



FBI v. Fazaga: Supreme Court Examines Interplay of State Secrets Privilege and the Foreign Intelligence Surveillance Act

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On November 8, 2021, the Supreme Court heard oral arguments in *Federal Bureau of Investigation (FBI) v. Fazaga*, a case that explores the circumstances in which a federal court may examine classified information in a civil lawsuit in order to review the legality of certain government surveillance activities.

The plaintiffs in *Fazaga* are three Muslim individuals who allege that the FBI directed a confidential informant to conduct surveillance at the plaintiffs' homes, businesses, and places of worship based purely on their religious identity. Such surveillance was conducted under the Foreign Intelligence Surveillance Act of 1978 (FISA), which authorizes, among other things, electronic surveillance and physical searches if there is probable cause to believe that the targets are agents of a foreign power. The plaintiffs sued the government [alleging](#) various constitutional and statutory claims. The plaintiffs also sued several FBI officials in their individual capacities pursuant to Section 110 of FISA (50 U.S.C. § 1810) which provides a [civil remedy](#) for an "aggrieved person . . . who has been subjected to an electronic surveillance" in violation of federal law.

The State Secrets Privilege

In response to the allegations asserted by the plaintiffs, the government argued that the surveillance was based on other factors besides the plaintiffs' religion, but that they could not disclose the applications and materials supporting the FISA orders because of the sensitive national security information contained therein. In formal terms, the government invoked the "state secrets privilege" which is a common law doctrine under which information may be protected from compelled disclosure if a court finds that there is a "reasonable danger" that such disclosure "will expose military matters which, in the interest of national security, should not be divulged."

In the seminal 1953 case of *Reynolds v. United States*, the Supreme Court upheld the use of the state secrets privilege to protect classified information from disclosure. In *Reynolds*, the Court attempted to balance the competing interests of a plaintiff's need for evidence and the government's national security interests. The Court held that, while the privilege requires some deference to the executive branch, an

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independent evaluation of the claim of privilege is necessary so as not to abdicate control over evidence “to the caprice of executive officers.” As part of this balancing, a court may go so far as to require the production of the evidence in question for *in camera* (in chambers) review where the court has found that the non-government party’s need for the information is high. However, if a court can determine, from all of the circumstances presented in the case, that the privilege is appropriate, the Supreme Court held in *Reynolds* that judges should not further “jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even . . . alone, in chambers.”

Section 106 of FISA

More recently, lower courts have explored whether the balancing test described in *Reynolds* may be modified by legislation enacted by Congress. For example, FISA provides special procedures to be used when courts are asked to evaluate the legality of a FISA order. Specifically, Section 106(f) of FISA directs that the court “shall . . . 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 *Fazaga*, the plaintiffs argued that these FISA-specific provisions requiring *in camera* review should prevail over the traditional procedures described in *Reynolds*. The district court rejected the plaintiffs’ arguments and instead applied the traditional *Reynolds* standard. After considering declarations made by the relevant government officials, but without examining the underlying evidence itself, the district court found that disclosure would present a sufficient risk to national security and subsequently dismissed the majority of their claims, except those brought against the individual FBI agents.

On appeal, the Ninth Circuit held that “the district court should have relied on FISA’s alternative procedures for handling national security information” which require the court to examine the FISA application and other material *in camera* and *ex parte*. Specifically, the Ninth Circuit held that Congress had displaced the common law state secrets privilege in *Reynolds* “as applied to electronic surveillance within FISA’s purview” and reinstated the plaintiffs’ claims alleging unlawful searches and religious discrimination. The government petitioned the Supreme Court to review this decision, and the Supreme Court granted the government’s request.

Arguments at the Supreme Court

In its briefs and at oral argument, the government argued that the special *in camera* procedures enacted in FISA do not clearly apply to suits like the ones brought by the plaintiffs in *Fazaga*. Specifically, the government contended that the *in camera* procedures described in FISA appear in Section 106 (50 U.S.C. § 1806), which principally addresses circumstances in which information derived from FISA is to be used in a trial, hearing, or other proceeding against an individual by the government, such as in a criminal prosecution. In contrast, the plaintiffs in *Fazaga* are not seeking to block government’s use of the information derived from FISA, but are challenging the lawfulness of the surveillance in a proceeding against the government. Therefore, the government argued that the special procedures to be used in actions such as criminal prosecutions do not clearly apply to civil suits brought against the government, and that the issue of disclosures in civil suits against the government should continue to be resolved pursuant to *Reynolds*.

In response, the respondents pointed to the text of Section 106(f) which states that FISA’s *in camera* procedures expressly apply “whenever any motion or request is made by an aggrieved person . . . to discover or obtain applications or orders or other materials relating to electronic surveillance” under the Act. In respondents’ view, this broad language of applicability undercuts the government’s argument that

FISA's *in camera* procedures were intended to be available only in actions *against* an aggrieved person. In the decision below, the Ninth Circuit had [similarly observed](#) that:

It would make no sense for Congress to pass a comprehensive law concerning foreign intelligence surveillance, expressly enable aggrieved persons to sue for damages when that surveillance is unauthorized, . . . and provide procedures deemed adequate for the review of national security-related evidence, . . . but not intend for those very procedures to be used when an aggrieved person sues for damages under FISA's civil enforcement mechanism.

During oral argument in *Fazaga*, Justice Sotomayor also expressed a concern that the government's position could be "[rendering \[the civil remedy in\] Section 1810 a nullity](#)" if the government can rely on *Reynolds* to exclude evidence of allegedly unlawful surveillance in civil suits.

The respondents also [argued](#) in the alternative that, even if FISA does not displace *Reynolds*, the district court should not have automatically dismissed their suit. The respondents acknowledged that the Court has [recognized](#) that the underlying subject matter of some lawsuits is so intrinsically tied to national security that courts lack jurisdiction even to hear the case. For example, in the 1876 case of *Totten v. United States*, the Court dismissed a suit against the United States brought by a Union spy that alleged that the government had breached its espionage contract with him. The Court held that any litigation involving the contract would unavoidably require disclosure of the secret terms of that espionage contract. In 2010, the Supreme Court [reaffirmed](#) the *Totten* form of the state secrets privilege, holding that if full litigation of a defense "would inevitably lead to the disclosure of" state secrets, . . . neither party can obtain judicial relief."

In contrast, with the *Totten* subject-matter privilege, the *Reynolds* privilege is evidentiary in nature and generally is [not understood](#) to require automatic dismissal of a suit; instead, only "[t]he privileged information is excluded and the trial goes on without it." Respondents in *Fazaga* contended that they must be afforded an opportunity to make their case without the excluded evidence. Specifically, even without the privileged information, they have [argued](#) that they may be able to state a claim for relief based on what they and their witnesses "saw the informant do, as well as other information made publicly available more than a decade ago, including the informant's own detailed declarations."

Still, even under *Reynolds*, there may be situations in which the privileged evidence is so central to the case that the plaintiff cannot make a claim using non-privileged evidence and dismissal is warranted. For example, the U.S. Court of Appeals for the Fourth Circuit recently held in *Wikimedia Foundation v. National Security Agency*, that FISA did not displace the state secrets privilege, largely based on similar arguments to those that the government is making in *Fazaga*. The Fourth Circuit then went on to [hold](#) that the privileged state secrets were so central to the proceeding that "it cannot be litigated without threatening their disclosure" and dismissed the suit.

Considerations for Congress

As the Court explained in *Reynolds*, cases involving the state secrets privilege invariably present a conflict between the interests of a litigant in having an opportunity to pursue legal remedies and the interests of the government in protecting sensitive national security information. The core legal issue presented in *Fazaga* is one of statutory interpretation, asking whether FISA displaces the state secrets doctrine only when the government is using FISA information in proceedings *against* an aggrieved person, or more broadly in any litigation where an aggrieved person seeks to discover or obtain FISA applications, orders, or information. If the Court decides the former, it may be more difficult for persons who believe they were unlawfully surveilled to have those claims adjudicated. On the other hand, if the Court finds that FISA displaces *Reynolds* more broadly, that holding could affect the government's decisions regarding when to share FISA-derived information amongst federal agencies in order to reduce the number of situations in which FISA applications, orders, and other material could become subject to

discovery or *in camera* review. Because this is a largely statutory issue, if Congress wishes, it could potentially respond to a decision in *Fazaga* by amending FISA to clarify whether the *in camera* procedures do or do not apply in lieu of the *Reynolds* privilege.

Author Information

Edward C. Liu
Legislative Attorney

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