

## THE STATE SECRETS PRIVILEGE: AN INSTITUTIONAL PROCESS APPROACH

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**ABSTRACT**—It is no secret that since September 11, 2001, the Executive Branch has acted at variance with laws otherwise restraining its conduct under the guise of national security. Among other doctrines that make up the new national security canon, state secrets privilege assertions have narrowed the scope of redressability for parties alleging official misconduct in national security cases. For parties such as the Muslim American community surveilled by the FBI in Orange County, California, or Abu Zubaydah, who was subjected to confirmed torture tactics by the U.S. government, success in the courts hinges on the government's unbridled ability to assert this privilege. This trend is unsurprising given how courts evaluate national security issues, even where individual rights are at stake. Through the institutional process framework, illuminated by Professors Samuel Issacharoff and Richard Pildes, federal courts are reluctant to invalidate unilateral executive action absent a congressional statute addressing the challenged national security conduct.

Scholarship on the institutional process framework to date has primarily examined the judiciary's role. This Note shifts the spotlight to Congress's role in the institutional process framework. Congress should embrace its role in fostering interbranch institutional cooperation by speaking directly to courts regarding national security issues. Specific to the state secrets privilege in its post-*Zubaydah* and *Fazaga* form, Congress must provide an interbranch procedural framework by which courts can assess assertions of the privilege. As the best institution to incorporate valuable considerations about the purpose and flaws of the privilege, Congress can empower Article III courts to meaningfully review state secrets privilege assertions and restore executive accountability.

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### INTRODUCTION

In 2008, the FBI admitted to having over 15,000 informants on its payroll, many of whom were allegedly tasked with surveilling Muslim American communities in the wake of the events of September 11.<sup>1</sup> Craig Monteilh, a former bodybuilder, became one of these confidential informants in Southern California in the 1980s.<sup>2</sup> In 2006, the FBI instructed him to infiltrate the Muslim American community in Orange County. Monteilh posed as “Farouk al-Aziz,” a Syrian–French fitness consultant interested in converting to Islam.<sup>3</sup> In furtherance of the FBI’s mission to uncover terror plots or signs of extremism, Monteilh developed friendly relationships with

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<sup>1</sup> FBI, FY 2008 AUTHORIZATION AND BUDGET REQUEST TO CONGRESS 4-23, <https://irp.fas.org/agency/doj/fbi/2008just.pdf> [<https://perma.cc/9RPW-3DDY>] (documenting the FBI’s request for resources to help manage “over 15,000 of the FBI’s CHSs,” or Confidential Human Sources, defined as an “individual who provides useful and credible information to the FBI about matters within the FBI’s jurisdiction, and from whom the FBI expects or intends to obtain additional useful and credible information in the future”). This number may be artificially low, not accounting for up to an additional 45,000 unofficial informants known in bureau parlance as “hip pockets.” Trevor Aaronson, *The Informants*, MOTHER JONES, Sept./Oct. 2011, <https://www.motherjones.com/politics/2011/07/fbi-terrorist-informants/> [<https://perma.cc/KS33-AZSV>] (describing the FBI’s process for cultivating and deploying informants in post-9/11 operations).

<sup>2</sup> Trevor Aaronson, *Spy in Disguise: An FBI Informant’s Unlikely Role in Upcoming Supreme Court Case on Surveillance of Muslims*, INTERCEPT (Sept. 12, 2021, 5:00 AM), <https://theintercept.com/2021/09/12/fbi-informant-surveillance-muslims-supreme-court-911/> [<https://perma.cc/YU7J-GC8M>].

<sup>3</sup> Class Action Complaint at 16, *Fazaga v. FBI (Fazaga I)*, 884 F. Supp. 2d 1022 (C.D. Cal. 2012) (No. SACV11-00301JST(VBKx)). As required at the pleading stage, the Ninth Circuit took as true all facts alleged by the plaintiffs. *Fazaga v. FBI (Fazaga II)*, 965 F.3d 1015, 1025 (9th Cir. 2020), *rev’d*, 142 S. Ct. 1051 (2022).

the Muslim clients at his gym and attempted to assimilate into the Islamic Center of Irvine community.<sup>4</sup> He spent over a year wearing a wire and planting recording devices in mosques, homes, cars, and offices. At each touchpoint, he shared personal information about community members with the FBI.<sup>5</sup>

Three Muslim Americans with whom Monteilh interacted filed a putative class action against the FBI alleging eleven counts of religious discrimination and surveillance.<sup>6</sup> Their case, *FBI v. Fazaga*, highlights the alleged widespread and invasive use of confidential informants in counterterrorism operations targeting countless Muslim Americans based on their religion. The case eventually made its way to the Supreme Court in the October 2021 term.<sup>7</sup> But an evidentiary issue stood in the way: the state secrets privilege. *Fazaga* asked whether the Foreign Intelligence Surveillance Act displaces the state secrets privilege to require a district court to review in camera evidence of electronic surveillance over which the privilege has been asserted.<sup>8</sup>

Around the same time that the FBI was surveilling the Irvine Muslim community, officers at a CIA black site were torturing Abu Zubaydah, leading to another assertion of the state secrets privilege by the U.S. Government. Zubaydah was the first post-September 11 detainee interrogated via waterboarding, and his torture was documented and confirmed in a watershed official unclassified Senate Committee report.<sup>9</sup> The parties did not dispute that Zubaydah was captured by the United States in Pakistan in 2002 and was held and interrogated at international CIA black sites before being imprisoned at Guantánamo Bay over the next decade.<sup>10</sup> Then, in a watershed moment for national transparency, President Barack Obama announced that these confirmed practices, which included

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<sup>4</sup> *Fazaga II*, 965 F.3d at 1026–27.

<sup>5</sup> *Id.* at 1212–13, 1218.

<sup>6</sup> First Amended Complaint Class Action at 62–68, *Fazaga I*, 884 F. Supp. 2d 1022 (No. SA CV 11-00301 CJC (VBKx)). The complaint specifically alleged discrimination in violation of the First Amendment, the Fifth Amendment, the Religious Freedom Restoration Act of 1993 (RFRA), the Federal Tort Claims Act (FTCA), and the Privacy Act of 1974, and unlawful surveillance in violation of the Fourth Amendment and the Foreign Intelligence Surveillance Act. *Id.*

<sup>7</sup> *FBI v. Fazaga (Fazaga III)*, 142 S. Ct. 1051 (2022).

<sup>8</sup> *Id.* at 1056, 1062.

<sup>9</sup> S. REP. NO. 113-288, at 40–47, 118, 488 (2014).

<sup>10</sup> *United States v. Zubaydah*, 142 S. Ct. 959, 964 (2022).

waterboarding, stress positions, cramped confinement, and sleep deprivation, constituted torture.<sup>11</sup>

After this announcement, Zubaydah sought redress against the Polish government for allegedly subjecting him to such tactics at a Polish black site, and filed a discovery application in the United States, seeking contractor testimony regarding the facility and his treatment.<sup>12</sup> In *United States v. Zubaydah*, the Government intervened and raised the state secrets privilege over such evidentiary requests on the grounds that confirming such operations in Poland would harm U.S.–Poland relations.<sup>13</sup> Though the use of torture techniques and the existence of black sites was indisputably publicly available information, the Supreme Court found mere confirmation of the location of the black site was enough of a threat to foreign relations to deny the evidentiary request.<sup>14</sup> As of 2022, Zubaydah remains a prisoner in Guantánamo Bay and has never been charged with a crime.<sup>15</sup>

The state secrets privilege, raised by the federal government in both of these cases, is part of a larger body of rules narrowing the scope of redressability for plaintiffs alleging official misconduct in national security

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<sup>11</sup> After the release of the Committee report, President Obama said at a press conference that “we tortured some folks” and “crossed a line” with certain interrogation techniques. *Presidential News Conference*, C-SPAN, at 39:53, 41:56 (Aug. 1, 2014), <https://www.c-span.org/video/?320821-1/president-obama-news-conference> [<https://perma.cc/KM7Z-CFG3>]. For a stunning firsthand report by Zubaydah’s lawyer on the U.S. torture program from the perspectives of both those who crafted the program and those who were tortured, see Mark P. Denbeaux et al., *How America Tortures* (Dec. 2, 2019) (unpublished manuscript), <https://papers.ssrn.com/a=3494533> [<https://perma.cc/FEH4-K9UQ>]; Carol Rosenberg, *What the CIA’s Torture Program Looked Like to the Tortured*, N.Y. TIMES (Dec. 4, 2019), <https://www.nytimes.com/2019/12/04/us/politics/cia-torture-drawings.html> [<https://perma.cc/VPB9-EAUQ>] (showing drawings Zubaydah made to portray his experience of interrogation techniques used at CIA black sites in Thailand).

<sup>12</sup> *Zubaydah*, 142 S. Ct. at 965.

<sup>13</sup> *Id.* at 966, 968–69.

<sup>14</sup> *Id.* at 968. *Zubaydah* was handed down on March 3, 2022 as escalations in the Russian invasion of Ukraine spilled over into neighboring Poland, a key NATO ally to the United States. *See, e.g., Around 575,100 People Have Entered Poland from Ukraine, Says Border Guard*, REUTERS (Mar. 3, 2022, 1:45 AM), <https://www.reuters.com/world/europe/around-575100-people-have-entered-poland-ukraine-says-border-guard-2022-03-03/> [<https://perma.cc/KQ23-NZCH>]; *U.S. Troops Arrive in Poland to Reinforce Eastern Europe Allies*, REUTERS (Feb. 7, 2022, 4:03 AM), <https://www.reuters.com/world/us-troops-arrive-poland-reinforce-eastern-europe-allies-2022-02-06/> [<https://perma.cc/7J7G-8XNF>]; Media Note, U.S. Dep’t of State, *Joint Statement on the Strategic Dialogue Between the United States and Poland* (Feb. 5, 2022), <https://www.state.gov/joint-statement-on-the-strategic-dialogue-between-the-united-states-and-poland/> [<https://perma.cc/47GB-DHHP>].

<sup>15</sup> *See The Guantánamo Docket*, N.Y. TIMES (Oct. 29, 2022), <https://www.nytimes.com/interactive/2021/us/guantanamo-bay-detainees.html> [<https://perma.cc/5EB7-QYJ8>].

cases. Nestled alongside cabined *Bivens* remedies,<sup>16</sup> contractor preemption,<sup>17</sup> the political question doctrine,<sup>18</sup> and qualified immunity,<sup>19</sup> courts have applied this evolving national security canon to limit damages judgments in lawsuits alleging individual rights violations stemming from post-9/11 U.S. counterterrorism policies.<sup>20</sup> Unlike the aforementioned doctrines, which provide or preclude causes of action for governmental misconduct, the state secrets privilege traditionally applies to the admissibility of particular pieces of evidence. The privilege can only be asserted by the head of an Executive Branch agency upon filing an affidavit stating that she personally reviewed the information and found it to contain state secrets.<sup>21</sup> This process is designed to protect information whose divulgence could cause various harms, including “impairment of the nation’s defense capabilities, disclosure of intelligence-gathering methods or capabilities, and disruption of diplomatic relations with foreign governments.”<sup>22</sup>

The Supreme Court’s recent decisions around this privilege have continued the overlapping trends of granting substantial deference to the Executive Branch and narrowing the window of redress for aggrieved parties such as those in *Zubaydah* and *Fazaga*. Looking at national security jurisprudence, this deference is unsurprising. Under the institutional process framework illuminated by Professors Samuel Issacharoff and Richard Pildes, judicial decision-making in the national security space turns on the process of decision-making by the other two branches.<sup>23</sup> Where Congress has legislated, and the Executive has executed, federal courts will rarely

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<sup>16</sup> *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971) (establishing an implied remedy for Fourth Amendment violations by federal agents); *see, e.g., Lebron v. Rumsfeld*, 670 F.3d 540, 548 (4th Cir. 2012) (referencing “special factors” in the national security context to affirm dismissal of a *Bivens* suit challenging detention); *Arar v. Ashcroft*, 585 F.3d 559, 580 (2d Cir. 2009) (en banc) (declining to recognize a *Bivens* claim over extraordinary rendition policies).

<sup>17</sup> *See, e.g., Saleh v. Titan Corp.*, 580 F.3d 1, 2, 5 (D.C. Cir. 2009) (holding that federal law preempted state law tort actions against private military contractors working for the federal government).

<sup>18</sup> *See, e.g., El-Shifa Pharm. Indus. v. United States*, 607 F.3d 836, 844 (D.C. Cir. 2010) (en banc) (holding nonjusticiable a claim requiring the court to determine whether a U.S. military attack was “mistaken and not justified” under the law of nations).

<sup>19</sup> *Harlow v. Fitzgerald*, 457 U.S. 800, 813–14 (1982) (entitling executive officials to immunity from “insubstantial” suits); *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011) (finding qualified immunity applicable in damages suit challenging counterterrorism policies).

<sup>20</sup> Extensive research has failed to find a successful claim in the public domain. *See* Stephen I. Vladeck, *The New National Security Canon*, 61 AM. U. L. REV. 1295, 1296 (2012). Professor Vladeck also analyzes the impact of 9/11 on each of these four doctrines. *See generally id.* I have not been able to find scholarship published after 2012 affirming this point.

<sup>21</sup> *United States v. Reynolds*, 345 U.S. 1, 4–5, 7–8 (1953).

<sup>22</sup> *Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983).

<sup>23</sup> Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism & Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, in *THE CONSTITUTION IN WARTIME: BEYOND ALARMISM & COMPLACENCY* 161, 162–63 (Mark Tushnet ed., 2005).

interfere. Yet where Congress has failed to legislate, as with the state secrets privilege, courts are hesitant to challenge alleged executive overreach.

Over twenty years since September 11, in an era shaped by broad congressional authorization of and acquiescence to expansive executive activity,<sup>24</sup> this framework raises concerns about what is lost when Congress fails to embrace its role of holding the Executive to account. Yet scholarship on the institutional process framework has primarily focused on the judiciary's role in this framework. With state secrets privilege cases fresh off the Supreme Court's docket, the privilege provides a timely opportunity to reexamine the institutional process framework.

This Note shifts the spotlight from the judiciary to Congress's role in the institutional process framework. Part I introduces the common law origins of the state secrets doctrine and examines the application and expansion of the privilege to its modern-day function as a dismissal tool. Part II synthesizes the new doctrine from *Zubaydah* and *Fazaga*, which, under one reading, significantly narrows the window for redress such that Congress must legislate around the privilege. Part III examines Professors Samuel Issacharoff and Richard Pildes's institutional process framework and argues that Congress must embrace its role in the framework through enacting procedural legislation around the state secrets privilege.

This Note argues that Congress should embrace its role of fostering interbranch institutional cooperation by speaking directly to courts regarding national security issues. Specific to the state secrets privilege, it can provide an interbranch procedural framework by which courts can assess assertions of the privilege. As the best institution to incorporate valuable considerations about the purpose and flaws of the privilege, Congress can empower the judiciary to critically examine executive conduct without forcing courts to operate outside the institutional process approach. As the state secrets privilege stands post-*Zubaydah* and *Fazaga*, the Judicial Branch's lack of congressional directive means that the government can effectively prevent civil litigants from holding the government legally accountable for harms deriving from national security actions.

## I. THE ROOTS AND EXPANSION OF THE STATE SECRETS PRIVILEGE

Much legal scholarship has reviewed the development of the state secrets privilege in the wake of 9/11. This Note thematically reviews the expansion of the privilege to demonstrate where *Zubaydah* and *Fazaga* fit. State secrets jurisprudence is tethered to two early cases: *Totten v. United*

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<sup>24</sup> See *infra* note 132 and accompanying text.

*States* and *United States v. Reynolds*.<sup>25</sup> The modern-day application of the privilege is far more expansive than in these foundational cases, paving the way for the consequential holdings of *Zubaydah* and *Fazaga*.

#### A. *U.S. Origins: Totten and Reynolds*

*Totten v. United States* was the first U.S. case establishing the absolute nature of a public interest common law evidentiary privilege, known as the *Totten* bar.<sup>26</sup> In *Totten*, the estate of an alleged Union spy sought to enforce a confidential contract between President Abraham Lincoln and the decedent to spy on the Confederate forces in exchange for \$200 per month.<sup>27</sup> In this case, mere disclosure of its existence breached the contract to spy, because the contract itself *was* the state secret. The confidential nature of the entire contract put its enforcement beyond the purview of the Court.<sup>28</sup>

In affirming the dismissal of the case on the pleadings, the Court discussed the public policy consequences of permitting a lawsuit of a secret government contract to proceed. Specifically, the Court found greater reason to forbid disclosure in this context than in the contexts of the confessional, spousal, and attorney–client privileges, because “the existence of a contract of that kind is itself a fact not to be disclosed.”<sup>29</sup> As discussed below, the Court has subsequently confirmed *Totten* establishes a narrow precedent for the Court’s “common-law authority to fashion contractual remedies in Government-contracting disputes” to preserve the contracting parties’ expectations.<sup>30</sup> By design, this precedent categorically precludes judicial inquiry into secret government contract claims.<sup>31</sup>

Not until the early twentieth century, however, did the Court develop a distinctive state secrets privilege focused on security-related disclosures. The privilege initially came out of a series of commercial disputes over military hardware.<sup>32</sup> In three separate cases, courts granted the privilege for military

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<sup>25</sup> *Totten v. United States*, 92 U.S. 105, 107 (1876); *United States v. Reynolds*, 345 U.S. 1, 6–8 (1953).

<sup>26</sup> 92 U.S. at 107.

<sup>27</sup> *Id.* at 105–06; see Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249, 1277–78 (2007) (outlining the judicial rationale for barring the contract suit on public policy grounds, arguing it amounted to an extension of the privilege to its logical extreme).

<sup>28</sup> *Totten*, 92 U.S. at 107. Notably, this opinion does not contain a single citation to prior authority.

<sup>29</sup> *Id.*

<sup>30</sup> *Gen. Dynamics Corp. v. United States*, 563 U.S. 478, 485 (2011).

<sup>31</sup> *Tenet v. Doe*, 544 U.S. 1, 7 n.4 (2005). Scholars have classified another state secrets privilege case, *Weinberger v. Catholic Action of Hawaii/Peace Education Project*, 454 U.S. 139, 146 (1981), as an anomaly rather than a reframing of the *Totten* bar. 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, 195–96, 196 n.10.

<sup>32</sup> Chesney, *supra* note 27, at 1281.

or national security reasons, precluding litigants from obtaining discovery essential to their cases.<sup>33</sup> Then, after World War II, the enactment of the Federal Tort Claims Act (FTCA) simultaneously permitted individuals to sue the government for alleged tortious conduct<sup>34</sup> and created new opportunities for state secrets privilege assertions and expansion.<sup>35</sup>

Finally, *United States v. Reynolds* codified the state secrets privilege in 1953, providing a doctrine through which the government can resist disclosing materials adjacent to military conduct.<sup>36</sup> After a military plane allegedly carrying secret electronic equipment crashed during a test flight, the widows of three civil observers who died in the crash filed FTCA suits alleging that the Government's negligence caused their husbands' deaths. During discovery, the widows requested the Government produce an official accident report and statements from the surviving crewmembers. The Government objected on the grounds that the requested accident report contained references to the secret electronic equipment, because the primary purpose of the failed mission was testing such equipment. The arguments on both sides were constitutionally charged. The Government asserted that the Executive has the power to withhold documents from judicial review to protect the public interest, while the widows asserted that the FTCA amounted to executive waiver of the power to withhold such documents.<sup>37</sup>

In its relatively simple holding, the Court bypassed the thorny constitutional questions of executive authority, grounding its reasoning for barring disclosure in the law of evidence.<sup>38</sup> Specifically, the FTCA expressly made the Federal Rules of Civil Procedure applicable to suits against the government. Under Rule 34, parties are only compelled to produce matters "not privileged."<sup>39</sup> The Secretary of the Air Force had lodged a formal

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<sup>33</sup> *Firth Sterling Steel Co. v. Bethlehem Steel Co.*, 199 F. 353, 353, 355–56 (E.D. Pa. 1912) (excluding evidence from the Bureau of Ordnance of the Navy Department relating to armor-piercing projectiles to prevent "disclosure of military secrets"); *Pollen v. United States*, 85 Ct. Cl. 673, 679–80 (1937) (overruling a motion to proceed with the case in camera); *Pollen v. Ford Instrument Co.*, 26 F. Supp. 583, 584–86 (E.D.N.Y. 1939) (denying discovery on the basis of a military secrets privilege claim raised by intervenor United States).

<sup>34</sup> See *Developments in the Law—Access to Courts*, 122 HARV. L. REV. 1151, 1160–63 (2009) ("Congress enacted the FTCA to make the government liable for certain 'garden-variety torts' by federal employees, such as the negligent operation of government motor vehicles." (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 706 n.4 (2004))).

<sup>35</sup> Chesney, *supra* note 27, at 1282.

<sup>36</sup> 345 U.S. 1, 6–8 (1953).

<sup>37</sup> *Id.* at 2–6.

<sup>38</sup> *Id.* at 6–10 (analogizing the state secrets privilege to the privilege against self-incrimination, where "[t]oo much judicial inquiry into the claim of privilege would force disclosure of the thing the privilege was meant to protect, while a complete abandonment of judicial control would lead to intolerable abuses").

<sup>39</sup> *Id.* at 6.



“Claim of Privilege” against revealing military secrets, and the Court found the privilege protecting those secrets to be well established within the law of evidence.<sup>40</sup>

Although the Court warned that such a privilege should be neither lightly invoked nor lightly accepted by courts, it did accept the Government’s argument that, in this specific case, disclosure of the accident report would reveal material touching upon military secrets.<sup>41</sup> Notably, it declined to require in camera review of the underlying evidence to avoid risking the security that the privilege is designed to safeguard.<sup>42</sup> Consequently, as a matter of precedent, it is up to the court to determine whether the circumstances are appropriate for the privilege claim. In this case, the Court took the Government at its word and the Government did not have to produce this particular piece of evidence.

The *Reynolds* Court crystalized the state secrets privilege as a common law evidentiary privilege resulting from a lack of judicial expertise in the security arena, plaintiffs’ informational needs, and the Executive’s need to protect military secrets.<sup>43</sup> However, this formal recognition relied on faulty reasoning. Remarkably, the daughter of one of the crash victims discovered the accident report online decades after the decision was made. The report revealed that the information the Government successfully withheld from disclosure contained no reference to secret military equipment: rather, it detailed a number of errors made with the plane and by the flight crew.<sup>44</sup> The very case that sowed the seeds for the privilege’s expansive use was exposed as an abusive and erroneous use of the privilege.

### *B. Application and Expansion*

The doctrines from these two hallmark cases—a categorical bar from *Totten* and a common law evidentiary privilege over particular pieces of evidence in *Reynolds*—have led to a cascade of increasingly expansive interpretations by lower courts.<sup>45</sup> Without statutory guardrails from Congress, the Executive Branch has diversified the circumstances warranting a state secrets privilege assertion, and the Judicial Branch has

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<sup>40</sup> See *id.* at 6–7, 7 n.11 (listing the cases and treatises in which this privilege is ingrained).

<sup>41</sup> *Id.* at 11.

<sup>42</sup> *Id.* at 10.

<sup>43</sup> *Id.* at 6–7, 10–11.

<sup>44</sup> See Beth George, Note, *An Administrative Law Approach to Reforming the State Secrets Privilege*, 84 N.Y.U. L. REV. 1691, 1696 (2009).

<sup>45</sup> There is also academic debate as to whether lower courts have conflated the two doctrines. See D. A. Jeremy Telman, *Intolerable Abuses: Rendition for Torture and the State Secrets Privilege*, 63 ALA. L. REV. 429, 455 (2012) (arguing that *Mohamed v. Jeppesen Dataplan*, 614 F.3d 1070, 1077–79 (9th Cir. 2010) (en banc), conflates the *Totten* bar and the state secrets privilege).

demonstrated increased deference to the Executive Branch. As Professor Laura Donohue illuminated, the government has asserted the privilege to collapse cases alleging environmental regulation noncompliance,<sup>46</sup> racial discrimination,<sup>47</sup> retaliation against whistleblowers,<sup>48</sup> and government-sanctioned abduction and torture of a man known to be innocent.<sup>49</sup> In this light, *Zubaydah* and *Fazaga* are two cases in a lineage of increased judicial deference to the Executive Branch at great consequence to civil litigants' redress prospects.

*1. From Withholding a Particular Piece of Evidence to Case Dismissal*

There are four circumstances post-*Totten* and *Reynolds* in which assertion of the privilege can lead to the outright dismissal of the plaintiffs' case: first, where the very subject matter is a state secret as exemplified in *Totten*;<sup>50</sup> second, where the plaintiff cannot make out a prima facie case without the privileged information;<sup>51</sup> third, where the privilege deprives the defendant of information critical to establishing a valid defense to the claim;<sup>52</sup> and fourth, where the plaintiff has sufficient nonprivileged evidence to make out an affirmative prima facie case, but the case is so enmeshed with

<sup>46</sup> See Laura K. Donohue, *The Shadow of State Secrets*, 159 U. PA. L. REV. 77, 187–89 (2010); *Kasza v. Browner*, 133 F.3d 1159, 1180–81 (9th Cir. 1998) (Tashima, J., concurring) (arguing that the majority's interpretation of the Resource Conservation and Recovery Act created a "class of information" covered by the state secrets privilege).

<sup>47</sup> See Donohue, *supra* note 46, at 189; *Sterling v. Tenet*, 416 F.3d 338, 347 (4th Cir. 2005) (finding the CIA's invocation of the state secrets privilege proper over employment information in a racial-discrimination case).

<sup>48</sup> See Donohue, *supra* note 46, at 191–93; *Edmonds v. U.S. Dep't of Just.*, 323 F. Supp. 2d 65, 81–82 (D.D.C. 2004) (dismissing an FBI translator's whistleblower retaliation claims after finding the government's invocation of the state secrets privilege proper).

<sup>49</sup> See Donohue, *supra* note 46, at 184–85; *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 537 n.10, 539, 541 (E.D. Va. 2006) (granting the government's motion to dismiss on the grounds that the mere holding of proceedings regarding the United States' "extraordinary rendition" program would jeopardize state secrets, notwithstanding the public evidence available about the program).

<sup>50</sup> 92 U.S. 105, 107 (1876).

<sup>51</sup> See, e.g., *Halkin v. Helms*, 690 F.2d 977, 998–99 (D.C. Cir. 1982) (affirming dismissal because plaintiffs could not establish standing without privileged information illuminating whether their communications were intercepted by the government); *Bareford v. Gen. Dynamics Corp.*, 973 F.2d 1138, 1140 (5th Cir. 1992) (affirming dismissal of a suit against a defense contractor because plaintiffs could not make out their prima facie case without classified information relating to a defective weapons system).

<sup>52</sup> For example, in *Molerio v. FBI*, 749 F.2d 815, 825 (D.C. Cir. 1984), the court affirmed a grant of summary judgment for the defendant after an in camera review of an affidavit presenting the real reason for government action. The court reasoned that the government's inability to present privileged information would "involve an attempt, however well intentioned, to convince the jury of a falsehood" if litigation moved forward. *Id.* See also *In re United States*, 872 F.2d 472, 476 (D.C. Cir. 1989) (noting that summary judgment against a plaintiff is proper where "the district court decides that the privileged information, if available to the defendant, would establish a valid defense to the claim"); *Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998).

the secret information that there is too great of a risk of disclosure if the case were to proceed.<sup>53</sup> The latter three are types of *Reynolds* dismissals used by lower courts.<sup>54</sup>

Judicial discretion underpins this common law privilege's variance and expansion. Judges may take the government at its word by accepting the assertion without further inquiry,<sup>55</sup> request in camera review of classified affidavits and reports articulating why the evidence poses a disclosure threat,<sup>56</sup> or request in camera review of the actual underlying evidence before accepting a state secrets privilege claim.<sup>57</sup> Accordingly, the most controversial acceptance of a state secrets assertion can be seen in *Fazaga v. FBI*, where the district court refused in camera review over the underlying materials and dismissed all but one of the Muslim American plaintiffs' claims even though the plaintiffs did not seek the evidence in question to make their prima facie argument.<sup>58</sup>

As mentioned in Part I, critics have good reason to condemn this practice: it is not guaranteed that the privilege assertion is made in good faith. The evidence in *Reynolds*, for example, which the Court declined to review in camera,<sup>59</sup> did not contain any actual state secrets—the Government likely wanted instead to cover up unrelated errors with the plane and crew.<sup>60</sup> Nevertheless, courts capitalized on this precedent eschewing in camera review. Between 1951 and 2006, courts did not undertake in camera review of documents other than affidavits in at least thirty-four of eighty-nine

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<sup>53</sup> See, e.g., *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268, 281 (4th Cir. 1980) (en banc) (holding that any attempt to establish tortious interference with future contract rights where the contracts were privileged would “so threaten disclosure of state secrets that the overriding interest of the United States and the preservation of its state secrets preclude[] any further attempt to pursue this litigation”).

<sup>54</sup> *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1083 (9th Cir. 2010) (en banc) (outlining the circumstances in which the *Reynolds* privilege doctrine requires dismissal).

<sup>55</sup> See, e.g., *United States v. Reynolds*, 345 U.S. 1, 10 (1953) (advising that where the privilege applies, “the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers”); *Bentzlin v. Hughes Aircraft Co.*, 833 F. Supp. 1486, 1496 (C.D. Cal. 1993) (“The extrinsic evidence indicating that the disclosure of such information would threaten national security is so strong that this court finds the privilege to be properly asserted, even without an *in camera* review of the privileged information.”).

<sup>56</sup> See, e.g., *Clift v. United States*, 808 F. Supp. 101, 106 (D. Conn. 1991) (holding information privileged based, in part, on a classified declaration viewed in camera).

<sup>57</sup> See, e.g., *Weston v. Lockheed Missiles & Space Co.*, 881 F.2d 814, 815 (9th Cir. 1989); *United States v. Abu-Jihaad*, 630 F.3d 102, 142 (2d Cir. 2010).

<sup>58</sup> *Fazaga I*, 884 F. Supp. 2d 1022, 1045, 1049 (C.D. Cal. 2012), *aff'd in part, rev'd in part*, 965 F.3d 1015 (9th Cir. 2020), *rev'd*, 142 S. Ct. 1051 (2022).

<sup>59</sup> *Reynolds*, 345 U.S. at 10 (“[T]he court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.”).

<sup>60</sup> See *George*, *supra* note 44, at 1696.

published opinions addressing the state secrets privilege, and in other cases, the review was scant.<sup>61</sup>

Underlying this discretion is a standard a federal judge must only satisfy for herself. For example, in *Molerio v. FBI*, then-Judge Antonin Scalia affirmed dismissal of a complaint alleging statutory and constitutional issues relating to the Bureau's decision not to hire the plaintiff as an agent, but only after independently determining the real reason the plaintiff was not hired through in camera review of the affidavit of the assistant director of the FBI's Intelligence Division.<sup>62</sup> In justifying the dismissal of Molerio's First Amendment claims, Judge Scalia stated the judges "satisfied [them]selves" through in camera review as to the real reason the FBI did not hire the plaintiff, which had no relation to the plaintiff's allegations.<sup>63</sup> This self-established threshold aligns with courts' broad discretion to determine whether the claim is based on valid concerns of revealing state or military secrets.<sup>64</sup> Notably, however, Judge Scalia declined to rest dismissal upon "conclusory statements" contained in the Acting Attorney General's public affidavit, favoring a sworn in camera affidavit divulging the real reason.<sup>65</sup>

Without any procedural guidelines to follow, courts have to make individualized institutional-competence assessments of how to evaluate a given state secrets privilege assertion. Though judges are regularly trusted to review sensitive content independently just by the nature of their offices, deference in national security cases carries weighty implications for rights vindication.

## 2. *Judicial Reliance on the Mosaic Theory*

When the plaintiff can make a prima facie case without reliance on allegedly privileged evidence, and the subject of the suit itself is not a secret, dismissal may alternatively rest on viewing underlying evidence in a "mosaic" context. Under the mosaic theory, a court may refuse to provide a party with access to evidence which itself is not classified due to the possibility that its disclosure, in combination with other disclosures, could lead to public inferences jeopardizing national security.<sup>66</sup>

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<sup>61</sup> Chesney, *supra* note 27, at 1315–32 (mapping out courts' actions in adjudicating the state secrets privilege cases post-*Reynolds*).

<sup>62</sup> 749 F.2d 815, 818–20, 822, 826 (D.C. Cir. 1984).

<sup>63</sup> *Id.* at 825.

<sup>64</sup> *Id.* at 822 ("To some degree at least, the validity of the government's assertion must be judicially assessed.").

<sup>65</sup> *Id.*

<sup>66</sup> The first case invoking the mosaic theory in a national security context was *Halkin v. Helms*, in which the court displayed deference to the government due to concerns about technological advances

As systematically analyzed for the first time by Professor David Pozen in his 2005 student note, the integration of mosaic theory into national security law in the late 1970s increased judicial deference to the Executive.<sup>67</sup> Judges have increasingly feared disclosure and lowered the threshold for specificity and support before upholding a state secrets privilege assertion. With a lower threshold, the Executive Branch can now rely on mosaic theory to convert public, “seemingly innocuous” evidence into a state secret that ends the litigation without alternative redress.<sup>68</sup> Overall, this expanded perspective on what kind of evidence risks national security has increased the latitude for the U.S. government to raise the privilege successfully, either as party or as intervenor.

A mosaic perception of evidence, instead of individualized treatment of each piece of evidence, represents a further departure from the original state secrets privilege. This lens pulls government conduct further from public scrutiny and individual redress.<sup>69</sup> In *Mohamed v. Jeppesen Dataplan, Inc.*, the ACLU, on behalf of five plaintiffs, sued Jeppesen, a company that provided flight planning and logistical services. The ACLU alleged the company provided over seventy extraordinary rendition flights to transport prisoners who were subsequently tortured in Morocco, in Egypt, and at a U.S. military base in Afghanistan.<sup>70</sup>

The Ninth Circuit affirmed the district court’s case dismissal after the U.S. Government intervened to argue the case could not proceed without requiring disclosure of evidence that would endanger relations with other nations cooperating in the extraordinary rendition program.<sup>71</sup> The court reasoned on dismissal that even if it were true that Jeppesen conspired with the U.S. Government to commit the acts alleged, the plaintiffs were without a remedy because the details of the Government’s involvement in international kidnapping and torture would be revealed throughout the litigation.<sup>72</sup>

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finding patterns in disparate information. 598 F.2d 1, 8 (D.C. Cir. 1978); see David E. Pozen, Note, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 YALE L.J. 628, 638–41 (2005) (discussing the extension of the mosaic theory to national security as a method of bolstering judicial deference).

<sup>67</sup> Pozen, *supra* note 66, at 632, 640–41.

<sup>68</sup> Danielle L. Nottea, Note, *The State Secrets Privilege: Distinguishing State Secrets in the Age of Information*, 42 SW. L. REV. 701, 721 (2013); *Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998).

<sup>69</sup> See Jenny-Brooke Condon, *Illegal Secrets*, 91 WASH. U. L. REV. 1099, 1129 (2014) (discussing how secrecy can immunize executive conduct from judicial review and public accountability); Telman, *supra* note 45, at 477–78.

<sup>70</sup> 614 F.3d 1070, 1073–75 (9th Cir. 2010) (en banc); First Amended Complaint at 3, *Mohamed v. Jeppesen Dataplan, Inc.*, 539 F. Supp. 2d 1128 (N.D. Cal. 2008) (No. 5:07-cv-02798 (JW)).

<sup>71</sup> *Mohamed*, 614 F.3d at 1076, 1093.

<sup>72</sup> *Id.* at 1087.

But the plaintiffs should not have been subject to the traditional *Totten* bar: neither the plaintiffs nor the defendants were in any secret contractual relationship with the U.S. Government, as *Totten* generally requires. Additionally, the plaintiffs already established the Government's relationship with the defendant by submitting 1,800 pages of publicly available documents implicating the Government, meaning they could make out a prima facie case without the allegedly privileged information.<sup>73</sup> Still, the court relied on the idea that the *Totten* bar and the *Reynolds* privilege form a "continuum of analysis," and that the litigation could not proceed because the privileged and nonprivileged evidence were inseparable, presenting an "unacceptable risk" of disclosing state secrets.<sup>74</sup> Similarly, the Ninth Circuit in *Kasza v. Browner* held that even innocuous information can be withheld from disclosure if, on the Government's word, it is too entangled with information implicating state secrets.<sup>75</sup>

Before *Zubaydah* and *Fazaga*, the Supreme Court most recently considered the state secrets privilege in 2011 in *General Dynamics Corp. v. United States*. *General Dynamics* involved a government contract in which many of the details were state secrets such that the court could not fashion a remedy. Justice Scalia's majority opinion clarified that *Totten* and *Reynolds* are two distinct doctrines, but did not close the door on dismissal grounds under either precedent: *Totten* provides courts with common law authority to dismiss or fashion remedies in government-contracting disputes, and *Reynolds* applies to particular pieces of evidence.<sup>76</sup>

The Court reasoned that it could refuse to enforce the contract because the parties's ex ante expectations included the risk that state secrets could prevent proper adjudication of inadequate-performance claims.<sup>77</sup> Justice Scalia emphasized that the state secrets privilege can lead to dismissal where it "precludes a valid defense in Government-contracting disputes, and only where both sides have enough evidence to survive summary judgment but too many of the relevant facts remain obscured by the state-secrets privilege" to allow the Court to rule reliably on the merits.<sup>78</sup> The majority used a mosaic theory of the evidence to defer to the Executive, asserting that the Court was

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<sup>73</sup> Telman, *supra* note 45, at 435–36.

<sup>74</sup> *Mohamed*, 614 F.3d at 1089.

<sup>75</sup> 133 F.3d 1159, 1166 (9th Cir. 1998) ("[I]f seemingly innocuous information is part of a classified mosaic, the state secrets privilege may be invoked to bar its disclosure and the court cannot order the government to disentangle this information from other classified information.")

<sup>76</sup> *Gen. Dynamics Corp. v. United States*, 563 U.S. 478, 485–86 (2011); *see Tenet v. Doe*, 544 U.S. 1, 6–7 n.4 (2005).

<sup>77</sup> *Gen. Dynamics Corp.*, 563 U.S. at 491.

<sup>78</sup> *Id.* at 492.

unwilling to sift through the evidence relevant to adjudicating the dispute because of the state secrets disclosure risk.<sup>79</sup>

The Supreme Court has otherwise provided little guidance on which subject matters preclude judicial review of an action under *Totten* because they are state secrets. Aside from in *Totten*, the Court has only applied this bar twice to hold the subject matter is a state secret.<sup>80</sup> Though *General Dynamics* clarifies when a categorical bar does apply, this holding does not preclude dismissal based on *Reynolds* as well. On the one hand, the decision treated the privileges as two separate categories. Yet the opinion suggests that a valid claim for *Reynolds* evidentiary withholding could effectively require case dismissal by constraining either party's ability to proceed on the merits or threats to national security.

## II. THE OCTOBER 2021 TERM: *ZUBAYDAH* AND *FAZAGA*

For the first time in a decade, the Supreme Court took up the state secrets privilege inquiry in *United States v. Zubaydah* and *FBI v. Fazaga*.<sup>81</sup> Through a narrow reading, the factual and procedural circumstances of the cases could be considered so idiosyncratic that the Court's holdings are not widely applicable in future suits. For both their doctrinal holdings and the broader messages in their reasonings, however, these decisions read together further narrow civil litigants' window of redressability. The privilege in its freshly minted form reflects an imbalance between the three federal branches, with the judiciary disempowered from curbing executive excess.

Specifically, the state secrets privilege in its post-*Zubaydah* and *Fazaga* form reflects a feedback loop of executive authority: the judiciary grants significant deference to the Executive Branch's assertion of privilege over an executive action. Traditionally, the government can successfully assert the state secrets privilege and withhold evidence from a proceeding once the court is satisfied with the government's initial demonstration of the threatened harms of disclosure.<sup>82</sup> Courts require varying levels of demonstrated harm to national security before allowing the government to

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<sup>79</sup> *Id.* at 487.

<sup>80</sup> *Weinberger v. Cath. Action of Haw./Peace Educ. Project*, 454 U.S. 139, 146 (1981) (holding that allegations warranting production of a U.S. Navy environmental impact report regarding a nuclear storage facility were "beyond judicial scrutiny" because the Navy could neither "admit nor deny" use of the facility for national security reasons); *Tenet*, 544 U.S. at 11 (finding claims barred under *Totten* because successful litigation depended on disclosing the existence of a secret relationship with the government).

<sup>81</sup> *United States v. Zubaydah*, 142 S. Ct. 959 (2022); *Fazaga III*, 142 S. Ct. 1051 (2022).

<sup>82</sup> *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1081 (9th Cir. 2010) (en banc) ("The court must sustain a claim of privilege when it is satisfied, 'from all the circumstances of the case, that there is reasonable danger that compulsion of the evidence will expose . . . matters which, in the interest of national security, should not be divulged.'" (quoting *United States v. Reynolds*, 345 U.S. 1, 10 (1953))).

successfully assert the privilege.<sup>83</sup> *Zubaydah* and *Fazaga* emphasize how congressional silence regarding the state secrets privilege impedes the judiciary's ability to meaningfully adjudicate claims of executive overreach in the national security space.

A. *The Zubaydah Court and the Analytical Circularity  
in State Secrets Privilege Analysis*

Abu Zubaydah filed an ex parte discovery motion in U.S. federal court to order two government contractors from the Polish CIA facility where he had been detained to provide testimony or documents for use in Polish litigation.<sup>84</sup> The district court and Ninth Circuit rejected the Government's claim that merely confirming that the site operated in Poland would threaten national security, reasoning that it was already publicly available information.<sup>85</sup> The Supreme Court reversed and held that the state secrets privilege applied to information that could confirm or deny the existence of the CIA facility, portraying this inquiry as a narrow evidentiary dispute.<sup>86</sup> Because the evidence in question—the sole purpose of the filing—could threaten U.S.–Poland relations, the whole application had to be dismissed.<sup>87</sup>

Of its doctrinal elders, this case most closely resembles the *Totten* line of cases, because the sole purpose of the U.S. suit was this evidentiary request. Under one reading, the application of this case in the future would only lead to dismissal where the whole purpose of the suit was to access the specific evidence in question. Indeed, the opinion included multiple reminders of the “narrowness” of the inquiry at bar.<sup>88</sup>

Moreover, not all may be lost for Zubaydah's case. A portion of the opinion signed by Justices Stephen Breyer, John Roberts, Brett Kavanaugh, and Amy Coney Barrett stated: “Of course, we need not and do not here decide whether a different discovery request filed by Zubaydah might avoid the problems that preclude further litigation regarding the requests at issue here.”<sup>89</sup> Additionally, seven Justices—all but Justices Samuel Alito and

<sup>83</sup> See *supra* notes 55–56 and accompanying text.

<sup>84</sup> *Zubaydah*, 142 S. Ct. at 963; see 28 U.S.C. § 1782 (permitting district courts to order production of testimony or documents “for use in a proceeding in a foreign . . . tribunal”).

<sup>85</sup> *Zubaydah*, 142 S. Ct. at 966.

<sup>86</sup> *Id.* at 967–68.

<sup>87</sup> See *id.* at 969.

<sup>88</sup> *Id.* at 967 (“Obviously the Court condones neither terrorism nor torture, but in this case we are required to decide only a narrow evidentiary dispute.”); *id.* at 968 (“An important factor in our analysis of that narrow issue is the specific language . . . .”); *id.* at 989 (“Even when it comes to the two remaining categories of information at issue—the location of the government's detention site and the CIA's treatment of Zubaydah there—the parties' dispute has narrowed substantially.”).

<sup>89</sup> *Id.* at 972.



Clarence Thomas—believe that questioning of the contractors who tortured him should be allowed.<sup>90</sup> Whether by refiling or proceeding with the current suit, “the Government concedes that information about Zubaydah’s treatment is no longer classified: It is, on any understanding, not a state secret.”<sup>91</sup> Practically, this means that Zubaydah could successfully refile his request without mentioning Poland and even successfully obtain the contractors’ requested testimony.<sup>92</sup>

Yet the principle extracted from the case is anything but narrow: the Court took the state secrets privilege to its formalistic outer limit by granting that “sometimes information that has entered the public domain may nonetheless fall within the scope of the state secrets privilege.”<sup>93</sup> *Zubaydah* effectively eliminated the Government’s burden to prove harm should the evidence be disclosed. Any harm to national security from disclosing that Poland was where the confirmed events took place had already been realized—the information was already public and confirmed to varying degrees by government officials, including President Obama.<sup>94</sup> Nevertheless, the Court deferred to the Government on the harm it perceived from filling the information gap of confirming or denying cooperation with Poland.<sup>95</sup>

Another perspective is that the harm the Government sought to prevent was not disclosure of a secret but instead a potential breach of the understanding between the U.S. intelligence services and those of a foreign ally that such cooperation in torture efforts would be done in secret. In his declaration, the CIA Director emphasized that “‘clandestine’ relationships with foreign intelligence services” are “based on mutual trust that the classified existence and nature of the relationship will not be disclosed.”<sup>96</sup> The Court then repeated the CIA Director’s admission that the Government deliberately reserved “an important element of doubt about the veracity” of Poland’s role in the international torture program to warrant dismissal based on this relationship rationale.<sup>97</sup>

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<sup>90</sup> *Id.* at 980–81 (Thomas, J., dissenting).

<sup>91</sup> *Id.* at 984 (Kagan, J., concurring in part and dissenting in part).

<sup>92</sup> In a blog post just after *Zubaydah* was handed down, Zubaydah’s counsel, Cornell Law Professor Joseph Margulies, expressed confidence in his client’s future prospects on these grounds. See Joseph Margulies, *In US v. Husayn (Abu Zubaydah), the Supreme Court Calls Torture What It Is*, JUST SEC. (Mar. 11, 2022), <https://www.justsecurity.org/80649/in-us-v-husayn-abu-zubaydah-the-supreme-court-calls-torture-what-it-is/> [<https://perma.cc/HNJ4-Z4S4>].

<sup>93</sup> *Zubaydah*, 142 S. Ct. at 968.

<sup>94</sup> See *supra* note 11 and accompanying text.

<sup>95</sup> *Zubaydah*, 142 S. Ct. at 968–69.

<sup>96</sup> *Id.* at 968.

<sup>97</sup> *Id.* at 969.

For both the unique factual background that gave rise to the case and the highly fractured composition of Justices signing onto each portion, this holding could have narrow precedential value. Additionally, as Professor Robert Chesney explains, the Court complicated the part of the state secrets privilege analysis that weighs necessity, or the litigant's need for the information.<sup>98</sup> But the broader message the Court sent through its opinion represents state secrets jurisprudence maximalism.<sup>99</sup> Seven Justices—all but Justices Neil Gorsuch and Sonia Sotomayor—agreed that U.S. executive officers could officially deny what they knew as public citizens: that the U.S. government maintained a black site in Poland.<sup>100</sup> If this holding is grafted onto future cases in the same maximalist manner, the government can plausibly withhold any public information on state secrets privilege grounds, as long as a granular detail has not been officially confirmed.

Through *Zubaydah*, the privilege analysis has evolved into a dragnet of all information but that which the federal government has explicitly confirmed. By eliminating the government's burden, the Court further entrenched the common law state secrets privilege as an Executive Branch tool for limiting or dismissing lawsuits. The privilege in its post-*Zubaydah* and *Fazaga* form puts government action further outside the scope of judicial review and permits the Executive Branch to define for the judiciary when to grant the privilege.

### B. *Constitutional Rebuke: The Zubaydah Dissent*

The *Zubaydah* dissent brought together ideologically diverse Justices for a full rebuke of this level of deference. Though not of precedential value on its own, this articulation demonstrates the gravity of the majority opinion from a prudential and a doctrinal standpoint. Justice Gorsuch in dissent, joined by Justice Sotomayor, saw the decision to be a problematic reduction of the government's burden, and sent a strong message about executive overreach and waning separation of powers.<sup>101</sup> He argued that “[t]here comes a point where we should not be ignorant as judges of what we know to be true as citizens” and insisted that the Court should have remanded for a

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<sup>98</sup> Robert Chesney, *No Appetite for Change: The Supreme Court Buttresses the State Secrets Privilege, Twice*, 136 HARV. L. REV. 170, 187–88 (2022).

<sup>99</sup> National security maximalism generally calls for deference to the President in her authority as Commander in Chief. On the opposite end of the spectrum, liberty maximalism calls for courts to protect individual liberties to the same degree during times of war and peace regardless of the national security circumstances. For an articulation of the flaws of post-9/11 national security maximalism, see Cass R. Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47, 65–75.

<sup>100</sup> See *Zubaydah*, 142 S. Ct. at 989 (Gorsuch, J., dissenting).

<sup>101</sup> *Id.* at 990.

preliminary in camera review of the evidence.<sup>102</sup> Excusing the government from meeting any burden granted too much deference to executive authority.

In Justice Gorsuch’s view, the state secrets privilege “is no blunderbuss and courts may not flee from the field at its mere display.”<sup>103</sup> He waded into the constitutional-arrangement inquiry, arguing that when the government “seeks to withhold every man’s evidence from a judicial proceeding thanks to the powers it enjoys under Article II, that claim must be carefully assessed against the competing powers Articles I and III have vested in Congress and the Judiciary.”<sup>104</sup> Accepting the government at its word, according to Justice Gorsuch, is antithetical to the constitutional system: “[t]he Constitution did not create a President in the King’s image” but instead “envisioned an executive regularly checked and balanced by other authorities.”<sup>105</sup>

As a doctrinal matter, the dissenting Justices offered a path forward once the privilege is found to attach to the information in question. In contrast with the majority’s approach requiring remand with instructions to dismiss, the dissenters argued that the case should be remanded for further proceedings to screen the requests for references to Poland but otherwise be allowed to proceed.<sup>106</sup> This delay “may effectively deny Zubaydah congressionally authorized discovery into admittedly nonprivileged information” or “prove a pointless formality.”<sup>107</sup> The only justification the dissenting Justices saw for dismissing this case was to impede the criminal investigation in Poland and avoid embarrassment for the government, grounds which they found unequivocally insufficient as a matter of executive accountability.<sup>108</sup>

### C. *FBI v. Fazaga*: *Foreclosing Unlawful Surveillance Redress*

In *FBI v. Fazaga*, a far-shorter unanimous opinion handed down just one day after *Zubaydah*, the Supreme Court further articulated the appropriate application of the state secrets privilege—or rather, where it does not apply. The case also reaffirmed the Court’s reluctance to find the state secrets privilege superseded by statute.

The Supreme Court granted certiorari in *FBI v. Fazaga* to determine whether § 1806(f) of the Foreign Intelligence Surveillance Act (FISA) displaces the state secrets privilege, instead requiring the district court to

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<sup>102</sup> *Id.* at 985, 998.

<sup>103</sup> *Id.* at 991.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 992.

<sup>106</sup> *Id.* at 1001.

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

<sup>108</sup> *Id.*

resolve, in camera and ex parte, the merits of the Orange County Muslim American community's unlawful-surveillance lawsuit.<sup>109</sup>

As brief background, after Yassir Fazaga filed suit against the U.S. Government, Attorney General Eric Holder submitted a formal invocation of the state secrets privilege and the Government moved for dismissal on state secrets grounds.<sup>110</sup> Without requiring in camera review of the underlying evidence, the district court dismissed the claims.<sup>111</sup> Eight years after the plaintiffs appealed the district court's holding, the Ninth Circuit held that § 1806(f) displaces the state secrets privilege.<sup>112</sup> The court remanded the case to require the district court to evaluate the classified surveillance material in camera and ex parte and make a merits determination.<sup>113</sup> The Ninth Circuit reasoned that Congress could displace federal common law by enacting a statute speaking directly to the question, and that the text of FISA did so in this case.<sup>114</sup>

The Ninth Circuit holding—that Congress *could* and *did* constitutionally circumvent the privilege—was a watershed moment in state secrets privilege doctrine. Though the court acknowledged the doctrine has “a constitutional ‘core’ or constitutional ‘overtones,’” it emphasized the privilege is an evidentiary rule rooted in common law.<sup>115</sup> Because the court found the text of FISA to speak directly to the question otherwise addressed by the common law dismissal remedy, it held that FISA requires in camera review of the materials instead of allowing the judge to defer to the Executive without further inquiry.<sup>116</sup>

The Supreme Court in *FBI v. Fazaga* reversed the Ninth Circuit, narrowly holding that FISA § 1806(f) does not abrogate the state secrets privilege to require in camera review of underlying evidence in unlawful-electronic-surveillance suits. Put simply, the Court held § 1806(f) and state secrets privilege are ships in the night.<sup>117</sup> The opinion, decided on purely statutory grounds, focused on structural differences between the common law form of the state secrets privilege and the provisions of § 1806(f). First, the Court reasoned that they involve two different inquiries: the state secrets

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<sup>109</sup> *Fazaga III*, 142 S. Ct. 1051, 1056 (2022).

<sup>110</sup> Declaration of Eric H. Holder, Attorney General of the United States, Joint Appendix at 26, 32, *Fazaga III*, 142 S. Ct. 1051 (No. 20-828); *Fazaga I*, 884 F. Supp. 2d 1022, 1034 (C.D. Cal. 2012).

<sup>111</sup> *Fazaga I*, 884 F. Supp. 2d at 1039.

<sup>112</sup> *Fazaga II*, 965 F.3d 1015, 1045, 1065 (9th Cir. 2020), *rev'd*, 142 S. Ct. 1051 (2022).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 1044.

<sup>115</sup> *Id.* at 1045 (quoting *In re Nat'l Sec. Agency Telecomms. Recs. Litig.*, 564 F. Supp. 2d 1109, 1124 (N.D. Cal. 2008)).

<sup>116</sup> *See id.* at 1045–46.

<sup>117</sup> For a full dissection of the *Fazaga*–FISA backstory, see Chesney, *supra* note 98, at 189–203.

privilege asks courts to consider possible national security harms from the disclosure of the evidence, whereas § 1806(f) asks “whether the surveillance of the aggrieved person was *lawfully authorized and conducted*.”<sup>118</sup> Second, they authorize two different forms of relief: the state secrets privilege leads to removal of particular pieces of evidence without consideration of their lawfulness, while § 1806(f) requires courts to award relief to an aggrieved person against whom the evidence in question was unlawfully obtained.<sup>119</sup> Third, they direct the parties to follow different procedures: the state secrets privilege can be invoked to block in camera and ex parte review of materials in question, while § 1806(f) cannot.<sup>120</sup>

Under one reading, this interpretation ignores the legislative purpose of FISA as enacted by Congress in 1970, which was to rein in perceived federal foreign-surveillance authority abuses and provide mechanisms for redress.<sup>121</sup> Yet because the context of *Fazaga* was national security, the Court instead framed the issue as a pure statutory interpretation question in which legislative context is irrelevant: “Regardless of whether the state secrets privilege is rooted only in the common law . . . or also in the Constitution . . . the privilege should not be held to have been abrogated or limited unless Congress has *at least* used clear statutory language.”<sup>122</sup> In no uncertain terms, the Court held, federal courts need direct legislation around the state secrets

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<sup>118</sup> *Fazaga III*, 142 S. Ct. 1051, 1061 (2022) (quoting 50 U.S.C. § 1806(f)).

<sup>119</sup> *Id.* at 1062.

<sup>120</sup> *Id.* Section 1806(f) reads:

Whenever a court or other authority is notified pursuant to subsection (c) or (d), or whenever a motion is made pursuant to subsection (e), or whenever any motion or request is made by an aggrieved person pursuant to any other statute or rule of the United States or any State before any court or other authority of the United States or any State to discover or obtain applications or orders or other materials relating to electronic surveillance or to discover, obtain, or suppress evidence or information obtained or derived from electronic surveillance under this chapter, the United States district court or, where the motion is made before another authority, the United States district court in the same district as the authority, shall, notwithstanding any other law, if the Attorney General files an affidavit under oath that disclosure or an adversary hearing would harm the national security of the United States, review in camera and ex parte the application, order, and such other materials relating to the surveillance as may be necessary to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted. In making this determination, the court may disclose to the aggrieved person, under appropriate security procedures and protective orders, portions of the application, order, or other materials relating to the surveillance only where such disclosure is necessary to make an accurate determination of the legality of the surveillance.

50 U.S.C. § 1806(f).

<sup>121</sup> Chesney, *supra* note 27, at 1269, 1292–93; Bobby Chesney & Steve Vladeck, *Episode 216: This Podcast Does Not Constitute Legal Advice*, NAT’L SEC. L. PODCAST, at 35:40 (Mar. 7, 2022), <https://www.nationalsecuritylawpodcast.com/episode-216-this-podcast-does-not-constitute-legal-advice/> [https://perma.cc/LGX7-UWE3].

<sup>122</sup> *Fazaga III*, 142 S. Ct. at 1060–61 (emphasis added).

privilege before meaningfully evaluating Executive Branch assertions of the privilege. In order for Congress to curtail the privilege in any way, it must do so directly.

### III. THE LEGISLATIVE BRANCH AND THE INSTITUTIONAL PROCESS FRAMEWORK

The judiciary has largely avoided tackling state secrets privilege assertions directly and has circumvented addressing whether the state secrets privilege has constitutional implications.<sup>123</sup> Yet given the privilege's often decisive role in national security litigation, its deployment by the government clearly fits into the broader context of executive unilateralism. Namely, in lawsuits, it implicates questions about the balance of national security and individual liberty interests. If the government succeeds—as it often does—in asserting the privilege, civil litigants can lose an avenue of meaningful redress.

Scholars have long grappled with how courts do, and should, handle this trade-off. Professors Samuel Issacharoff and Richard Pildes's institutional process framework illuminates how, in adjudicating cases that pit national security against individual liberty interests, courts have developed a process-based, institutionally oriented framework for examining the legality of governmental action.<sup>124</sup> Rather than centering on first-order determinations regarding the individual right infringed upon through executive action, judicial decision-making largely centers on the process of decision-making by the other two branches.<sup>125</sup> In this way, the post-Civil War positive law of national security adheres to Justice Robert H. Jackson's *Steel Seizure* concurrence: examine the delta between any executive action and congressional legislation to determine constitutionality.<sup>126</sup>

The institutional process approach to judicial decision-making demands congressional participation before pushing back on executive unilateralism. As Professor Joseph Landau notes, this pragmatic approach shifts the emphasis away from which governmental branch should “win” in favor of “a collective responsibility of the political branches to engage one another

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<sup>123</sup> See, e.g., *supra* note 122 and accompanying text.

<sup>124</sup> Issacharoff & Pildes, *supra* note 23, at 161.

<sup>125</sup> Two partial exceptions embracing civil libertarianism at the Supreme Court level are *Hamdi* and *Boumediene*, in which the Court rejected executive claims of unlimited-detention power over enemy combatants. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004); *Boumediene v. Bush*, 553 U.S. 723, 783 (2007). Yet even those cases were devoid of any substantive discussion of the scope of individual rights.

<sup>126</sup> Put differently, executive power is greatest with congressional authorization, and at its “lowest ebb” when exercised despite any congressional statutes to the contrary. See *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579 636–38 (1952) (Jackson, J., concurring).

on policy.”<sup>127</sup> The framework centers the terms for the judiciary to assess executive policies and individual liberties.<sup>128</sup> It is rooted in democratic accountability: during exigent circumstances such as war, the judicial role is to ensure there is “bilateral institutional endorsement” for executive action because the electorate can only hold the two political branches to account for such actions.<sup>129</sup>

Overall, scholarship around the institutional process framework has focused on how the judiciary evaluates bilateral institutional endorsements of executive activity, and its methods and degrees of deference.<sup>130</sup> Yet there has been little consideration in scholarship of the inverse: how Congress should behave toward the judiciary within the institutional process framework. Perhaps this is because the framework presupposes the possibility of ultimate congressional action, and even assumes Congress has an active role in legislating around executive action during wartime.<sup>131</sup>

In the twenty years since September 11, and seventeen years since Issacharoff and Pildes’s institutional process framework first entered legal scholarship, much has changed in the real-world national security landscape. Congress has acquiesced to executive authority through a combination of the 2001 and 2002 Authorizations for Use of Military Force, the passive mechanisms of the War Powers Resolution, and permitting “humanitarian intervention” without congressional authorization.<sup>132</sup> There has also been congressional silence in areas that repeatedly present clear needs for

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<sup>127</sup> Joseph Landau, *Chevron Meets Youngstown: National Security and the Administrative State*, 92 B.U. L. REV. 1917, 1974 (2012).

<sup>128</sup> Issacharoff & Pildes, *supra* note 23, at 186–87.

<sup>129</sup> *Id.* at 187.

<sup>130</sup> See, e.g., *id.* at 173 (discussing the Court’s consideration of judgments reached by the Legislative and Executive Branches). Professor Landau has examined this issue through the lens of *Chevron*, *Steel Seizure*, and traditional administrative law methods of deference, emphasizing the role Justice Jackson’s *Steel Seizure* concurrence has played in resolving post-9/11 national security cases. Landau, *supra* note 127, at 1918–19 (collecting scholarship on national security and administrative law).

<sup>131</sup> Issacharoff & Pildes, *supra* note 23, at 190 (“Through such doctrinal and rhetorical structures of analysis, courts channel the issues back into the bilateral political process and keep open a critical congressional role, should Congress strongly disagree with executive action during crises.”); Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2351 (2006) (“[T]he *Youngstown* framework assumes that Congress will be actively involved in making the difficult policy decisions required during wartime and will provide the oversight of Executive-initiated action that courts feel ill-suited to offer through first-order rights adjudication.”).

<sup>132</sup> BOB BAUER & JACK GOLDSMITH, *AFTER TRUMP: RECONSTRUCTING THE PRESIDENCY* 300–07 (2020); Levinson & Pildes, *supra* note 131, at 2350–53 (recounting eras of congressional passivity as a feature of partisan alignment among the branches).

congressional oversight, such as with the state secrets privilege.<sup>133</sup> In light of *Zubaydah* and *Fazaga*, Congress's inaction towards the other branches presents an ongoing accountability problem that courts cannot unilaterally ameliorate.

Congress should embrace its role in fostering interbranch institutional cooperation by speaking directly to courts regarding national security issues. Specific to the state secrets privilege, Congress can provide an interbranch procedural framework by which courts can assess assertions of the privilege. As the best institution to incorporate valuable considerations about the purpose and flaws of the privilege, Congress can empower the judiciary to critically examine executive conduct without forcing courts to operate outside the institutional process approach.

#### A. *Congress's Role in Fostering Interbranch Relationships*

Rather than permitting the judiciary to substantively defer wholesale to the Executive Branch's assertion of the state secrets privilege, Congress should establish procedural guardrails to provide more measured state secrets privilege assessments. It is well within Congress's authority to craft legislation fostering procedural relationships among the three branches and allowing the judiciary to exercise review over claims of executive overreach. Reforms to the state secrets privilege would not only preserve executive accountability, but also serve as a legitimizing mechanism for executive assertions of the privilege. In general, Executive Branch secrecy can be "at best unnecessary and at worst deeply harmful" by intrinsically diminishing domestic and international credibility and functionally disincentivizing informed decision-making through reduced accountability.<sup>134</sup> Allowing the Executive Branch to unilaterally collapse constitutional and civil rights litigation on opaque grounds undermines public trust in the federal government. Moreover, it undermines trust in the judicial process purported to serve as a backstop against antidemocratic behavior.

Congress is uniquely positioned within the institutional process framework to foster interbranch cooperation, and it should be energized to do so through procedural legislation. First, looking to the Constitution's structural provisions, Congress has Article I powers related to national security and foreign affairs, and further power to legislate through the

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<sup>133</sup> See, e.g., Timothy Bazzle, Note, *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, 61 (2012) ("While Congress contemplated codifying a state secrets type privilege when it adopted the Federal Rules of Evidence (FRE), it ultimately decided to leave the state secrets privilege out of the FRE.")

<sup>134</sup> Heidi Kitrosser, *Congressional Oversight of National Security Activities: Improving Information Funnels*, 29 CARDOZO L. REV. 1049, 1066 (2008).



Necessary and Proper Clause. Congress also has Article III powers to set rules of procedure and evidence for the federal courts, including to authorize judges to adjudicate cases implicating foreign affairs.<sup>135</sup>

Myriad sources across the branches support this reading. Justices Gorsuch and Sotomayor’s *Zubaydah* dissent forcefully endorsed this view as it pertains to judicial review.<sup>136</sup> Similarly, the Senate Judiciary Committee has noted that layered upon any executive Article II powers associated with the state secrets privilege are Congress’s powers to regulate that privilege.<sup>137</sup> Moreover, in direct refutation of an absolute state secrets privilege, the Court endorsed in camera review of information pertaining to military or diplomatic secrets before excising any portions privileged under *Reynolds*.<sup>138</sup> The structural provisions of the U.S. Constitution permit Congress to exercise concurrent authority over the protection of state secrets or guardrails for implementing the privilege, especially in the face of perceived executive overreach.

Additionally, Congress’s authority to craft federal jurisdiction under Article III is particularly important considering how the state secrets doctrine has expanded over time to be used in cases in which the Government is not a party.<sup>139</sup> When the Executive asserts the state secrets privilege to directly or implicitly require the federal court to dismiss cases over which Congress has constitutionally assigned jurisdiction through Article III, separation of powers erodes. Such executive primacy intrudes on the federal judiciary’s independence and Congress’s jurisdiction-conferring authority.<sup>140</sup> Further, in seeking dismissal of cases by raising the privilege, the Executive is infringing on the separation of powers scheme that permits the other branches to work together in curbing executive overreach.

The executive argument that resolution of state secrets issues is best left to the political branches fails to consider that Congress—a political branch—empowered the judiciary to hear suits regarding constitutional violations by the Executive.<sup>141</sup> In short, a political branch’s solution to the problem in

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<sup>135</sup> U.S. CONST. art. I, § 8; *id.* art. III, §§ 1–2; *see* *United States v. Zubaydah*, 142 S. Ct. 959, 990 (2022) (Gorsuch, J., dissenting) (first citing Judiciary Act of 1789, Pub. L. No. 1-20, § 9, 1 Stat. 73, 77; and then citing Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, § 4(a)(4)(A), 117 Stat. 2875, 2878 (codified at 18 U.S.C. § 1595)).

<sup>136</sup> *See* *Zubaydah*, 142 S. Ct. at 990–91, 994–96 (Gorsuch, J., dissenting).

<sup>137</sup> *See, e.g.*, S. REP. NO. 110-443, at 11–13 (2008) (authorizing appropriations for programs within the Department of the Treasury and Department of Commerce).

<sup>138</sup> *United States v. Nixon*, 418 U.S. 683, 715 n.21 (1974).

<sup>139</sup> *See generally* Donohue, *supra* note 46.

<sup>140</sup> Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 *FORDHAM L. REV.* 1931, 1932 (2007).

<sup>141</sup> *Id.* at 1933.

question is giving the judiciary jurisdiction. To date, however, such jurisdictional solutions have been insufficient to convince the judiciary that it has an independent role in the institutional process of evaluating state secrets privilege assertions.

Moreover, Congress has embraced its role in fostering institutional interbranch procedural relationships in the national security context before. FISA represents the first “grand bargain” between the three branches of government in the national security space, specifically in regulating foreign intelligence surveillance.<sup>142</sup> FISA required a form of judicial compromise, and authorized for the first time what had previously been an unsupervised executive function.<sup>143</sup> In this arrangement, the Executive Branch gave up some unilateral, unbridled authority over national security actions by allowing foreign intelligence surveillance conducted inside the United States to be governed by statute in exchange for legitimization by the other branches of such actions.<sup>144</sup> The legislature, through its intelligence and judiciary committees, gained the ability to oversee and regulate this exercise of executive power, albeit in closed-door proceedings.<sup>145</sup> Similarly, the judiciary gained a congressionally articulated role to play in evaluating the Executive’s Article II responsibility to protect national security.<sup>146</sup>

FISA’s procedures are emblematic of a broader pattern of implicit cooperation between the Judicial and Legislative Branches to check executive overreach in the spheres of national security and secrets. The Freedom of Information Act (FOIA) and the Classified Information Procedures Act (CIPA) are prime examples of what energized congressional action looks like.<sup>147</sup> Courts laud FOIA’s procedures for balancing the public’s need for information and government accountability.<sup>148</sup> Specific to the evidentiary context, CIPA’s special procedures governing governmental secrets during discovery were included to address concerns that criminal

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<sup>142</sup> See Richard C. Tallman & Tania M. Culbertson, “*Holding the Delicate Balance Steady and True*”: *The History of FISA’s Grand Bargain*, 80 MONT. L. REV. 137, 147 (2019).

<sup>143</sup> *Id.* at 148.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 147–48.

<sup>146</sup> The nature of this authority raises questions, such as whether assessing applications to conduct surveillance ex parte satisfies the Article III case or controversy requirement. *Id.*

<sup>147</sup> 5 U.S.C. § 552 (2018); Classified Information Procedures Act, Pub. L. No. 96-456, 94 Stat. 2025 (1980) (codified as amended at 18 U.S.C. app. §§ 1–16); Chris Baumohl, Comment, *Piercing the Veil: Reconciling FISA and the State Secrets Privilege in the Schrems II Era*, 71 AM. U. L. REV. 235, 281 (2021).

<sup>148</sup> See, e.g., *Weinberger v. Cath. Action of Haw./Peace Educ. Project*, 454 U.S. 139, 144 (1981) (citing *EPA v. Mink*, 410 U.S. 73, 80 (1973)).

defendants, such as suspected terrorists, could force governmental-secret disclosure.<sup>149</sup>

Absent any bilateral dialogue around the privilege—meaning there is no legislation to look to—courts have been deferential to Executive Branch assertions of the privilege. In past state secrets privilege cases, the Executive Branch has deployed expansive claims about Article II authority. These claims are most expansive around the executive privilege—specifically, the subset of the privilege covering presidential communications.<sup>150</sup> Though the state secrets privilege is not the same as the executive privilege, the government has invoked similar structural constitutional arguments in asserting it.

The Supreme Court articulated the executive-centric argument of the doctrine’s potential constitutional dimensions in *United States v. Nixon*, stating that an executive privilege against information disclosure concerns “areas of Art. II duties [in which] the courts have traditionally shown the utmost deference to Presidential responsibilities.”<sup>151</sup> The Court implied that President Richard Nixon’s confidentiality interest might warrant greater protection if it concerned “military, diplomatic, or sensitive national security secrets.”<sup>152</sup>

In application, the executive privilege and state secrets privilege materially differ in one central aspect: the former is subject to balancing tests. In evaluating executive privilege assertions in the course of litigation, the President’s classic candor rationale is weighed against demonstrated and specific needs for evidence under due process of law in the fair administration of justice.<sup>153</sup> Though some Justices in *Zubaydah* questioned *Zubaydah*’s need for the information in question to uphold the state secrets privilege assertion, a demonstration of need is not sufficient to defeat the

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<sup>149</sup> See Donohue, *supra* note 46, at 207–08 (2010); see also *Fazaga II*, 965 F.3d 1015, 1069 (9th Cir. 2020) (Gould & Berzon, JJ., concurring) (“The government uses these very same procedures all the time when prosecuting suspected terrorists; the government does so by choice, and without any evident handwringing over whether the use of the § 1806(f) procedures might lead to the disclosure of state secrets.”), *rev’d*, 142 S. Ct. 1051 (2022); Baumohl, *supra* note 147, at 281 (“Congress, in drafting CIPA in particular, responded to concerns that criminal defendants would be able to force the government to reveal secret information, and the statute established special procedures governing the handling of such information, including during the discovery phase.”).

<sup>150</sup> A president can invoke the executive privilege to refuse disclosing information to the legislative or judicial branches. See Heidi Kitrosser, *Like “Nobody Has Ever Seen Before”: Precedent and Privilege in the Trump Era*, 95 CHI.–KENT L. REV. 519, 521 (2020).

<sup>151</sup> 418 U.S. 683, 710 (1974).

<sup>152</sup> *Id.* at 706, 711.

<sup>153</sup> *Id.* at 711–13. Presidents often argue that in order to have candid decision-making processes and achieve outcomes that are best for the country, they need assurance that their communications will not be disclosed. For an overview and critique of the candor rationale, see generally Gia B. Lee, *The President’s Secrets*, 76 GEO. WASH. L. REV. 197 (2008).

government's assertion. For example, under Justice Thomas's framework in his *Zubaydah* concurrence, a demonstration of need only triggers the process of testing the government's claim—a question of the level of deference to the Executive.<sup>154</sup>

This distinction from the executive privilege exemplifies the unique and absolute nature of the state secrets privilege in its current doctrinal form and explains why courts are so deferential. Operating in the institutional process framework, yet in the zone in which Congress has not yet done its part to provide standards through legislation, courts naturally credit Article II arguments. The Fourth Circuit demonstrated this position in *El-Masri v. United States*, stating that the state secrets privilege is a tool that allows the Executive Branch to protect secret military and foreign affairs information in conformity with its Article II authority. The privilege's utility rests on "allow[ing] the executive branch to protect information whose secrecy is necessary to its military and foreign affairs responsibilities" independent of party or institutional needs for the information.<sup>155</sup> This view reflects a common claim of the Executive Branch: the President is vested with broad constitutional authority as commander in chief, independent from and unconstrained by congressional regulation.<sup>156</sup> Moreover, the President has the exclusive and preclusive authority and duty to address immediate foreign attacks on the United States and U.S. citizens.<sup>157</sup> This contrasts with a president's peripheral powers, which can be subject to regulation.<sup>158</sup>

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<sup>154</sup> *United States v. Zubaydah*, 142 S. Ct. 961, 973 (Thomas, J., concurring in part and concurring in the judgment).

<sup>155</sup> 479 F.3d 296, 303–04 (2007) (citing *Nixon*, 418 U.S. at 710–11).

<sup>156</sup> *Dep't of the Navy v. Egan*, 484 U.S. 518, 527 (1988)("[A]uthority to classify and control access to information bearing on national security . . . flows primarily from this constitutional investment of power in the President and exists quite apart from any explicit congressional grant."); see *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring) (arguing that historic congressional deference to the executive on national security "may be treated as a gloss on 'executive Power' vested in the President by § 1 of Art. II" (quoting U.S. CONST. art. II, § 1)); Jared Cole, Note, *Historical Gloss and Congressional Power: Control over Access to National Security Secrets*, 99 VA. L. REV. 1855, 1856 (2013).

<sup>157</sup> See, e.g., *The Brig Amy Warwick (The Prize Cases)*, 67 U.S. (2 Black) 635, 649 (1863) (reaffirming the constitutional entitlement of the President to use commander in chief powers in case of invasion). Notably, Justice Kavanaugh raised in the *Fazaga III* oral arguments that he has real doubts about whether executive Article II power is exclusive and preclusive in regard to domestic questions of national security. He emphasized that Article II should influence the statutory reading of FISA in the case because of its relevance to national security, but that statutory mechanisms pertaining to court proceedings are far afield from core Article II concerns. Justice Kavanaugh, Oral Argument at 43:22, *Fazaga III*, 142 S. Ct. 1051 (2022) (No. 20-828), <https://www.oyez.org/cases/2021/20-828> [<https://perma.cc/FT9N-FYCT>].

<sup>158</sup> For example, the Court invalidated the Bush administration's use of military commissions in *Hamdan v. Rumsfeld* because the procedures were in conflict with congressional statute. 548 U.S. 557, 567 (2006).

Yet, around the edges of that national security authority rests textually committed congressional power, such as the power to declare war.<sup>159</sup> Most important to note is that a state secrets privilege assertion only examines the threat of disclosure of evidence, not the underlying merits of foreign policy or military decisions made by the Executive Branch. This distinction brings the state secrets privilege into a regulable domain. On balance, neither congressional legislation nor judicial review of the Executive's assertion of the state secrets privilege infringes upon an untouchable realm of constitutionally based executive privileges. But Congress has to fulfill its role in the institutional process framework in order to activate such review. When the Executive is going it alone, courts have no terms by which they can evaluate the propriety of the action. This procedural legislation setting guardrails around the state secrets privilege would allow a court to act like a court, incentivizing courts to cooperate in striking the right balance in the national security arena.

#### *B. Congress's Role in Establishing Interbranch Procedures*

Congress can foster interbranch cooperation in preventing executive overreach without infringing on the Executive's expertise in military and foreign relations by enacting procedural reforms that draw in the judiciary. Federal courts regularly engage Congress through judicial decision-making techniques—for example, canons such as clear statement, constitutional avoidance, and presumption against repeal of the common law.<sup>160</sup> These canons signal to Congress that the judiciary adheres to the institutional process framework and is looking for cooperation. Similarly, Congress needs to recognize its own responsibility in this effort to curb executive overreach by engaging with the judiciary through procedure.

The Executive Branch has directly fostered a procedural relationship with the judiciary on the state secrets privilege. Absent legislation to lean on, federal courts adhere to the procedures articulated in the Obama Administration's 2009 memorandum on the state secrets privilege.<sup>161</sup> In 2022, the Executive Branch reemphasized its procedural primacy after the Supreme Court handed down *Zubaydah* and *Fazaga* by reissuing the 2009

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<sup>159</sup> U.S. CONST. art. I, § 8, cl. 11.

<sup>160</sup> See *supra* note 122.

<sup>161</sup> See, e.g., *Horn v. Huddle*, 669 F. Supp. 2d 236, 239 (D.D.C. 2010) (“The Attorney General therein sets forth a much more detailed structure for the proper invocation of the state secrets privilege, which the Court applauds.”); Memorandum from Att’y Gen., U.S. Dep’t of Just., to the Heads of Exec. Dep’ts & Agencies, Policies and Procedures Governing Invocation of the State Secrets Privilege (Sept. 23, 2009), <https://www.justice.gov/archive/opa/documents/state-secret-privileges.pdf> [<https://perma.cc/WV6H-P7HG>].

memorandum.<sup>162</sup> While internal executive procedures are better than no procedures, Congress is inherently better positioned than the Executive to implement procedures that meaningfully guard against executive abuse. For example, it is hard to imagine that the Executive Branch will be incentivized to implement an in camera review procedure in lawsuits against itself.

From an oversight standpoint, Congress is the best branch to implement procedures for the judiciary to evaluate state secrets privilege assertions. In the wake of *Fazaga*, Professor Robert Chesney argues that reform for electronic-surveillance harms could be done by amending FISA and via the impending Section 702 renewal in 2023.<sup>163</sup> This could give courts the clear statement needed to exercise review over the Executive's invocation of the state secrets privilege. But more is also needed to guide courts through state secrets privilege assertions outside of the electronic-surveillance context. Such procedures could include in camera and ex parte hearings regarding the underlying evidence, court-ordered presentation of adequate or nonprivileged substitutes for privileged information, detailed indexing of all materials, prehearing conferences to determine steps necessary to protect information, mandatory disclosure of any additional materials courts might need to assess the privilege claim, and an objective basis from which courts can establish valid invocations of the privileges.<sup>164</sup>

In tandem, these procedural protections would work towards optimizing national security, democratic accountability, individual redress, and judicial administrability. Congress has repeatedly introduced, but failed to enact, legislation to this effect.<sup>165</sup> However, the Court's recent holdings in *Zubaydah* and *Fazaga* should reinvigorate these efforts.

### C. Congress's Role in Advancing Policy Considerations

Preservation of a civil litigation option for those asserting individual-liberties violations should be of paramount importance to Congress, and

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<sup>162</sup> Memorandum from Att'y Gen., U.S. Dep't of Just., to Heads of Exec. Dep'ts & Agencies, Supplement to Policies and Procedures Governing Invocation of the State Secrets Privilege (Sept. 30, 2022), [https://www.justice.gov/d9/pages/attachments/2022/09/30/supplement\\_to\\_policies\\_and\\_procedures\\_governing\\_invocation\\_of\\_the\\_state\\_secrets\\_privilege.pdf](https://www.justice.gov/d9/pages/attachments/2022/09/30/supplement_to_policies_and_procedures_governing_invocation_of_the_state_secrets_privilege.pdf) [<https://perma.cc/TLJ3-8ZD5>].

<sup>163</sup> Chesney, *supra* note 98, at 203–06.

<sup>164</sup> These features are found in past legislation. *See, e.g.*, H.R. 4767, 114th Cong. (2016) (attempting to introduce such procedures).

<sup>165</sup> Congressman Jerrold Nadler has predominately led the charge in the House, along with Senator Patrick Leahy in the Senate, introducing the State Secrets Protection Act in the 110th, 111th, 112th, 113th, and 114th Congresses. *See, e.g.*, H.R. 5956, 112th Cong. (2012); S. 417, 111th Cong. (2009); *State Secrets Privilege: Time for Congress to End the Rubber Stamp*, WASH. POST (May 30, 2011), [https://www.washingtonpost.com/opinions/state-secrets-privilege-time-for-congress-to-end-the-rubber-stamp/2011/05/20/AGrTEzEH\\_story.html](https://www.washingtonpost.com/opinions/state-secrets-privilege-time-for-congress-to-end-the-rubber-stamp/2011/05/20/AGrTEzEH_story.html) [<https://perma.cc/2CXT-8WK5>].

Congress should do its part to facilitate cooperation in assessing national security claims across the branches. Courts operate from the baseline need to ensure “vigilance over the institutional tendency to concentrate power in the hands of the executive and its military.”<sup>166</sup> Yet by requiring legislative endorsement of executive action as a precondition to the Executive Branch, courts trust Congress to signal when that power has been impermissibly concentrated.

Under the judiciary’s current regime of deference to the Executive’s state secrets privilege assertions, there is little chance it will take on curing the constitutional infirmities the privilege presents. Such considerations are outside the courts’ practical approach. Instead, the democratically accountable branches share the obligation to develop national security policy.<sup>167</sup> Specifically, Congress can encourage the Judicial Branch to review the Executive through procedural mechanisms enriched by valuable policy reforms.

As established in Part II, the Court narrowed judicial oversight of the Executive Branch through its deferential acceptance of the state secrets privilege in *Zubaydah* and its failure to provide oversight over unlawful electronic surveillance allegations in *Fazaga*. Congress has explicitly acknowledged that the federal common law structure does not provide sufficient safeguards against government abuse and fails to properly balance national security and civil liberties.<sup>168</sup> This acknowledgement propelled FISA’s enactment and should similarly propel state secrets privilege legislation.

There are myriad ways to repair this privilege, both in resolving its doctrinal flaws and in reimagining its roots, purposes, and goals. This Note proposes some guiding norms in considering the next era of the state secrets privilege, while acknowledging that each of these could be a stand-alone research endeavor. These norms would be relevant for Congress to consider when drafting legislation around the state secrets privilege.

First, in considering the necessity of in camera review of the underlying evidence, context is important. There are factual and logical arguments supporting required in camera review of the underlying evidence. Factually, there have been no successful efforts to identify an example of a court being the source of a national security leak.<sup>169</sup> Though the Supreme Court

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<sup>166</sup> Issacharoff & Pildes, *supra* note 23, at 177.

<sup>167</sup> See Landau, *supra* note 127, at 1974.

<sup>168</sup> H.R. REP. NO. 95-1283, pt. 1, at 21 (1978).

<sup>169</sup> I saw this point originally made in Professor Jeremy Telman’s article *Intolerable Abuses*, published in 2011, and after doing additional research on the last decade, could not find an instance of a

reasonably seems to remain concerned about the sensitivity of national security information,<sup>170</sup> the lack of leaks by the judiciary should weigh in favor of requiring more in camera review.

The main practical counterargument to this is twofold: that a lack of leaks should not circularly justify a loosening of procedure, and that just because leaks have not been publicly reported does not mean there has not been information compromised.<sup>171</sup> Logically, courts may be the best entity to look at a piece of evidence, neutrally decide its consequence for the structural progression of a litigation, and set guardrails preventing disclosure of information. On the other hand, the government knows its litigation strategy best, and it knows whether the sensitive information would be fatal to an otherwise meritorious defense.

Justice Thomas's *Zubaydah* concurrence presents another counterargument from an accountability lens: the Executive can hold subordinates accountable through enforcing penalties for disclosure of state secrets, but has few tools to control state secrets once in the judiciary's hands.<sup>172</sup> But this point ignores Congress's Article III powers over the judiciary, through which Congress could create control mechanisms similar to those currently insulating the Foreign Intelligence Surveillance Court from any erroneous information disclosure.<sup>173</sup> Either way, categorical preclusion of this practice by courts is not the best route for preserving governmental accountability, assuming that the in camera process is not prone to leaks. As mentioned above, an in camera review requirement has

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lower court judicial leak. See Telman, *supra* note 45, at 497. Concededly, the leaked opinion from *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022), and alleged prepublication conversations around *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), certainly challenge the general impermeability of the judiciary. See Josh Gerstein & Alexander Ward, *Supreme Court Has Voted to Overturn Abortion Rights, Draft Opinion Shows*, POLITICO (May 3, 2022, 2:14 PM), <https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473> [<https://perma.cc/DJ2H-FHRN>]; Jodi Kantor & Jo Becker, *Former Anti-Abortion Leader Alleges Another Supreme Court Breach*, N.Y. TIMES (Nov. 19, 2022), <https://www.nytimes.com/2022/11/19/us/supreme-court-leak-abortion-roe-wade.html> [<https://perma.cc/L4JA-YW2V>].

<sup>170</sup> For example, Justice Kavanaugh raised during oral arguments that this “is not the kind of information you want floating around even in the White House.” Justice Kavanaugh, Oral Argument at 1:55:00, *Fazaga III*, 142 S. Ct. 1051 (2022) (No. 20-828), <https://www.oyez.org/cases/2021/20-828> [<https://perma.cc/FT9N-FYCT>].

<sup>171</sup> This may be compounded as the U.S. governmental infrastructure is increasingly targeted. See *Judiciary Addresses Cybersecurity Breach: Extra Safeguards to Protect Sensitive Court Records*, U.S. CTS. (Jan. 6, 2021), <https://www.uscourts.gov/news/2021/01/06/judiciary-addresses-cybersecurity-breach-extra-safeguards-protect-sensitive-court> [<https://perma.cc/EVB9-WA4V>].

<sup>172</sup> *United States v. Zubaydah*, 142 S. Ct. 959, 977 (2022) (Thomas, J., concurring in part and concurring in the judgment).

<sup>173</sup> See, e.g., FISA CT. R. P. 5(a) (“Each judge may exercise the authority vested by the Act and such other authority as is consistent with Article III of the Constitution . . . to the extent not inconsistent with the Act.” (emphasis added)).



been included in multiple iterations of the State Secrets Protection bill,<sup>174</sup> and should make it into future legislation.

Second, and relatedly, Congress should recalibrate the state secrets privilege to allow courts to consider the gravity of the harms alleged as balanced against the specific risk of harm to national security. In particular, mass surveillance of American citizens based on religion is among the most sensitive of constitutional abuses. By repeatedly selecting the institutional process framework over a civil-libertarian rights-focused framework, courts have shown little appetite for rights balancing in the national security context. Courts will not find meaningful interrogation of the Executive to be within the judiciary's purview absent federal legislation.

Historically, the state secrets doctrine has myopically evaluated the potential harm of secret disclosure. The harm of ignored individual constitutional rights violations, however, is largely left out of the analysis. Under the current state secrets paradigm, the court defers to the Executive's view that a private citizen's lawsuit should not be grounds for jeopardizing national security, relieving courts of the untenable obligation of demanding information disclosure that the Executive contends would endanger the nation as a whole.<sup>175</sup> The need for such legislation is compounded by the emergence of a national security canon that has otherwise effectively foreclosed civil litigation challenging civil liability abuses, including electronic surveillance.<sup>176</sup>

Legislation empowering judicial review would allow the judiciary to rigorously evaluate claims. Courts purport to be sensitive to the implications of dismissal on their own: as *Reynolds* stated, this privilege is "not to be lightly invoked."<sup>177</sup> Yet no competing public or private interest can be advanced to compel disclosure, because precedent has well established the sole priority of protecting state secrets over even facially considering the interests of private litigants.<sup>178</sup>

More specifically, as highlighted in the *Fazaga* district court opinion, there is no support in any authority for the argument that the Constitution prohibits dismissal of a case on state secrets grounds where the plaintiff seeks injunctive relief from ongoing constitutional violations.<sup>179</sup> This seems at odds

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<sup>174</sup> See *supra* note 165 and accompanying text.

<sup>175</sup> See Emily Simpson, Comment, "Nothing Is So Oppressive as a Secret": Recommendations for Reforming the State Secrets Privilege, 80 TEMP. L. REV. 561, 592 (2007).

<sup>176</sup> See *supra* notes 15–20 and accompanying text.

<sup>177</sup> *United States v. Reynolds*, 345 U.S. 1, 7 (1953).

<sup>178</sup> See, e.g., *In re United States*, 872 F.2d 472, 476 (D.C. Cir. 1989) (citing several past decisions to support the idea that protecting state secrets takes priority over the interests of private litigants).

<sup>179</sup> *Fazaga I*, 884 F. Supp. 2d 1022, 1038–39 (C.D. Cal. 2012), *aff'd in part, rev'd in part*, 965 F.3d 1015 (9th Cir. 2020), *rev'd*, 142 S. Ct. 1051 (2022).

with the very point of judicial review, and at a great cost. As articulated in *Marbury v. Madison*, the “very essence of civil liberty certainly consists in the right of every individual to claim protection of the laws, whenever he receives an injury.”<sup>180</sup> A comparative or balancing standard would transform the privilege from an absolute to a qualified privilege.<sup>181</sup> With a regulated privilege, Article III judges will be better positioned to exercise their authority to ascertain abusive claims and protect plaintiffs’ constitutional rights.

Finally, Congress could spatially and temporally reassess what can qualify as a state secret. Surveillance of U.S. citizens on U.S. soil is intrastate conduct, and continuously justifying dismissal of the related suit after the formal conclusion of the armed conflict in the Middle East expands both the time and space of that conflict. This principle reflects the *Steel Seizure* majority, finding certain presidential actions under the Art. II § 2 commander in chief power impermissible outside the “theater of war.”<sup>182</sup>

Where the state secrets privilege is asserted in cases on domestic soil involving U.S. citizen plaintiffs such as those in *Fazaga*, Congress and the judiciary may have good reason to change its deference standard by, for example, requiring in camera review for wholly domestic claims. And just as the *Steel Seizure* majority framed President Harry S. Truman’s actions as usurping congressional legislative authority, executive directives to the judiciary without congressional input should be questioned.<sup>183</sup> Where the boundaries of armed conflict lie, and where on those boundaries domestic mass surveillance falls, is beyond the scope of this Note. But the possibility of incorporating these considerations into legislation exemplifies why Congress is the superior branch to foster interbranch cooperation and course-correct the Executive Branch’s use and the judiciary’s review of the state secrets privilege.

#### CONCLUSION

Judicial review of government surveillance and executive overreach is critical to the rule of law. By allowing the Executive Branch to engage in clandestine unlawful activity effectively outside of the scope of judicial review because it says evidence of such activity should be outside of judicial review, courts have allowed the Executive Branch to erode key constitutional rights protections. Read together, the precedent from *Zubaydah* and *Fazaga*

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<sup>180</sup> 5 U.S. (1 Cranch) 137, 163 (1803).

<sup>181</sup> Simpson, *supra* note 175, at 591–92.

<sup>182</sup> Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 587 (1952).

<sup>183</sup> *Id.* at 587–89.

could give the Executive Branch absolute deference in whether civil litigants can hold the government legally accountable for surveillance and other harms.

Post-*Zubaydah* and *Fazaga*, Congress must be energized to play its role in the institutional process framework by fostering interbranch procedural relationships. This recalibration would legitimize all three branches' conduct in the national security space and incorporate valuable policy concerns. Most concretely, absent congressional action and meaningful judicial scrutiny, harms arising from the U.S. government national security actions may remain unredressed.

