NATIONAL SECURITY, STATE SECRETS, STANDING, AND FIRST AMENDMENT VALUES IN JUSTICE BREYER'S JURISPRUDENCE

Symposium on Justice Breyer's First Amendment Jurisprudence
University of North Carolina Law School, November 18, 2022

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INTRODUCTION

National security law and the First Amendment's free speech clause exist in an uneasy relationship.[1] In the national security context, the government will inevitably prioritize keeping information secret from the public and will justify that secrecy by reference to important national security concerns. These limits on speech in the name of national security can take the form of crackdowns on subversive speech, such as the many historical examples of prosecution under the Alien and Sedition Acts of the founding era,[2] the Espionage Act of 1917,[3] and the Sedition Act of 1918.[4] They could also include criminal prosecutions of those who leak classified information to the press.[5] Or, following surveillance pursuant to the Foreign Intelligence Surveillance Act (FISA),[6] the government could prosecute U.S. citizens working as lobbyists alleged to be agents

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[1] *See, e.g.*, Mary-Rose Papandrea, *Information is Power: Exploring a Constitutional Right of Access*, in NATIONAL SECURITY, LEAKS AND THE FREEDOM OF THE PRESS: THE PENTAGON PAPERS FIFTY YEARS ON 232 (Lee C. Bollinger & Geoffrey R. Stone eds., 2021); JEFFREY A. SMITH, WAR AND PRESS FREEDOM: THE PROBLEM OF PREROGATIVE POWER (1999); GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME (2005); William J. Brennan, Jr., *The American Experience: Free Speech and National Security*, *in* FREE SPEECH AND NATIONAL SECURITY 10 (Shimon Shetreet, ed., 1991); Gregory P. Magarian, *The First Amendment, The Public-Private Distinction, and Nongovernmental Suppression of Wartime Political Debate*, 73 GEO. WASH. L. REV. 101 (2004); Mary-Rose Papandrea, *The Publication of National Security Information in the Digital Age*, 5 J. NAT'L. SEC. L. & POL'Y. 1 (2011).

[2] Sedition Act of 1798, ch. 74, 1 Stat. 596; Alien Enemies Act of 1798, ch. 66, 1 Stat. 577; Alien Friends Act, ch. 58, 1 Stat. 570 (1798); Naturalization Act of 1798, ch. 54, 1 Stat. 566.

[3] Espionage Act of 1917, ch. 30, 40 Stat. 217 (codified as amended at 18 U.S.C. §§ 793–98).

[4] Sedition Act of 1918, ch. 75, 40 Stat. 553.

[5] *See*, *e.g.*, United States v. Manning, 78 M.J. 501 (U.S. Army Crim. App. 2018); United States v. Morison, 844 F.2d 1057 (4th Cir. 1988), *cert. denied*, 488 U.S. 908 (1988); *see also* Heidi Kitrosser & David Schulz, *A House Built on Sand: The Constitutional Infirmity of Espionage Prosecutions for Leaking to the Press*, 21 FIRST AMEND. L. REV. (2021); Mary-Rose Papandrea, *Leaker Traitor Whistleblower Spy: National Security Leaks and the First Amendment*, 94 B. U. L. REV. 449 (2014).

[6] 50 U.S.C. § 1801.

of a foreign power.[7] All of these, of course, pose real threats to free speech norms, and not surprisingly, they have been much discussed in the scholarly literature.[8]

Less studied in First Amendment scholarship, however, are doctrines that may not explicitly implicate free speech rights but that have the effect of limiting public access to information by preventing courts from reaching the merits of national security-related claims. For example, courts might deny standing to individuals who claim that government national security surveillance has chilled the exercise of their First Amendment rights. Alternatively, the government might assert the state secrets doctrine to prevent important national security information from reaching the public arena.

Sometimes, these cases arise in the classic First Amendment context, in which individuals are claiming that their speech rights are being restricted. In such cases, courts might deny standing precisely because of the national security context, preventing consideration of the free speech claim. But even when there is no explicit First Amendment speech claim, any time the state secrets doctrine is invoked information will, by definition, be withheld from the public, thereby potentially implicating core First Amendment free speech values that support democratic self-governance.[9] Thus, we might call both of these types of cases First Amendment-adjacent.

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[7] *See*, *e.g.*, United States v. Rosen, 447 F. Supp. 2d 538 (2006).

[8] *See, e.g., supra* note 1.

[9] For a discussion of democratic self-governance theories of the First Amendment, *see*, *e.g.*, OWEN FISS, THE IRONY OF FREE SPEECH (1996) (arguing that the First Amendment protects "robust" public debate in order to foster democracy); ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 79-80 (1948) (contending that the core speech rights protected by the First Amendment are those related to political speech, because of the crucial role speech plays in informing the public and preserving "the program of self-government" necessary to democracy); ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948); JOHN HART ELY, DEMOCRACY AND DISTRUST (1981) (arguing that robust judicial review is warranted in the First Amendment context particularly in order to reinforce democratic processes); Thomas I. Emerson, *Toward a General Theory of the First Amendment*, YALE L. J. 877, 885 (1963) (arguing that robust public debate is one justification for expressive freedom); Owen Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1407, 1415 (1986) (arguing that free speech should promote "collective self-determination" and requires "rich public debate"); Gregory Magarian, *Regulating Political Parties under a "Public Rights" First Amendment*, 44 WM. & MARY L. REV. 1939, 1944 (2003) (arguing for an understanding of the First Amendment as "an affirmative constitutional commitment to foster a vigorous, broadly participatory electoral discourse," in which "all members of the political community will have access to the information they need in order to participate thoughtfully in the political process"); Mary-Rose

This Essay explores these doctrines that stand at the intersection of national security and First Amendment law through the prism of Justice Stephen G. Breyer's jurisprudence. In *Clapper v. Amnesty International*,[10] the U.S. Supreme Court, over Justice Breyer's dissent, adopted a threshold for standing in national security surveillance cases that renders it almost impossible for those who claim that government surveillance chills their First Amendment rights to ever get that claim heard in court. And in *United States v. Zubaydah*,[11] the Court, with Justice Breyer writing the plurality opinion, adopted a version of the state secrets doctrine that barred a Guantánamo detainee from accessing government information relevant to proceedings in a foreign tribunal. Both of these cases, therefore, limit public access to information based almost solely on the government's untested assertion of a national security imperative.

Justice Breyer's position in both of these cases sought to preserve at least a modicum of judicial oversight with respect to these sweeping executive branch assertions. In *Clapper*, he criticized the majority's standing doctrine as too limited. And in *Zubaydah*, he cobbled together a plurality for a less extreme—though still possibly overbroad—version of the state secrets doctrine that at least preserves some role for courts in determining the scope of the doctrine without simply deferring to the government's blanket assertion of national security needs.

Justice Breyer does not explicitly tie these decisions to the First Amendment, and indeed they are not necessarily thought of as First Amendment cases at all. But I argue that First Amendment scholars should include these cases in their purview because they illustrate the importance of these First Amendment-adjacent doctrines to free speech and democratic governance values in the national security context. In particular, these cases highlight the need to preserve judicial oversight of executive branch action in national security settings in order to promote

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Papandrea, *Information is Power: Exploring a Constitutional Right of Access*, *in* NATIONAL SECURITY, LEAKS, AND THE FREEDOM OF THE PRESS: THE PENTAGON PAPERS FIFTY YEARS ON 232 (Lee C. Bollinger & Geoffrey R. Stone eds., 2021) (contending that the First Amendment should protect access to government information in the national security context to protect "robust" public debate and the free flow ideas necessary to democratic self-government); Robert Post, *Participatory Democracy and Free Speech* 97 Va. L. Rev. 477, 486 (articulating a theory of the First Amendment, rooted in the democratic self-governance rationale, that encompass a broad swath of speech "whenever it is included within public discourse").

[10] 586 U.S. 398, 423 (2013) (Breyer, J., dissenting).

[11] 142 S. Ct. 959, 967 (2022).

the vigorous public debate that is essential for democracy to flourish.

It is especially appropriate to analyze these national security doctrines through the lens of democracy-protecting First Amendment values as part of this Symposium. After all, Justice Breyer, in his own writing, often emphasized that one of the principal roles of courts in general, and free speech rights in particular, is the safeguarding of the mechanisms of democracy. In doing so, Breyer echoed other theorists of the First Amendment who have argued that free speech should be understood not simply as a guarantee of personal expression, but specifically as a mechanism for preserving the possibility of democratic self-government.[12] Yet, as I suggest below, if one adopts that vision of the First Amendment, one should also be concerned about the adjacent doctrines of standing and state secrets that can implicate First Amendment values but are often neglected in discussion of free speech jurisprudence.

I. JUSTICE BREYER'S VIEW OF THE COURT AND FREE SPEECH RIGHTS AS NECESSARY TO DEMOCRATIC SELF-GOVERNANCE.

Justice Breyer has long been concerned with the role that constitutional courts must play in supporting democratic self-governance. In his book *Making Our Democracy Work*,[13] he argues that a central role of courts—and in particular the U.S. Supreme Court—is in helping "to ensure a democratic political system."[14] Even in the national security context, where deference to the executive branch is often thought to be at its zenith,[15] Breyer insisted on the importance of self-governance values. For example, in *Hamdan v. Rumsfeld*, a decision rejecting the executive's unilateral decision to use military commissions to try terrorism suspects, Breyer wrote separately to emphasize that the Court's decision was required by a commitment to democratic self-government.[16] Thus, he wrote:

> Where, as here, no emergency prevents consultation with Congress, judicial insistence

[12] *See* Meiklejohn, *supra* note 9, at 79–80.
[13] STEPHEN G. BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW (2010).
[14] *Id*. at xii.
[15] *See*, *e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (quoting Dep't of Navy v. Egan, 484 U.S. 518, 530 (1988), which emphasized "the reluctance of the courts to intrude upon the authority of the Executive in military and national security affairs") (internal quotations omitted).
[16] Hamdan v. Rumsfeld, 548 U.S. 557, 636 (2006) (Breyer, J., concurring).

> upon that consultation does not weaken our Nation's ability to deal with danger. To the contrary, that insistence strengthens the Nation's ability to determine—through democratic means—how best to do so. The Constitution places its faith in those democratic means. Our Court today simply does the same.[17]

With respect to the First Amendment's free speech guarantee specifically, Justice Breyer has emphasized that the underlying rationale of the Clause is to "facilitate a conversation among ordinary citizens that will encourage their informed participation in the electoral process."[18] He therefore has allied himself with those scholars who have long argued that the First Amendment is primarily aimed at protecting democratic self-government and the robust public debate necessary for democracy to function. This approach to the First Amendment, perhaps most associated with Alexander Meiklejohn, focuses less on the Clause as a protection for all forms of individual self-expression and more on the crucial role speech plays in informing the public and preserving "the program of self-government" necessary to democracy.[19] Like Meiklejohn, John Hart Ely argued for stronger judicial review to reinforce democratic processes, including political speech.[20] And scholars such as Owen Fiss and Cass Sunstein have picked up on these ideas to justify certain speech restrictions, such as regulations on broadcast content or limitations on campaign donations, in the interest of promoting greater democratic participation.[21]

In his book *Active Liberty*, Breyer echoes these ideas, arguing that liberty "is particularly at risk when law restricts speech directly related to the shaping of public opinion, for example, speech that takes place in areas related to politics and policy-making by elected officials."[22] Thus, he argues that speech that facilitates the public debate necessary in a democracy "justifies especially strong pro-speech presumptions."[23]

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[17] *Id.*
[18] STEPHEN G. BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 46 (2007).
[19] *See* Meiklejohn, *supra* note 9, at 79–80.
[20] *See* ELY, *supra* note 9.
[21] Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255 (1992); *see*, *e.g.*, Owen Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1407, 1415 (1986).
[22] *See* BREYER, *supra* note 18, at 42.
[23] *Id.*

According to Breyer, careful judicial review is warranted "whenever the speech in question seeks to shape public opinion, particularly if that opinion in turn will affect the political process and the kind of society in which we live."[24]

Relying on this theory of the First Amendment, Justice Breyer joined the majority in *Turner Broadcasting v. FCC*,[25] upholding a rule requiring cable companies to carry local broadcast and public access channels, but he concurred to emphasize precisely the democracy-protecting concerns implicated by the case. While recognizing that the rule at issue "extracts a serious First Amendment price" and "amounts to a 'suppression of speech,'"[26] he nevertheless provided the fifth vote upholding the rule because the FCC sought "to facilitate the public discussion and informed deliberation, which . . . democratic government presupposes and the First Amendment seeks to achieve."[27] Likewise, in the context of campaign finance rules, Breyer separately concurred in *Nixon v. Shrink Missouri Government PAC*.[28] Again noting that "constitutionally protected interests lie on both sides of the legal equation," he emphasized that "[t]he Constitution often permits restrictions on the speech of some in order to prevent a few from drowning out the many."[29] Even going so far as to cite Meiklejohn, Breyer argued that

> restrictions upon the amount anyone individual can contribute to a particular candidate . . . aim to democratize the influence that money itself may bring to bear upon the electoral process. In doing so, they seek to build public confidence in that process and broaden the base of a candidate's meaningful financial support, encouraging the public participation and open discussion that the First Amendment itself presupposes.[30]

While on the Supreme Court, Justice Breyer did not have many occasions to opine on these First Amendment values in the

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[24] *Id.*
[25] 520 U.S. 180 (1997).
[26] *Id.* at 226 (Breyer, J., concurring).
[27] *Id.* at 227 (Breyer, J., dissenting) (citing Whitney v. California, 274 U.S. 357, 375–76 (1927) (concurring opinion)).
[28] 528 U.S. 377, 399 (2000).
[29] *Id.* at 400, 402 (Breyer, J., concurring).
[30] *Id.* at 401 (Breyer, J., concurring) (citing ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT, *supra* note 9, at 24-27) (additional citations omitted).

national security context specifically. However, in *Holder v. Humanitarian Law Project*, Justice Breyer dissented in a case where the Supreme Court rejected a First Amendment challenge to the application of a federal law criminalizing the provision of "material support" to terrorists.[31] The plaintiffs had sought to provide funds to groups designated as foreign terrorist organizations by the U.S. Department of State, but they argued that they were providing the funds to facilitate only the lawful, nonviolent purposes of those groups—including training in international humanitarian law and political advocacy—and that applying the material support law to bar them from doing so would violate their First Amendment free speech and associational rights.[32] (They also argued that the statute was too vague, in violation of the Fifth Amendment.[33]) Justice Breyer dissented, again invoking the First Amendment as primarily a protection grounded in democratic self-government. According to Justice Breyer, the Government did not meet "its burden of showing that an interpretation of the statute that would prohibit this speech–and association–related activity serves the Government's compelling interest in combating terrorism."[34] Justice Breyer noted that "all of the activities" at issue "involve the communication and advocacy of political ideas and lawful means of achieving political ends," including in the United States.[35] Furthermore, he emphasized "that . . . speech and association for political purposes is the kind of activity to which the First Amendment ordinarily offers its strongest protection."[36]

Thus, it seems clear that Justice Breyer consistently has adopted a theory of the First Amendment that focuses on the protection of democratic processes and allows for the sort of informed discourse necessary to the project of self-government. Yet, if one subscribes to this approach to the First Amendment, it is necessary to re-consider the potential free speech implications even of doctrines that may not squarely be framed as First Amendment issues. This is especially true in the national security context, where the executive branch will inevitably seek to keep claims from being heard or information from being shared due to purported security imperatives. Accordingly, the national security arena is one in which First Amendment

[31] 561 U.S. 1, 8 (2010).
[32] *Id.* at 10.
[33] *Id.* at 8.
[34] *Id.* at 41 (Breyer, J., dissenting).
[35] *Id.* at 42.
[36] *Id.*

scholars should engage, identifying and analyzing the trade-offs involved when these First Amendment-adjacent doctrines are invoked.

II. STANDING AND *CLAPPER V. AMNESTY INTERNATIONAL*

The requirement that plaintiffs have standing to sue, because it effectively blocks access to courts, always at least potentially implicates the First Amendment right to petition for redress of grievances. But here, my focus is particularly on cases that deny constitutional standing when the underlying claim itself implicates speech concerns. And in the national security setting, where classification regimes[37] and the government's need for secrecy can limit litigants' access to information related to injury and other standing elements, the standing doctrine can have a particularly damaging impact on First Amendment values. Litigation is a crucial mechanism for bringing information about government clandestine activities to light. Such information obviously is essential for providing democratic oversight of what could be executive branch overreach in the national security realm. Thus, an overly strict approach to standing denies the people a chance to know what their government is doing in their name. In *Clapper v. Amnesty International*,[38] the Supreme Court, over Justice Breyer's dissent, imposed a positively Kafkaesque standard for injury in a national security surveillance case, vividly revealing the First Amendment implications that standing doctrine can pose in this context.

In *Clapper*, the plaintiffs argued that a post-9/11 amendment to the Foreign Intelligence Surveillance Act (FISA) violated the First Amendment, as well as the Fourth Amendment, Article III, and separation-of-powers principles.[39] The statutory amendment,[40] added by the FISA Amendments Act of 2008 (FAA),[41] significantly lowered the legal threshold for the U.S. government to engage in surveillance aimed at non-U.S. persons located outside the country—below the prior standards

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[37] For a careful overview of the U.S. classification regime and an account of the problem of over-classification, see Heidi Kitrosser, *Classified Information, Leaks, and Free Speech*, U. ILL. L. REV. 881 (2008).
[38] 568 U.S. 398, 407 (2013).
[39] *See id.*
[40] Section 702 of the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. § 1881a (2006 ed., Supp. V).
[41] Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008 (FISA Amendments Act of 2008)), Pub. L. No. 110-261, 122 Stat. 2436 (2008).

set by FISA. Plaintiffs—some of whom worked as lawyers for suspected terrorists, and others as human rights researchers or journalists in contact with such individuals—argued that the enactment of the FAA made it much more likely that government surveillance would sweep in their communications with non-U.S. persons likely to be targeted.[42] Their First Amendment claim consisted of a facial challenge to the FAA, including arguments that the new statutory framework had chilled their speech and forced them to engage in costly measures such as traveling abroad to avoid surveillance.[43] They made two related arguments that they had Article III standing to assert their First Amendment and other claims: first, that there was an "objectively reasonable likelihood that their communications [would] be acquired" pursuant to the FAA, and second, that the risk of surveillance under the FAA was so substantial that they were "forced to take costly and burdensome measures to protect the confidentiality of their international communications."[44]

The majority opinion rejected their claim without addressing the merits, imposing an extraordinarily stringent test for plaintiffs to satisfy in order to meet the injury requirement for Article III standing.[45] According to the majority, the plaintiffs lacked standing because they could not show that the harms alleged were "certainly impending" and therefore could not establish the requisite injury.[46] The Court rejected the Second Circuit's standard that an "objectively reasonable likelihood" of harm could establish injury, under which the lower court had concluded that plaintiffs had standing.[47] Writing for the majority, Justice Alito argued that the harms the plaintiffs claimed they would suffer were insufficiently concrete. First, he noted that it was "highly speculative" whether the government would imminently target communications to which plaintiffs were parties because plaintiffs had "no actual knowledge" of the government's surveillance practices.[48] Second, even if they could

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[42] *See Clapper*, 568 U.S. at 407.
[43] *See id.*
[44] *Id.*
[45] U.S. CONST. art. III (limiting federal courts' jurisdiction to "cases" and "controversies"). The U.S. Supreme Court has interpreted this language to impose a "standing" requirement on litigants, which includes a showing of "injury" that is "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Clapper*, 568 U.S. at 408 (quoting Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139 (2010)).
[46] *Clapper*, 568 U.S. at 409.
[47] Amnesty International v. Clapper, 638 F.3d 118, 133–34, 139 (2d Cir. 2011).
[48] *Clapper*, 568 U.S. at 410-12.

show a risk that their communications would be targeted for surveillance, they could "only speculate" as to whether the government would use the FAA procedures to justify that surveillance as opposed to other potential surveillance authorities.[49] Third, plaintiffs could only speculate whether the Foreign Intelligence Surveillance Court (FISC) would approve methods that would permit surveillance that would encompass their communications.[50] Fourth, even assuming FISC approval, it was uncertain whether the government would actually obtain the communications of plaintiffs' foreign contacts.[51] And finally, even if the government did obtain those communications, plaintiffs could "only speculate" that their own communications would be included.[52] The Court also rejected the plaintiffs' arguments that the travel and other costs they had already incurred to avoid surveillance constituted a present injury in fact,[53] an alternative theory of standing accepted by the Second Circuit. Because the Court concluded that the plaintiffs lacked standing, it did not even reach the underlying First Amendment issue.

Just listing the Court's argument for lack of standing readily reveals that almost no national security surveillance claim is likely ever to satisfy the standard. Indeed, absent a government whistleblower leaking classified information, plaintiffs will almost always be forced to "speculate" as to their harms because U.S. government surveillance under FISA is shrouded in secrecy. Government applications to the FISC are *ex parte* and not open to the public. The targets of surveillance (or those whose communication with targets is incidentally collected) do not even know that surveillance is occurring unless the government uses the information it has collected as evidence in a subsequent criminal or administrative proceeding.[54]

Justice Breyer, in a forceful dissent (joined by Justices Kagan, Sotomayor, and Ginsburg),[55] rejected the majority's draconian standing standard. In his characteristically pragmatic style, Justice Breyer argued that the harm to plaintiffs was not speculative at all, but rather "as likely to take place as are most future events that commonsense inference and ordinary

[49] *Id.* at 412.
[50] *Id.* at 413–14.
[51] *Id.* at 414.
[52] *Id.*
[53] *Id.* at 415–17.
[54] *See* 50 U.S.C. §§ 1806(c), 1825(d).
[55] *Clapper*, 568 U.S. at 422–41 (Breyer, J., dissenting).

knowledge of human nature tell us will happen."[56] To begin with, he outlined the broad expansion of the government's surveillance powers set forth in the FAA.[57] Under the amendments, the government no longer has to make a specific, particularized showing to the FISC that a target of surveillance was an agent of a foreign power, that the information sought was foreign intelligence information, or that surveillance procedures would minimize the acquisition, retention, and dissemination of private information acquired about U.S. persons—all of which the original FISA regime required.[58] Rather, instead of mandating that the government get approval to target specific individuals, the FAA now permits surveillance based only on approval from the FISC of an overall surveillance "program."[59] Moreover, the government need only show that (1) a significant purpose of the acquisition is to obtain foreign intelligence information and (2) that it will use general targeting and privacy-intrusion minimization procedures of a kind previously approved.[60]

Breyer then concluded, based on the record and "commonsense inferences," that there was a very high likelihood the Government, acting pursuant to the FAA, would intercept these plaintiffs' communications and cause harm.[61] He observed that, as lawyers, human rights researchers, and journalists in regular communications with suspected terrorists such as detainees at the U.S. naval base at Guantánamo Bay, the plaintiffs hold jobs that require them to gather information from suspected terrorists abroad, regularly communicate electronically with them, and exchange foreign intelligence information as defined within the statutory framework.[62] Furthermore, he noted that some of the plaintiffs had been able to demonstrate that extensive surveillance of their foreign contacts had already been conducted under the more onerous FISA regime prior to the FAA, and that this was a good indication that their communications were likely to be intercepted under the new statutory framework as well.[63] For example, one plaintiff who was the lawyer for a Guantánamo

[56] *Id*. at 422.
[57] *Id.* at 424–25.
[58] *Id*.
[59] *See id.*
[60] *Id.* at 425.
[61] *Id.* at 427.
[62] *Id. at* 427–28.
[63] *Id.* at 429.

detainee had documented that, under the FISA framework prior to the enactment of the FAA, the government had intercepted approximately 10,000 telephone calls and 20,000 email communications involving his client.[64]

Justice Breyer also based his conclusion that the government had likely surveilled plaintiffs on a pragmatic recognition of the government's national security imperatives. He noted that the government has a "strong motive to listen to conversations of the kind described" by plaintiffs.[65] For example, the government "seeks to learn as much as it can reasonably learn about suspected terrorists (such as those detained at Guantánamo), as well as about their contacts and activities, along with those of friends and family members."[66] In addition to motive, Justice Breyer emphasized that the government also has the capacity to conduct surveillance of plaintiffs, and past government actions are a strong indication that it is doing so or will do so in the future.[67]

Finally, Justice Breyer walked through much of the U.S. Supreme Court's precedent regarding standing, arguing that the majority's "certainly impending" test was out of keeping with prior cases, a better reading of which supports a "reasonable probability standard."[68] Specifically, he criticized the majority for pulling the "certainly impending" test out of cases in which the Court determined that the elements of standing had actually been met: "The majority cannot find support in cases that use the words 'certainly impending' to deny standing. While I do not claim to have read every standing case, I have examined quite a few, and not yet found any such case."[69] Indeed, he argued that the likelihood of harm, in this case, was greater than in other cases in which the Court had found a sufficient likelihood of injury to establish standing.[70]

Justice Breyer's dissent does not express any view on the merits of the plaintiffs' actual constitutional claims, but the First Amendment values implicated by the majority's standing decision clearly lurk in the background. The standard articulated by the majority will make it almost impossible in the future for plaintiffs, such as those in this case, to seek judicial review of the

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[64] *Id.*
[65] *Id.* at 427 (emphasis omitted).
[66] *Id.* at 428.
[67] *Id.* at 429.
[68] *Id.* at 431–41.
[69] *Id.* at 439.
[70] *Id.*

FAA amendments regime for potential First Amendment violations. And the public is also denied important information about the breadth of governmental surveillance operations, even with regard to U.S. citizens who might be in communication with foreigners. Although FISA and the FISC do provide an avenue for judicial consideration of First Amendment issues and other constitutional rights potentially affected by FISA surveillance, plaintiffs cannot participate in FISC proceedings or assert their rights there,[71] and the court is notoriously deferential to the government.[72] Furthermore, FISC proceedings are secret, and the judicial decisions are only sometimes made public. If subject to criminal prosecution, a defendant might be able to assert a First Amendment (or other challenge) in that context, but the likelihood that plaintiffs or similarly situated persons would be charged is low. As to the actual non-U.S. person targets outside the United States, even if there is a greater likelihood that they might face criminal charges, there are serious questions about whether such persons would even be able to assert First (or Fourth) Amendment claims. And the possibility is also slim that third parties, such as internet service providers ordered by the government to turn over information, might assert First Amendment or other claims.

In sum, the *Clapper* majority asserts a standing requirement that, in the national security surveillance context, undermines First Amendment values. Not only does the requirement limit individuals from bringing claims to protect their own First Amendment right to speak, but the draconian standing rules also hinder public access to information about the scope of government surveillance and therefore deprive the public of the tools needed to engage in an informed debate about national security surveillance. And while of course sometimes such surveillance may be justified, the standing doctrine articulated in *Clapper* removes the necessary information from

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[71] *See*, *e.g.*, Redacted, 2011 WL 10945618, at *78 (FISA Ct. Oct. 3, 2011) (concluding that "upstream collection" of multiple internet transactions pursuant to the FAA was "deficient" on Fourth Amendment grounds because the method of collection swept in "very large number of Fourth Amendment-protected communications that have not direct connection to any" appropriate target of surveillance).

[72] *See*, *e.g.*, George Croner, *To Oversee or to Overrule: What is the Role of the Foreign Intelligence Surveillance Court Under FISA Section 702*, LAWFARE (May 18, 2021), https://www.lawfareblog.com/oversee-or-overrule-what-role-foreign-intelligence-surveillance-court-under-fisa-section-702 (noting that the FISC routinely approves the government's programmatic surveillance under the FAA, despite evidence of significant government noncompliance with procedures designed to minimize overreach).

public debate altogether. Thus, even though the Court in *Clapper* frames its decision as one involving standing rather than the First Amendment, viewing the case through a First Amendment lens reveals the important ways in which the court's decision interferes with the values of democratic self-government and access to information that the First Amendment protects.

III. THE STATE SECRETS DOCTRINE AND *UNITED STATES V. ZUBAYDAH*

Like the doctrine of standing, the state secrets doctrine is also First Amendment adjacent. The need for secrecy to protect national security often restricts the free flow of information that is necessary for a democracy to function.[73] Such restrictions, therefore, create a difficult trade-off. The state secrets doctrine specifically enables government officials to block sensitive information from disclosure in litigation.[74] While such secrecy is important to protect national security, there is a risk that government officials might assert the privilege in self-serving or overly sweeping ways.[75] And sometimes the doctrine blocks the litigation entirely.[76] By limiting access to courts, the doctrine curtails not only the vindication of direct constitutional rights claims but also the disclosure of information, through litigation, that may be important to democratic debate and self-government. Overbroad implementation of the doctrine thus threatens democratic values.

The Supreme Court's plurality opinion in *United States v. Zubaydah*, authored by Justice Breyer, allows the government broad latitude in asserting the state secrets doctrine, even as it preserves an important role for the courts.[77] The case arose out of litigation initiated by Abu Zubaydah, a detainee at the U.S. naval base at Guantánamo Bay.[78] The United States had

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[73] *See*, *e.g.*, Dep't. of Navy v. Egan, 484 U.S. 518, 527 (1988) (concluding that the Merit Systems Protection Board did not have the authority to review the denial of a security clearance and observing that "authority to protect [national security] information falls on the president as head of the Executive Branch and as Commander in Chief").

[74] United States v. Reynolds, 345 U.S. 1, 6–7 (1953).

[75] *See* United States v. Zubaydah, 142 S. Ct. 959, 992-93 (2022) (Gorsuch, J., dissenting) (describing examples when the state secrets doctrine has been invoked "to shroud major abuses and even ordinary negligence from public view").

[76] *See, e.g.*, Totten v. United States, 92 U.S. 105, 107 (1875) (holding that "public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated").

[77] *See Zubaydah*, 142 S. Ct. at 971.

[78] *Id.* at 963.

captured him in Pakistan shortly after the September 11, 2001, terrorist attacks on the United States.[79] Believed to be a senior Al Qaeda operative with knowledge of future attacks, the CIA detained him at several sites before transferring him to Guantánamo in 2006.[80] The U.S. Government has since acknowledged that he endured enhanced interrogation techniques that amounted to torture, including serial waterboarding, stress positions, cramped confinement (including forced burial), and sleep deprivation.[81] But the government has never publicly acknowledged the location of his detention by the CIA, which he claims was in Poland.[82]

In 2010, lawyers representing Zubaydah filed a criminal complaint in Poland seeking to hold Polish nationals accountable for their involvement in his mistreatment.[83] The United States denied multiple requests by Polish prosecutors, pursuant to a Mutual Legal Assistance Treaty, for information related to the Polish proceedings.[84] Subsequently, the European Court of Human Rights (ECHR) concluded that Poland had failed to investigate the claims sufficiently, and Poland reopened its criminal process in 2015.[85] Zubaydah then initiated this U.S. case by filing a discovery application pursuant to 28 U.S.C. § 1782, which permits U.S. District Courts to order production of testimony and documents for use in foreign tribunals.[86] Zubaydah filed for permission to serve two former CIA contractors, James Mitchell and John Jessen, with subpoenas requesting information regarding the CIA detention facilities in Poland, as well as Zubaydah's treatment there.[87] Zubaydah requested this information based on his allegation that Mitchell and Jessen had designed the program of enhanced interrogation techniques.[88] The U.S. government then intervened in the litigation after the CIA director asserted the state secrets privilege.[89]

A judge-made, common-law evidentiary privilege, the state secrets doctrine seeks to balance the need of the executive

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[79] *Id.* at 964.
[80] *Id.*
[81] *Id.*; *see also id.* at 986 (Gorsuch, J., dissenting).
[82] *Id.* at 964–65.
[83] *Id.* at 965.
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.* at 964–65.
[88] *Id.*
[89] *Id.* at 966.

branch to prevent disclosure of sensitive national security information in judicial proceedings with the judicial search for truth.[90] In part, the privilege derives from the common law of evidence, and, in fact, a rule of evidence related to the privilege was proposed but never accepted.[91] But it also has a constitutional element, in part because assertion of the privilege implicates the President's Article II authority over military and foreign affairs, and thus over information related to such affairs, a point the U.S. Supreme Court noted in *U.S. v. Nixon*.[92] However, application of the doctrine can also limit individuals' ability to vindicate constitutional rights directly (such as First Amendment rights to freedom of association and freedom of expression).[93] But more fundamentally, invocation of the privilege presents a risk of executive branch overreach, and overbroad application of the doctrine not only limits access to courts but also the free flow of ideas that is crucial for democracy to function.

The privilege generated few cases prior to the September 11, 2001 attacks, but the primary case that set forth the doctrine was *United States v. Reynolds*, decided in 1953.[94] That case involved litigation against the United States that arose after an Air Force B-29 bomber crashed during testing of secret equipment, killing three civilian observers.[95] The widows of the deceased observers sued the Air Force under the Federal Tort Claims Act, but the Air Force refused to disclose some of the material sought in discovery, invoking the state secrets privilege.[96] *Reynolds* delineated a three-part framework for the privilege: First, the head of the relevant government agency must assert the privilege.[97] Second, the court must determine whether there is "reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged."[98] Third, if the court determines

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[90] *See*, *e.g.*, El-Masri v. United States, 479 F.3d 296, 303-04 (4th Cir. 2007).
[91] *See, e.g.*, 26 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE 415-16 (1992) (setting forth draft rule of evidence 509, which was never enacted).
[92] 418 U.S. 683, 710-11 (1974) (noting that the state secrets privilege concerns "areas of Art. II duties [in which] the courts have traditionally shown the utmost deference to Presidential responsibilities," and that, to the extent a claim of privilege "relates to the effective discharge of a President's powers, it is constitutionally based").
[93] *See* Halkin v. Helms, 690 F.2d 977, 990 (D.C. Cir. 1982).
[94] 345 U.S. 1 (1953).
[95] *Id.* at 2–3.
[96] *Id.* at 3–4.
[97] *Id.* at 7–8.
[98] *Id.* at 10.

that the material is privileged, it must assess whether the litigation can proceed without the privileged material.[99] In *Reynolds,* the Court sustained the privilege, concluding that the litigation could proceed, but without the privileged material.[100] Nevertheless, *Reynolds* itself demonstrates the risk of overbroad assertions of the privilege: years later, it turned out that the material for which the government had asserted the privilege did not, in fact, relate to national security at all.[101]

In *Zubaydah*, the U.S. Court of Appeals for the Ninth Circuit had applied the *Reynolds* framework to conclude that much of the information sought was properly protected by the privilege but that Zubaydah's request under section 1782 could potentially proceed in some respects.[102] The court concluded that, under the second step of *Reynolds*, the disclosure of the location of Zubaydah's detention site in Poland and details of his treatment at that site were not validly subject to the privilege because that information was already in the public domain.[103] Indeed, another court, the ECHR, had already determined that the CIA detention took place in Poland and that Zubaydah was tortured there.[104] The Ninth Circuit also reasoned, under the third step of *Reynolds*, that some of the other material within the scope of the privilege could be turned over to Polish officials after a process of segregating the privileged material from the non-privileged material.[105]

The U.S. Supreme Court reversed 7-2 in a fractured opinion, with Justice Breyer writing for the majority as to some parts of the opinion and the plurality for other parts.[106] Applying the *Reynolds* framework, the majority concluded both that the material Zubaydah sought was privileged and that the litigation could not proceed without it, thereby dismissing the case.[107] Even though the information about the detention site was already in the public domain, Justice Breyer reasoned that the material that related to the location of the detention in Poland still warranted

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[99] *See id.* at 11.
[100] *Id.*
[101] *See* United States v. Zubaydah, 142 S. Ct. 959, 993 (2022) (Gorsuch, J., dissenting) (noting that, "decades later, when the government released the report [on the material sought in *Reynolds*], it turned out to contain no state secrets—only convincing proof of governmental negligence").
[102] *Id.* at 966.
[103] *Id.* at 966.
[104] *Id.* at 965.
[105] *See id.* at 989 (Gorsuch, J., dissenting).
[106] *See id.* at 959–60.
[107] *Id.* at 971.

the assertion of the privilege.[108] An official acknowledgement is different from other public reporting, Justice Breyer observed, because it leaves no room for doubt.[109] Confirmation by CIA insiders Mitchell and Jessen that the CIA detained Zubaydah in Poland would therefore constitute a distinctly new disclosure, even if journalists or non-U.S. courts had already written about the Polish location.[110] Further, he noted that clandestine relationships with foreign intelligence agencies are based on the mutual trust that classified information arising from that relationship will not be disclosed.[111] If made public, the discovery material confirming the Polish detention site could damage future intelligence relationships between the United States and other countries. The Court concluded that the government had thus met its burden to show there was a "reasonable danger that compulsion of the evidence" would "expose . . . matters which, in the interest of national security, should not be divulged."[112] Furthermore, because all of the information sought pertained to the Polish site, including the conditions at the site and Zubaydah's treatment there, the plurality determined that the litigation could not proceed without the privileged material.[113]

Justice Breyer's recognition of the government's need to withhold confirmation of the detention site location in Poland reflects the pragmatic strain in his jurisprudence. He acknowledges the executive branch perspective, including in national security and foreign affairs cases, and the opinion, in careful detail, walks through and embraces the rationale the government put forward to explain why official confirmation of information related to the Polish detention site could impede the trust necessary for future intelligence cooperation between the United States and other countries.[114]

Yet, Justice Breyer also emphasizes the key role for the courts in making independent judgments about executive branch justifications for invoking the state secrets privilege and therefore adopts a relatively robust standard for the executive branch to meet in order to assert the privilege successfully.[115] Key to Justice's Breyer's opinion is the centrality of the court's

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[108] *Id.* at 968.
[109] *Id.* at 970.
[110] *Id.*
[111] *Id.* at 968–69.
[112] *Id.* at 969.
[113] *Id.* at 972.
[114] *Id.* at 967–69.
[115] *See id.* at 967.

independent role, both in assessing whether the privilege should apply and whether the litigation should proceed. With respect to the former, in a portion of the opinion joined by Justices Roberts, Kagan, Kavanaugh, and Barrett, he emphasizes that it is courts—not the executive branch—that independently determine whether circumstances justify invocation of the privilege.[116] Quoting *Reynolds*, he asserts that "judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers."[117] Due to the national security context, courts should perhaps be reluctant to intrude upon the power of the executive, but ultimately the court must make its own decision.

Justice Breyer's plurality opinion (joined by Justices Roberts and Kagan) differs from the other opinions agreeing with the outcome in the case—Justices Thomas and Alito, on the one hand, and Justices Kavanaugh and Barrett, on the other—in the way in which it defines the courts' role in evaluating the privilege and the level of deference owed to the executive branch.[118] According to Justice Breyer, litigants objecting to the privilege should have the opportunity to show that they need the material.[119] Then, the court makes a decision about how far it should probe in satisfying itself that the occasion for invoking the privilege is appropriate, for example by reviewing some of the privileged material *in camera*.[120] Justice Breyer reasons that in this particular case, Zubaydah had little need for the information, both because much of it was already in the public domain and because Zubaydah was more interested in issues related to his treatment than the location of his detention.[121] In addition, the government said in the litigation that it would allow Zubaydah "'to send a declaration that could be transmitted to Polish prosecutors,'" subject to a national security review.[122]

In contrast, Justice Thomas (joined by Justice Alito) argues that courts should defer far more to the executive branch whenever it asserts the state secrets privilege.[123] Indeed, according to Justice Thomas, courts should not even independently evaluate the strength of the government's

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[116] *See id.*
[117] *Id.*
[118] *See id.*
[119] *Id.*
[120] *Id.* at 969–70.
[121] *Id.* at 971–72.
[122] *Id.* (quoting Letter from B. Fletcher, Acting Solicitor General, to S. Harris, Clerk of Court 3 (Oct. 15, 2021)).
[123] *Id.* at 973, 975–76 (Thomas, J., joined by Alito, J., concurring in part).

justification for asserting the privilege unless the litigant can first demonstrate a legitimate need for the information, which Thomas found lacking in this case.[124] Justice Thomas concludes that any judicial evaluation would "undermine[] the 'utmost deference' [the Court owes] to the executive's national security judgments."[125]

The concurring opinion of Justice Kavanaugh, joined by Justice Barrett, lands somewhere in between the Breyer plurality and the Thomas concurrence on the question of deference. Justice Kavanaugh would not engage in a two-step analysis that assesses the litigant's need for the privileged material before assessing the degree of deference owed to the executive's assertion of its rationale for asserting the privilege.[126] Thus, Kavanaugh, like Breyer, does envision an independent role for courts to evaluate the government's assertion regardless of need. Nevertheless, Kavanaugh emphasizes that the threshold the executive branch must meet to assert the privilege is "not demanding" and that, in most cases, the result is "typically self-evident."[127] The Kavanaugh opinion, therefore, would be more likely to accept executive branch assertions than the approach articulated by the Breyer plurality.

Thus, in this case, although Justice Breyer ultimately allowed the government to assert the privilege, he managed to cobble together a majority that at least secured some kind of independent role of courts in evaluating governmental invocations of the state secrets privilege. And although Breyer did not analyze this case through the lens of First Amendment values, the actual impact of the decision on First Amendment democratic self-governance in this particular case was relatively minimal because the information in question was already part of the public domain. But, of course, that will not always be the case.

The stinging dissent by Justice Gorsuch, joined by Justice Sotomayor, also does not recognize the First Amendment democratic self-governance values implicated here, even as the dissent argues that the decision threatens "the rule of law."[128] Instead, Justice Gorsuch focuses on separation of powers concerns about executive branch overreach in relation to the

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[124] *Id.* at 973 (Thomas, J., concurring in part).
[125] *Id.* at 977 (quoting Dep't of Navy v. Egan, 484 U.S. 518, 530 (1988)).
[126] *See id.* at 982–83 (Kavanaugh, J., concurring).
[127] *Id.* at 982 (Kavanaugh, J., concurring).
[128] *See id.* at 991 (Gorsuch, J., dissenting).

judiciary. Excoriating the majority for deferring too much to the executive, Justice Gorsuch argues that the Court should engage in a much more searching review of the executive branch rationale for asserting the privilege, including *in camera* review of the predicate for the claims of harm to national security.[129] According to Justice Gorsuch, judicial checking of the executive branch is essential to ensure that the President does not become akin to a "king."[130]

In the end, all of the Justices missed an opportunity to articulate the possibility that the state secrets doctrine can threaten First Amendment democratic self-governance values. These values are necessarily at risk when the government can easily block litigation in the national security context simply by invoking the privilege. Litigation, especially regarding national security, is an important vehicle for introducing information into the public sphere that is critical to democratic debate and self-governance. Interestingly, in this case, it was not the U.S. courts but rather foreign and international courts that were attempting to serve this function. The proceedings in the Polish courts and the European Court of Human Rights brought to light key aspects of the U.S. detention program post-9/11, including the use of CIA "black sites" and abusive interrogation techniques. That information is obviously important to debates within the United States about counterterrorism policies and practices on into the future. Yet, the state secrets doctrine could permanently block that crucial information from view.

Of course, recognizing that the state secrets doctrine implicates First Amendment values does not necessarily mean that the government's invocation of the privilege should necessarily always be rejected by courts. To the contrary, it will sometimes—perhaps even often—be the case that secrecy is still justified on national security grounds. But once we understand that invocation of the privilege prevents the people from obtaining information necessary for democratic self-government, we may be less deferential to executive branch assertions of the privilege than we otherwise would be. In any event, this is an area of law that merits increased attention from First Amendment scholars.

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[129] *See id.* at 983 (Kavanaugh, J., concurring).
[130] *Id.* at 991–92.

IV. CONCLUSION

Throughout his judicial career, Justice Breyer embraced a vision of the First Amendment that focuses on the importance of free speech, particularly when such speech contributes to maintaining an informed citizenry that can make knowledgeable judgments as part of the project of democratic self-government. In this Essay, I argue that First Amendment scholars who share that perspective should focus more attention on the intersection of national security and the First Amendment.

In that domain, we see that First Amendment-adjacent doctrines such as standing and state secrets can implicate core democratic self-governance values even though they may not at first seem to do so. Indeed, by studying *Clapper* and *Zubaydah*, we can see that a more robust conception of the First Amendment values at stake might well have altered and clarified the analytical framework used to resolve both cases.

Thus, First Amendment scholars need to turn their attention to the national security arena and recognize that even claims that do not explicitly raise First Amendment concerns may nevertheless fruitfully be examined as free speech/democratic self-governance questions. Executive branch action that chills litigation, advocacy, and independent journalism and that hides information from the public unquestionably thwarts the ability of "We the People" to actively and knowledgeably participate in governance. Such executive branch action is, therefore, a problem from a First Amendment perspective, and we should not shy away from naming these fundamental free speech values and insisting that the government point to real—not conjectural—national security imperatives in order to override the core democracy values at stake.