



Congressional Displacement of the State Secrets Privilege and Article II

December 5, 2023

Supreme Court cases addressing the state secrets privilege are few and far between. Before the 2021 term, when the applicability of the privilege was at issue in two cases, the Court had addressed it in only [four cases](#), the last one decided a decade earlier. One of the cases of the 2021 term—*FBI v. Fazaga*—was historic in at least two respects of particular interest to Congress.

Initially, for the first time, the Court addressed the question whether a statute displaced the state secrets privilege. The statute in question was the [Foreign Intelligence Surveillance Act of 1978](#) (FISA), which currently pending [Senate](#) and [House](#) bills would amend to provide stronger restrictions on executive surveillance authority, including by expressly abrogating the state secrets privilege in civil suits alleging violations of law related to government surveillance.

Second, this case appears to be the first in which most of the Justices on the current Court (all except for Justice Ketanji Brown Jackson, who replaced Justice Stephen Breyer in 2022) have construed a federal statute in a case involving executive claims of authority based on independent Article II authority related to national security and foreign policy.

A [previous Legal Sidebar](#) summarized the background of and the Court’s decision in *Fazaga*, with a particular focus on the statutory interpretation questions that the Court left unresolved. This Legal Sidebar focuses on the Court’s analysis of the statutory interpretation question that the Court *did* resolve—namely, whether [Section 106\(f\)](#) of FISA displaces the state secrets privilege—and the Court’s answer that it does not. More specifically, this Sidebar (1) explains the Court’s doctrine on statutory displacement of federal common law; (2) examines the Court’s displacement analysis in *Fazaga* and how it differs from the Court’s traditional approach; and (3) discusses the potential implications for congressional and executive power in the context of disclosure of national security information in litigation, and potentially in the context of national security and foreign policy more broadly.

Statutory Displacement of Federal Common Law

The state secrets privilege is a federal common law doctrine that the Supreme Court [began developing](#) early in U.S. history. The doctrine allows the executive to prevent disclosure of information in litigation in certain circumstances when it assesses doing so would compromise national security.

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LSB11086

The Court has long recognized that federal statutes may “displace” federal common law and that the test for determining when Congress has done so is whether the statute “speaks directly” to the issue. The Court has further emphasized that the test is “not whether Congress ha[s] affirmatively proscribed the use of federal common law.” The Court has contrasted its test for displacement of federal common law with that for “preemption” of *state* law (whether statutory or common law), reasoning that federalism concerns require that the test for preemption be more exacting than that for displacement:

[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. . . . Such concerns are not implicated in the same fashion when the question is whether federal statutory or federal common law governs, and accordingly the same sort of evidence of a clear and manifest purpose is not required. Indeed . . . we start with the assumption that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law. (internal quotation marks and citations omitted).

Thus, the Court has determined that “when Congress addresses a question previously governed by . . . federal common law the need for such an unusual exercise of lawmaking by federal courts disappears.”

In *Fazaga v. FBI*, the U.S. Court of Appeals for the Ninth Circuit applied the “speaks directly” test in holding that the procedures governing the use of national security information required under Section 106(f) displaced the state secrets privilege and should therefore be applied in the case. In reversing the Ninth Circuit, the Supreme Court did not expressly indicate the standard it was applying, but the Court’s reasoning and the authority it relied on suggest that it applied a standard more akin to that for preemption of state law instead of the traditional test for displacement of federal common law.

The Supreme Court’s Displacement Analysis in *FBI v. Fazaga*

In its unanimous decision in *Fazaga* holding that Section 106(f) does not displace the state secrets privilege, the Court did not mention the “speaks directly” test. Instead, the first (and seemingly primary) reason that the Court provided in support of its holding indicates that Congress must clearly state its intention to displace the privilege: “The absence of any statutory reference to the state secrets privilege is strong evidence that the availability of the privilege was not altered in any way.” This reasoning appears to be a departure from the Court’s recognition in previous displacement cases that the question is “not whether Congress ha[s] affirmatively proscribed the use of federal common law.”

In support of its determination that “the privilege should not be held to have been abrogated or limited unless Congress has at least used clear statutory language,” the Court cited two cases: one involving the impact of a federal statute on state law and the other the applicability of the canon of statutory interpretation based on constitutional avoidance. As the Court did not elaborate on its reasoning in citing these cases beyond short citation parentheticals, the reader is left to speculate that the Court may have sought to avoid a constitutional problem arising from interference with the executive’s inherent Article II authorities related to national security and secret information.

As the Court points out, such interference with Article II authorities is one of the arguments that the government relied on. In its brief, the government advanced a clear-statement requirement along the lines that the Court ultimately adopted:

[U]nless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs. That approach reflects the judgment that Congress does not bring about a significant change in the Executive Branch’s power to protect the national security by happenstance, or by securing the President’s approval of a bill with that unstated effect. The reluctance to infer such a change should only be

amplified when the question concerns the elimination of a privilege inherent in the constitutional design and acknowledged since our Nation's founding. (internal citations and quotation marks omitted) (alteration in original).

Although the Court [stated](#) that it did not need to decide the question “whether the state secrets privilege is rooted only in the common law (as respondents argue) or also in the Constitution (as the Government argues),” the clear-statement rule that the Court applied instead of the traditional displacement test appears to rest on the conclusion that, at the very least, a congressional failure to expressly abrogate the privilege may raise constitutional problems based on the executive's inherent authorities related to national security.

The question that remains is whether the Court's reliance on the interpretive canon of constitutional avoidance implies merely that a construction of a statute as displacing the state secrets privilege without a clear statement may be constitutionally problematic or that displacement—even if express—might unconstitutionally infringe on executive power.

Considerations for Congress

At the very least, the Court makes clear in *Fazaga* that if Congress wishes to displace the state secrets privilege in FISA or any other statute involving procedures for the disclosure of secret information in litigation, it should do so expressly (as the currently pending bills amending FISA would do).

If Congress were to enact such legislation, there is a possibility that, in the event that a court rejects the government's assertion of the privilege on the ground that the statutory procedures supersede it, the government would challenge Congress's abrogation on the ground that it impermissibly interferes with the executive's independent Article II authorities. The government [made such an argument](#) in *Fazaga* in addition to its argument that a clear statement was required. As described, the Court's brief opinion in the case seems to leave this question open.

More broadly, it is worth considering the import of the Court's reliance on the constitutional avoidance canon in *Fazaga* in light of the Court's previous determination that a case involving the separation of powers in the area of foreign policy did not raise a nonjusticiable political question because the resolution depended on the determination of whether a statute was unconstitutional. This combination could indicate that the Court would be willing to hear a case involving a challenge to a statute expressly abrogating the state secrets privilege or otherwise expressly restricting executive authority in foreign affairs and national security and that the Court would take executive claims of independent Article II authority seriously.

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