



FBI v. Fazaga: Supreme Court Unanimously Holds That FISA Does Not Displace the State Secrets Privilege

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On March 4, 2022, the Supreme Court unanimously decided that the [Foreign Intelligence Surveillance Act of 1978](#) (FISA) [Section 106\(f\)](#) does not displace the state secrets privilege in *Federal Bureau of Investigation (FBI) v. Fazaga*. This Legal Sidebar (1) describes the case’s background, (2) discusses the Court’s resolution of the dispute regarding the operation of the FISA provision and the privilege, and (3) highlights some topics that the Court’s order might raise for Congress.

Suit Raised Question of Statutory and Common Law Interaction

As described in a [previous Sidebar](#), the plaintiffs in *Fazaga*—three Muslim individuals in southern California—alleged that the government illegally surveilled their communications because of their religious views and challenged the lawfulness of the FISA order that authorized such surveillance. This challenge required the trial court to consider how it would adjudicate the plaintiffs’ claims without risking disclosure of any sensitive national security information contained within the underlying FISA application and supporting documents.

Section 106 of FISA expressly allows the *government* to use information derived from foreign-intelligence surveillance in prosecutions and administrative proceedings after following [specified procedures](#). Such use often occurs in a case where the government affirmatively seeks to submit FISA material in evidence—for example, in proceedings against a criminal defendant. Procedures described in Section 106(f) require the court to determine the lawfulness of such surveillance by examining the relevant FISA surveillance application, supporting affidavits, and information “*ex parte*” and “*in camera*,” meaning only the judge will review the materials in chambers. If the judge determines that the surveillance was unlawful, the introduction of evidence derived from that surveillance may be suppressed. Whether FISA also requires these *in camera* procedures in civil litigation *against* the government is a topic about which [circuit courts](#) disagree.

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As a further complication, the Section 106(f) in camera procedures are not the only mechanism to protect national security information from disclosure in litigation. The [state secrets privilege](#) is a common law privilege (which the government [argued](#) is rooted in the Constitution) that allows the government to protect information from disclosure when a court determines that such disclosure would create a national security danger. When the privilege has been properly asserted by the government, the Supreme Court has upheld the privilege following application of a [balancing test](#) that weighs the interests of the parties.

How these two schemes for handling national security information relate was the question at the core of the *Fazaga* litigation. The plaintiffs argued in their civil suit against the government that FISA required the court to examine the FISA application in camera to determine whether the surveillance was lawful. The government respondents moved to dismiss the matter pursuant to the “state secrets” privilege, which the district court found compelling. However, the [Ninth Circuit disagreed and reversed](#), opining that “Congress intended FISA to displace the state secrets privilege and its dismissal remedy with respect to electronic surveillance.” The Supreme Court ultimately reversed the Ninth Circuit and remanded the case to determine whether it can proceed without the privileged evidence.

Supreme Court Finds No Operational Inconsistency Between Adjudicating Lawfulness of Order and State Secrets Privilege

In reaching its decision, the Supreme Court assumed, without deciding, that Section 106(f) applied to the suit brought by the plaintiffs. However, the Court reversed the Ninth Circuit, opining that there are two reasons why FISA does not displace the state secrets privilege. First, the Court held that the text of FISA does not mention the state secrets privilege, which the Court viewed as “[strong evidence](#)” that Congress did not intend to displace it. Second, the Court determined that the operation of Section 106(f) is [consistent](#) with application of the state secrets privilege because they (1) require courts to conduct different inquiries, (2) authorize courts to award different forms of relief, and (3) direct the parties and the courts to follow different procedures.

The Court emphasized that while FISA asks whether surveillance was lawfully authorized, the state secrets privilege focuses on harm to national security where classified information is disclosed, whether or not it was obtained lawfully. The Court further [explained](#) that it has “never suggested that an assertion of the state secrets privilege can be defeated by showing that the evidence was unlawfully obtained.” For these and other reasons, the Court reversed and remanded, leaving open [some issues](#) that it deemed unnecessary to adjudicate to resolve the case.

Although the Court characterized its decision as narrowly holding that FISA Section 106(f) did not displace the common law state secrets privilege, it might be argued that the decision means, in practice, that the state secrets privilege curtails the applicability of FISA Section 106(f) in suits against the government. Theoretically, the Court’s holding would permit Section 106(f) in camera review of allegedly unlawful FISA surveillance, so long as the government did not assert that the state secrets privilege protected such information. It is unclear when such a fact pattern would present itself. In particular, in camera review under Section 106(f) is triggered when the Attorney General files an affidavit that disclosure or an adversarial hearing would harm the national security, which is nearly identical to the determination that the government must make to assert the state secrets privilege.

Considerations for Congress

The Court made clear in its unanimous opinion that it did not need to resolve the circuit split on the issue of Section 106(f)'s scope. For this statutory question, a central issue is whether FISA information is being “used” in litigation where the government asserts the state secrets privilege as a defense. For example, the *Fazaga* plaintiffs asserted that Section 106(f) applies to civil actions to obtain or challenge FISA information, arguing that the government’s invocation of the state secrets privilege constituted a “use” of that FISA information. The government disagreed, arguing that the privilege *prevented* the “use” of the FISA information.

The Court’s decision to leave this question unresolved presents Congress with several options. Congress may view the outcome of *Fazaga* as sufficient to clarify its intent to define the scope of FISA procedure. Alternatively, the Court’s decision not to opine on the scope of Section 106(f) may prompt legislative interest to amend the statute to clarify the provision’s scope as either narrow or broad, or to provide more specificity regarding what constitutes a “use” of FISA information. As circuits remain split over the provision’s scope, another option for Congress may be to channel FISA-related litigation to one circuit accustomed to addressing classified matters. Congress may also prefer to specify in statute the nature of the applicability of the state secrets privilege to cases involving FISA in response to the *Fazaga* decision.

Lastly, given the Court’s reliance on the lack of mention of the state secrets privilege in FISA, if Congress considers legislation that is intended to abrogate the state secrets privilege in the future, whether in the context of FISA or otherwise, it may seek to ensure that such legislation includes a clear statement specifying how the state secrets privilege should be applied.

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