenode/att/chemerinskyamicus.pdf.