ABDICATING JUDICIAL INDEPENDENCE: EXPANDING THE STATE SECRETS AND DELIBERATE PROCESS PRIVILEGES TO BURY NATIONAL SECURITY ABUSES OF CIVIL LIBERTIES*

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ABSTRACT

Splashy accounts of threats to the nation's security mark the American landscape. Scholars and journalists recount the banning of entire groups from U.S. entry largely because of religious affiliation; the possible treasonous misappropriation and misuse of classified defense materials; the press's disclosure of troves of electronic surveillance revealing widespread abuses; and more. Courts often play central roles in these highly publicized security-liberty dramas.

Flying beneath the public radar, though, is a seemingly mundane, yet inordinately impactful, aspect of the legal process. Little noticed, that is, until Spring 2022. The U.S. Supreme Court then presented two rare opinions on the state secrets privilege—an executive privilege designed to prevent the civil discovery of information whose disclosure would ostensibly compromise national security. "Ostensibly" because, history shows, the executive branch has oftentimes invoked the privilege to cloak not genuinely sensitive security information, but damning evidence of civil liberties abuses and subsequent government dissembling to justify its transgressions.

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A few scholars had much earlier traced the troubling post-9/11 expansion of the state secrets privilege and its evidentiary cousin, the deliberative process privilege. Viewed through a novel jurisprudential lens, this article casts in new light the alarming legal and societal consequences of that accelerating expansion. It assesses the Court's recent enshrining of an engorged version of the former in United States v. Zubaydah *and* FBI v. Fazaga*, and the Trump Administration's expansive deployment of the latter in* Trump v. Hawaii *and the ensuing transgender-servicemember cases. Court rulings in those cases threaten to swallow up independent judicial inquiry for future national security-civil liberties controversies—a doctrinal expansion so appalling that the unusual dissenting alliance of Justices' Gorsuch and Sotomayor cited* Korematsu v. United States *and chastised the* Zubaydah *majority for placing its imprimatur on "intolerable [national security] abuses" damaging America's people. Building upon Professor Eric K. Yamamoto's suggested analytical framework for judicial review in these types of cases, the article highlights the intensifying risks for litigants, courts, and American democracy, and calls for a sharp curtailment of the state secrets and deliberative process privileges to help restore for U.S. democracy a calibrated accommodation of both national security and civil liberties.*

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The Constitution did not create a President in the King's image but envisioned an executive regularly checked and balanced by other authorities. Our Founders knew from hard experience the "intolerable abuses" that flow from unchecked executive power.

. . . . More recent history reveals that executive officials can sometimes be tempted to misuse claims of national security to shroud major abuses . . . from public view. In Korematsu v. United States*, the President persuaded this Court to permit the forced internment of Japanese-American citizens during World War II . . . [by relying on a key military report that] contained information executive officials knew to be false at the time . . . .*

*In [*United States v. Reynolds*, the inaugural state secrets privilege case], a similar story unfolded . . . .*

– Justice Neil Gorsuch, *United States v. Zubaydah* (2022)[1]

PROLOGUE

This Prologue offers a glimpse of what impelled Justice Gorsuch's trenchant observations in 2022: in recent years, "executive officials can sometimes be tempted to misuse claims of national security to shroud major abuses" from the public and the courts.[2] It concisely recounts two instances of sustained and serious government abuses, each shielded from close judicial and public scrutiny by the expansive operation of the state secrets privilege, an evidentiary privilege that allows the government to withhold government secrets from civil discovery that would damage the nation's security.[3]

The abuses, along with numerous others, occurred during the United States's prolonged war on terror. After 9/11, the government sweepingly investigated religious and racial groups for links to the Al-Qaeda attacks.[4] In some situations, prosecution, trial, and incarceration

1. United States v. Zubaydah, 595 U.S. 195, 250–51 (2022) (Gorsuch, J., dissenting) (first quoting United States v. Reynolds, 345 U.S. 1, 8 (1953); and then citing Korematsu v. United States, 323 U.S. 214 (1944)).

2. *Id.* at 251.

3. For a further discussion of the two cases, see *infra* Sections IV.A and IV.B.

4. *See* USA PATRIOT Act, Pub. L. 107-56, 15 Stat. 272 (2001); Elizabeth Goitein, *Rolling Back the Post-9/11 Surveillance State*, BRENNAN CTR. FOR JUST. (Aug. 25, 2021), https://www.brennancenter.org/our-work/analysis-opinion/rolling-back-post-911-surveillance-state.

appropriately followed.[5] A number of government actions, though, were grossly excessive and indeed abusive—torture, interrogation, and deliberate disruption of religious communities among them.[6]

Targeted individuals and religious communities sued to stop the abuses and hold the government accountable.[7] The U.S. government responded by maneuvering to avoid the substantive merits of the claims and keep the litigation out of the public eye.[8] At the outset, the government invoked the state secrets privilege to shield revealing evidence of its transgressions.[9] Furthermore, as detailed in Part IV, in spring 2022, in *United States v. Zubaydah*[10] and *FBI v. Fazaga*,[11] the U.S. Supreme Court not only countenanced the shrouding of major abuses, but also expanded the privilege for future government deployment in a wide range of controversies.

Story 1: Torture in United States Black Sites Abroad

The first story emerges from a hospital bed. Zayn al-Abedin Muhammad Husayn (known as Abu Zubaydah), suspected of participation in terrorist activity, lay recovering from gunshot wounds sustained during his capture by U.S. forces.[12] Meanwhile, U.S. Central Intelligence Agency ("CIA") officers planned what they euphemistically labeled "'enhanced interrogation' techniques," and what the U.S. Supreme Court would later call by its actual name—torture.[13]

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5. *See generally Protecting America Through Investigation and Criminal Prosecution*, U.S. DEP'T JUST. ARCHIVES, https://www.justice.gov/archive/911/protect.html (last visited Nov. 4, 2023); Aruna Viswanatha, *The Only U.S. Conviction of a 9/11 Terrorist*, WALL ST. J. (Sept. 11, 2021, 4:06 P.M.), https://www.wsj.com/livecoverage/9-11-20th-anniversary/card/TQEr2xfCIkXYm9XUZPeU.

6. *See infra* Sections IV.A.1 (detailing the torture interrogation of Abu Zubaydah) and IV.B.2 (detailing the surveillance of Muslim American communities in Orange County, California in 2006 through 2007).

7. *See Zubaydah*, 595 U.S. 195; FBI v. Fazaga, 595 U.S. 344 (2022).

8. *See Zubaydah*, 595 U.S. at 199; *Fazaga*, 595 U.S. at 351–52.

9. *See Zubaydah*, 595 U.S. at 199; *Fazaga*, 595 U.S. at 351–52.

10. 595 U.S. 195 (2022).

11. 595 U.S. 344 (2022).

12. Michel Paradis, *State Secrets and the Torture of Abu Zubaydah,* JUST SEC. (June 16, 2021), https://www.justsecurity.org/76923/state-secrets-and-the-torture-of-abu-zubaydah/.

13. *Zubaydah*, 595 U.S. at 200 (quoting S. REP. NO. 113-288, at 40–41 (2014)).

Pursuant to apparent authorization recited in the U.S. "torture memos,"[14] CIA contractors tortured Zubaydah and others in Poland and at other "black sites" abroad.[15] In personal notes and sketches, Zubaydah depicted eighty-three sessions of "waterboarding," or controlled drowning; hundreds of hours of live burial simulations in a coffin; "rectal rehydration"; and forty-seven days of solitary confinement.[16] The government later conceded that Zubaydah possessed no new information bearing on national security.[17]

Later, while incarcerated at Guantánamo Bay, Zubaydah filed a discovery application for permission from a U.S. district court to depose the U.S. contractors who designed and carried out the torture program.[18]

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14. *See generally* OFF. OF PRO. RESP., U.S. DEP'T OF JUST., INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL'S MEMORANDA CONCERNING ISSUES RELATED TO THE CENTRAL INTELLIGENCE AGENCY'S USE OF "ENHANCED INTERROGATION TECHNIQUES" ON SUSPECTED TERRORISTS 1 (2009).

15. The CIA established a network of these secret prison "black sites" around the world to "interrogate" detainees using extreme methods that would not otherwise be lawful within the United States. Robert Chesney, Comment, *No Appetite for Change: The Supreme Court Buttresses the State Secrets Privilege, Twice*, 136 HARV. L. REV. 170, 181 (2022) [hereinafter Chesney, *No Appetite for Change*] (citing Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST (Nov. 2, 2005, 7:00 PM), https://www.washingtonpost.com/archive/politics/2005/11/02/cia-holds-terror-suspects-in-secret-prisons/767f0160-cde4-41f2-a691-ba989990039c). *See generally* Julie Vitkovskaya, *What Are 'Black Sites'? 6 Key Things to Know About the CIA's Secret Prisons Overseas.*, WASH. POST (Jan. 25, 2017, 2:17 PM), https://www.washingtonpost.com/news/checkpoint/wp/2017/01/25/what-are-black-sites-6-key-things-to-know-about-the-cias-secret-prisons-overseas/. It did so even though "prior to the attacks of September 2001, the CIA itself determined from its own experience with coercive interrogations, that such techniques 'do not produce intelligence,' 'will probably result in false answers,' and had historically proven to be ineffective." S. REP. NO. 113-288, at vi.

16. *Zubaydah*, 595 U.S. at 266 (Gorsuch, J., dissenting). *See generally* MARK P. DENBEAUX ET AL., HOW AMERICA TORTURES 23–24 (2019) (quoting and citing Compiled Notes of Abu Zubaydah, which were appended to the report).

17. *Zubaydah*, 595 U.S. at 239 (Gorsuch, J., dissenting) (citing S. REP. NO. 113-288, at 410) ("Although Zubaydah's relationship with al Qaeda remains the subject of debate today, the authors of the Senate Report found that the CIA's records 'do not support' the suggestion that he was involved in the September 11 attacks.").

18. *See In re* Zayn Al-Abidin Muhammad Husayn, No. 2:17-CV-0171-JLQ, 2018 WL 11150135, at *1 (E.D. Wash. Feb. 21, 2018), *rev'd sub nom.* Husayn v. Mitchell, 938 F.3d 1123 (9th Cir. 2019), *rev'd sub nom.* United States v. Zubaydah, 595 U.S. 195 (2022). Nearly twenty years after his initial capture, Zubaydah remained incarcerated alongside thirty-five other prisoners at Guantánamo Bay, without charges or trial. Carol Rosenberg, *Lawyers Expand Legal Fight for Longest-Held Prisoner of War on Terrorism*, N.Y. TIMES (Oct. 4, 2023), https://www.nytimes.com/2023/10/04/us/politics/abu-zubaydah-guantanamo-court-cases.html; *USA: Amnesty International Condemns 21 Years of Ongoing Violations at Guantánamo Bay*, AMNESTY INT'L (Jan. 10, 2023), https://www.amnesty.org/en/latest/news/2023/01/amnesty-international-condemns-21-years-guantanamo-bay/#:~:text="It%27s%20tragic%20that%2021%20years,has%20had%20a%20fair%20trial.

The Justice Department intervened to block discovery, invoking the state secrets privilege and claiming that depositions would reveal Poland as the secret location of the black site, threatening U.S. security, even though Poland had already been publicly identified as a torture site.[19] The government then sought federal court dismissal of Zubaydah's discovery application in its entirety.[20]

The Justice Department rejected Zubaydah's lawyers' stipulation that they would limit discovery to avoid any indication of the torture site's location.[21] That rejection revealed the government's apparent, albeit unacknowledged, aim—to prevent direct, on-the-record evidence of the CIA's deliberate human rights violations. With all major players on board, the executive branch aimed to ensure that Zubaydah would "remain incommunicado for the remainder of his life."[22] The purpose of that pact was to uphold as if it were true President George W. Bush's Orwellian doublespeak during the war on terror: "I want to be absolutely clear with our people and the world. The United States does not torture. It's against our laws, and it's against our values."[23]

In *United States v. Zubaydah*, a Supreme Court majority blocked Zubaydah's discovery request.[24] The Court fully deferred to the executive branch's tenuous claim that possible disclosure of Poland as a torture site would harm the nation's security.[25] In doing so, the Court effectively gave the president unchecked power to abuse human rights in the name of national security. The Court's imprimatur of the expansively construed state secrets privilege prompted Justice Neil Gorsuch's scorching dissent. Highlighting *Korematsu v. United States*[26] alongside *United States v. Reynolds*,[27] the case first formulating the state secrets privilege, Gorsuch declared that "[t]he Constitution did not create a President in the King's image but envisioned an executive regularly checked and balanced by

19. *See infra* notes 206–11, 229–34 and accompanying text.

20. *In re Husayn*, 2018 WL 11150135, at *9.

21. *Id.*

22. *See* Paradis, *supra* note 12 (quoting Cable from the CIA CTC/UBL on Eyes Only – HQs Feedback on Issues Pending for Interrogations of Abu Zubaydah 4 (July 18, 2002), https://www.cia.gov/readingroom/docs/0006541507.pdf).

23. President George W. Bush, Speech on Terrorism (Sept. 6, 2006), *in* N.Y. TIMES (Sept. 6, 2006), https://www.nytimes.com/2006/09/06/washington/06bush_transcript.html.

24. United States v. Zubaydah, 595 U.S. 195 (2022).

25. *See id.* at 207.

26. 323 U.S. 214 (1944).

27. 345 U.S. 1 (1953).

other authorities. Our Founders knew from hard experience the 'intolerable abuses' that flow from unchecked executive power."[28]

Story 2: Protracted Surveillance and Harassment of Muslim American Communities

After 9/11, U.S. officials sweepingly targeted Muslim American communities within the United States without indication of connections to international terrorist organizations.[29] Between 2006 and 2007, the Federal Bureau of Investigation ("FBI") conducted a counterterrorism sting operation in Orange County, California, dubbed "Operation Flex" after its primary informant, former bodybuilder Craig Monteilh.[30] The FBI directed Monteilh, who had previously become an FBI informant in exchange for light treatment on unrelated criminal charges, to pose as a Muslim convert and report on the activities of Americans who worshipped at local mosques.[31] In "scenes out of a James Bond movie," Monteilh "wore a secret video recorder sewn into his shirt" or "activated an audio recorder on his key rings."[32] He turned all these recordings over to the FBI.[33]

Muslim American community members whom Monteilh spied on—none of whom were involved in terror activity—ironically reported *him* to the FBI after he persistently inquired about violent *jihad*.[34]

28. *Zubaydah*, 595 U.S. at 250 (Gorsuch, J., dissenting) (quoting *Reynolds*, 345 U.S. at 8).

29. *See* Faiza Patel, *Ending the 'National Security' Excuse for Racial and Religious Profiling*, BRENNAN CTR. FOR JUST. (July 22, 2021), https://www.brennancenter.org/our-work/analysis-opinion/ending-national-security-excuse-racial-and-religious-profiling.

30. Steven D. Schwinn, *Court to Hear State Secrets, FISA Case*, L. PROFESSOR BLOGS NETWORK (Nov. 8, 2021), https://lawprofessors.typepad.com/conlaw/2021/11/court-to-hear-state-secrets-fisa-case.html. *See generally* Trevor Aaronson, *Spy in Disguise: An FBI Informant's Unlikely Role in Upcoming Supreme Court Case on Surveillance of Muslims*, INTERCEPT (Sept. 12, 2021, 6:00 AM), https://theintercept.com/2021/09/12/fbi-informant-surveillance-muslims-supreme-court-911/; Leila Rafei, *How the FBI Spied on Orange County Muslims And Attempted to Get Away With It*, ACLU (Nov. 8, 2021), https://www.aclu.org/news/national-security/how-the-fbi-spied-on-orange-county-muslims-and-attempted-to-get-away-with-it/.

31. *See* Aaronson, *supra* note 30.

32. Paul Harris, *The Ex-FBI Informant With a Change of Heart: 'There is no Real Hunt. It's Fixed'*, GUARDIAN (Mar. 20, 2012, 12:50 PM), https://www.theguardian.com/world/2012/mar/20/fbi-informant [hereinafter Harris, *The Ex-FBI Informant*].

33. *Id.*

34. FBI v. Fazaga, 595 U.S. 344, 351 (2022).

After the unveiling of Monteilh's spying, three Muslim men, Yassir Fazaga, Ali Malik, and Yasser AbdelRahim, through a class action lawsuit, publicly depicted the disruption and trauma they and their communities experienced.[35] For Fazaga, Malik and AbdelRahim, the FBI's prolonged spying through a person they had invited into their mosques and homes violated the privacy and security of their religious communities, all without cause.[36] Monteilh's warrantless secret surveillance on the FBI's behalf five years after 9/11 "cemented a belief that some people were second-class citizens and Muslim Americans were never going to be treated as equal in the eyes of the law."[37]

The *Fazaga* plaintiffs claimed that the FBI targeted and harassed them and their communities because of their religion and subjected them to illegal surveillance under the Foreign Intelligence Surveillance Act of 1978 ("FISA") and other laws.[38] FISA established a special set of procedures for surveillance warrant applications including *in camera* and *ex parte* judicial review so courts could confidentially determine the validity of the purported national security justifications.[39] The FBI abjured these checks and balances procedures and, with the Justice Department, endeavored to bury its abuses under the mantle of the state secrets privilege.[40]

As detailed in Part IV, in *FBI v. Fazaga*, a unanimous Supreme Court acquiesced, declaring that FISA procedures were not intended to displace the privilege's secrecy shield.[41] The Court ruled that even though Congress expressly designed FISA to prevent abuses in foreign intelligence gathering, when the government asserts the state secrets privilege, the courts would not be allowed to employ FISA-prescribed confidentiality procedures to determine if state secrets were genuinely involved.[42]

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35. *See id.*

36. *See* Mary Harris, *What It's Like to Worship While the FBI Is Watching*, SLATE (Nov. 16, 2021, 5:07 PM), https://slate.com/news-and-politics/2021/11/supreme-court-fbi-fazaga-muslims-government-surveillance.html [hereinafter Harris, *What It's Like to Worship*].

37. *Id.*

38. Fazaga v. FBI, 884 F. Supp. 2d 1022, 1028–29 (C.D. Cal. 2012), *aff'd in part, rev'd in part*, 916 F.3d 1202 (9th Cir. 2020), *rev'd*, 595 U.S. 344 (2022).

39. *Fazaga*, 595 U.S. at 394–95 (citing 50 U.S.C. § 1806(f)).

40. *See id.* at 351–52.

41. *Id.* at 355.

42. *See id.* at 348 (holding FISA did not displace the state secrets privilege); *see also infra* Section IV.B.4.

Following the *Fazaga* and *Zubaydah* rulings, judges now appear to be duty-bound to turn a blind eye. Judges are not only obliged to acquiesce to the government's contention that a security secret is involved. They are also instructed to dismiss all substantive constitutional and statutory claims for government accountability because of the ostensibly sensitive subject matter of the litigation—even if the "secret" is not factually substantiated, and even if claimants can prove their case without reliance on confidential materials.[43] In a marked expansion of the state secrets privilege, United States violations of important domestic and international laws and the extent of damage to targeted communities would never be ventilated in courts of law.

I. INTRODUCTION

Accelerating from 9/11 through the Trump era, U.S. presidential administrations have repeatedly invoked the state secrets privilege and its evidentiary cousin, the deliberative process privilege ("the privileges"), in national security cases to block the discovery of probative evidence of civil liberties abuses—all without close judicial scrutiny into whether security secrets were actually at play.[44] *Zubaydah* and *Fazaga* serve as formidable reminders that executive officials at times, and perhaps often, abuse security powers and transgress civilian liberties. They then attempt to shroud those abuses behind the veil of evidentiary privilege.[45] As it turns out, the executive branch has regularly deployed the privileges not to protect sensitive security information, but to hide exaggerated or even false claims of necessity and to disguise maneuvers for bald political advantage. Lower federal courts resisted expansion of those privileges.[46] Not so the U.S. Supreme Court.[47]

43. *See infra* notes 200–05 and accompanying text (describing the conflation of the state secrets privilege (an evidentiary privilege preventing discovery of specific evidence) and the *Totten* ban (a justiciability doctrine directing dismissal of entire lawsuits)).

44. *See infra* Section III.B, Part V (detailing the respective expansions of the state secrets and deliberative process privileges).

45. *See* United States v. Zubaydah, 595 U.S. 195, 250 (2022) (Gorsuch, J., dissenting).

46. *See infra* Sections III.A.1, IV.A.3, IV.B.3 (summarizing the lower courts' watchful care in *Reynolds*, *Zubaydah*, and *Fazaga*).

47. *See infra* Sections III.A.2, IV.A.4, IV.B.4 (detailing the U.S. Supreme Court's blind deference to the executive in *Reynolds*, *Zubaydah*, and *Fazaga*).

The stakes are high—far higher than they initially appear. Hidden beneath the veneer of the legal process ("it's only about procedure"),[48] invocation of the privileges amounts to demands for extending utmost judicial deference to presidents whenever they claim national security as justification for curtailing fundamental liberties. The impacts on substantive law and peoples' lives are sometimes enormous. The evidentiary privileges often dictate judicial rejection of civil liberties claims at the starting gate. When the judiciary yields to these demands, it at times countenances racial or religious oppression and gives the executive branch free passes from accountability. The privileges thereby undercut the foundation of the U.S. constitutional scheme of checks and balances, with the judiciary as the ultimate arbiter of civilian liberty claims aimed at preventing or redressing serious government abuses.

The American people and the courts continue to grapple with how best to accommodate both national security and civil liberties during times of national distress. Security is essential to the protection of people and the survival of institutions. Civil liberties, enforced by courts, serve as the populace's check on national security run amok. Drawing on historical lessons from *Korematsu* and recent security-liberty controversies, in 2018, Professor Eric K. Yamamoto called for courts to undertake heightened scrutiny of national security justifications for curtailing fundamental liberties to ensure a calibrated accommodation of both security and liberty.[49] The increasingly expansive state secrets and deliberative process privileges subvert this balance by undercutting judges' ability to carefully and independently scrutinize what's really going on behind the curtain of privilege.

The Supreme Court faces intensifying criticism about its apparent abdication of judicial independence and, hence, its legitimacy.[50] As

48. *See* Eric K. Yamamoto, *Critical Procedure: ADR and the Justices' "Second Wave" Construction of Court Access and Claim Development*, 70 SMU L. REV. 765 (2017) (describing how the "myth of procedural neutrality" disguises the substantive impacts of procedural changes by rule makers and judges).

49. ERIC K. YAMAMOTO, IN THE SHADOW OF KOREMATSU: DEMOCRATIC LIBERTIES AND NATIONAL SECURITY (2018) [hereinafter YAMAMOTO, SHADOW OF KOREMATSU] (proposing a framework for the judicial role in national security and civil liberties controversies); *see also infra* notes 437–49 and accompanying text (outlining Yamamoto's framework). *See generally* ERIC K. YAMAMOTO, LORRAINE P. BANNAI, & MARGARET CHON, RACE, RIGHTS AND NATIONAL SECURITY: LAW AND THE JAPANESE AMERICAN INCARCERATION (3rd ed. 2021).

50. Douglas Keith, *A Legitimacy Crisis of the Supreme Court's Own Making*, BRENNAN CTR. FOR JUST. (Sept. 15, 2022), https://www.brennancenter.org/our-work/analysis-opinion/legitimacy-crisis-supreme-courts-own-making.

public faith in the Court diminishes,[51] so, too, does popular assent to the judiciary's directives. The Court-endorsed expansion of the state secrets and deliberative process privileges adds "fuel to that fire."[52] In Justice Gorsuch's words, it jettisons even the "pretense of an independent judicial inquiry into the propriety of a claim of privilege and extending instead 'utmost deference' to the Executive's mere assertion" of national security.[53]

Thematically, this article first urges public and judicial acknowledgement of the executive branch's at times pervasive practice of telling national security lies. To bolster judicial independence in scrutinizing national security-civil liberties controversies, the article then calls for sharp limits to the expanding state secrets and deliberative process privileges.

Accordingly, to underscore the grave dangers of executive dissembling on national security coupled with minimalist judicial scrutiny, Part II elaborates on Justice Gorsuch's uplifting of *Korematsu* in his *Zubaydah* dissent. The Roosevelt administration's political scapegoating of Japanese Americans during World War II, fabricated national security evidence, and five-part cover-up—validated by a deferential Supreme Court majority—were only unveiled forty years after the fact through a congressional investigation and the federal courts' *coram nobis* reopening of the Court's wartime curfew-incarceration decisions.[54]

Parts III and IV delve into the state secrets privilege. Part III reviews the fraudulent inception of the state secrets privilege first recognized in *Reynolds* and traces recent lower court cases that extend the privilege far beyond its original boundaries. Part IV charts the culmination of this significant expansion in the Supreme Court's 2022 state secrets cases, *Zubaydah* and *Fazaga*.

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51. Paul Waldman, Opinion, *Judge Cannon Shows the Courts Have Been Politicized Far Beyond SCOTUS*, WASH. POST (Sept. 30, 2022, 3:16 PM), https://www.washingtonpost.com/opinions/2022/09/30/judge-cannon-trump-politicized-courts/?utm_medium=email&utm_source=newsletter&wpisrc=nl_opinions&utm_campaign=wp_opinions; Jeffrey M. Jones, *Confidence in U.S. Supreme Court Sinks to Historic Low*, GALLUP (June 23, 2022), https://news.gallup.com/poll/394103/confidence-supreme-court-sinks-historic-low.aspx.

52. *See* United States v. Zubaydah, 595 U.S. 195, 252 (2022) (Gorsuch, J., dissenting).

53. *Id.* at 252–53.

54. *See* Hirabayashi v. United States, 828 F.2d 591 (9th Cir. 1987); Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984); Yasui v. United States, No. 83-151-BE (D. Or. Jan 26, 1984).

Part V surveys the parallel judicial expansion of the deliberative process privilege. It highlights two key challenges to Trump administration abuses. First, it examines *Trump v. Hawaii*,[55] the 2018 Supreme Court case that tacitly relied on the deliberative process privilege to shield from public and judicial scrutiny the purported basis for President Trump's claim that national security (rather than religious animus and political pandering) motivated his Muslim-exclusion executive orders. Second, it unravels two lower court cases that expressly employed the privilege to shield from scrutiny Trump's hollow claim that national security (rather than constituent transphobia and electoral advantage) motivated his abrupt ban of transgender servicemembers from the military.

Part VI synthesizes the preceding parts to show how expansion of the state secrets and deliberative process privileges intensifies *Korematsu*'s dangerous practice of excessive judicial deference to the executive branch whenever the executive intones "national security." Finally, Part VII calls for the sharp cabining of the state secrets and deliberate process privileges to generate a better, constitutionally appropriate accommodation of national security and the liberties fundamental to a functioning democracy.

II. BIGOTRY "MASQUERADING BEHIND A FAÇADE OF NATIONAL SECURITY"—INSIGHTS FROM *KOREMATSU*

Justice Gorsuch's *Zubaydah* dissent cited *Korematsu v. United States* as a glaring example of how "history reveals that executive officials can sometimes be tempted to misuse claims of national security to shroud major [civil liberties] abuses . . . from public view."[56] The Supreme Court's infamous 1944 *Korematsu* decision upheld President Roosevelt's Executive Order 9066[57] that authorized the forced removal of over 120,000 Japanese Americans.[58] Over vociferous dissents and

55. 585 U.S. 667 (2018).

56. *Zubaydah*, 595 U.S. at 250 (Gorsuch, J., dissenting).

57. Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942).

58. *Executive Order 9066: Resulting in Japanese American Incarceration (1942)*, NAT'L ARCHIVES, https://www.archives.gov/milestone-documents/executive-order-9066#:~:text=Issued%20by%20President%20Franklin%20Roosevelt,the%20incarceration%20of%20Japanese%20Americans (Jan. 24, 2022). *See generally* YAMAMOTO, BANNAI, & CHON, *supra* note 49; ROGER DANIELS, THE JAPANESE AMERICAN CASES: THE RULE OF LAW IN TIME OF WAR (2013).

employing a deferential double negative, the six-justice majority declared it could "[]not reject as unfounded" the government's contention that military necessity justified the curtailment of fundamental liberties of Japanese Americans.[59]

Justice Hugo Black, a former Ku Klux Klan member,[60] announced the Court's commitment to strict scrutiny review of the government's claim that pressing public necessity justified the mass racial removal leading to incarceration.[61] But then Black's majority opinion pivoted. It refrained from calling for bona fide evidence of necessity or from scrutinizing the factual contentions recited in the final report ("Report" or "Final Report") of General John DeWitt, the West Coast Commander who issued the military orders pursuant to the president's executive order.[62] Instead, the majority passively accepted the DeWitt Report's factual contentions and assessments—all presented outside the formal court record via judicial notice.[63]

In his Final Report, DeWitt intimated that West Coast Japanese Americans had engaged in acts of disloyalty, including illicit shore-to-ship signaling and radio communications with Japan's navy.[64] The Report concluded that these acts of espionage, along with Japanese Americans' inherent cultural predisposition toward disloyalty, generated an imminent danger to defense facilities and operations.[65] DeWitt's Report also

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59. Korematsu v. United States, 323 U.S. 214, 218 (1944). *See generally* GREG ROBINSON, BY ORDER OF THE PRESIDENT: FDR AND THE INTERNMENT OF JAPANESE AMERICANS (2001).

60. Brian P. Smentkowski, *Hugo Black,* ENCYC. BRITANNICA (Sep. 21, 2023), https://www.britannica.com/biography/Hugo-L-Black.

61. *Korematsu*, 323 U.S. at 216 ("[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect . . . . [C]ourts must subject them to the most rigid scrutiny."); *see also* YAMAMOTO, SHADOW OF KOREMATSU, *supra* note 49, at 27 ("*Korematsu* announced a demanding 'most rigid scrutiny' standard of review—now denominated strict scrutiny—in light of the government's act apparently targeting 'a single racial group.'").

62. *See Korematsu*, 323 U.S. at 218.

63. *See id.*; *see also* Eric K. Yamamoto, Maria Amparo Vanaclocha Berti, & Jaime Tokioka, *Loaded Weapon Revisited: The Trump Era Import of Justice Jackson's Warning in Korematsu*, 24 ASIAN AM. L.J. 5, 23 (2017) ("After announcing its commitment to the most rigid scrutiny, the *Korematsu* majority pivoted 180 degrees. It actually subjected the government's racial exclusion to bare minimalist review.").

64. JOHN L. DEWITT, FINAL REPORT: JAPANESE EVACUATION FROM THE WEST COAST 8 (U.S. Gov't Print. Off. ed., 1943).

65. *See id.* at 8–9. DeWitt maintained that because Japanese Americans were a "large, unassimilated, tightly knit racial group," they were "bound to an enemy nation by strong ties of race, culture, custom and religion" and, therefore, "their loyalties were unknown." Letter

asserted there was insufficient time to individually ascertain disloyalty—there was no ready means for sorting the loyal from the disloyal,[66] and "time was of the essence."[67] Hence the "pressing public necessity"[68] for the sweeping executive order effectively targeting the removal and confinement of *all* West Coast Japanese Americans, without charges, trial, or proof of individual wrongdoing.

Decades later, in the mid-1980s, *coram nobis* reopenings of the World War II convictions of resisters challenging the executive and military orders revealed newly discovered government documents showing that War and Justice Department leaders deliberately cooked the books on national security.[69] More specifically, the federal courts hearing the *Korematsu* and *Hirabayashi coram nobis* petitions determined that World War II government documents showed that the War and Justice Departments had intentionally falsified the president's claim of military necessity and had subsequently engaged in an elaborate scheme to conceal its national security lies.[70]

Investigations by the FBI, Federal Communications Commission ("FCC"), and Office of Naval Intelligence ("ONI") cleared Japanese Americans of espionage and sabotage.[71] Most importantly, the ONI—the intelligence body assigned by the president to investigate and handle the West Coast "Japanese problem"—determined that Japanese Americans

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of Transmittal from John L. DeWitt, Lt. Gen., U.S. Army, to the Chief of Staff, U.S. Army, *in* JOHN L. DEWITT, FINAL REPORT: JAPANESE EVACUATION FROM THE WEST COAST, at vii (U.S. Gov't Print. Off. ed., 1943).

66. DEWITT, *supra* note 64, at 9.

67. Letter of Transmittal from John L. DeWitt, *supra* note 65.

68. Korematsu v. United States, 323 U.S. 214, 216 (1944).

69. *See generally* PETER H. IRONS, JUSTICE AT WAR: STORY OF THE JAPANESE AMERICAN INTERNMENT CASES (1993) [hereinafter IRONS, JUSTICE AT WAR]; LORRIANE P. BANNAI, ENDURING CONVICTION: THE STORY OF FRED KOREMATSU'S QUEST FOR JUSTICE (2016); YAMAMOTO, SHADOW OF KOREMATSU, *supra* note 49, at 39–41 (summarizing the falsified facts on military necessity contained in the DeWitt report).

70. *See* Hirabayashi v. United States, 828 F.2d 591, 599 (9th Cir. 1987); Korematsu v. United States, 584 F. Supp. 1406, 1418 (N.D. Cal. 1984); *see also* Yasui v. United States, No. 83-151-BE (D. Or. Jan. 26, 1984) (petition granted without findings based on government's agreement with the remedy).

71. *See* Memorandum from J. Edgar Hoover, Dir., Fed. Bureau of Investigation, to Francis Biddle, Att'y Gen., U.S. Dep't of Just. (Feb. 2, 1942), *reprinted in* PERSONAL JUSTICE DENIED: REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS 73 (1982–1983); Memorandum from James L. Fly, Dir., Fed. Commc'ns Comm'n, to Francis Biddle, U.S. Att'y Gen. (Apr. 4, 1944), *reprinted in Korematsu*, 584 F. Supp., at Exhibit V; Memorandum from Kenneth D. Ringle, Lt. Commander, U.S. Army, to Chief of Naval Operations, on *Japanese Question, Report On*, (Jan. 26, 1942), *reprinted in* Petition, *Korematsu*, 584 F. Supp., at Exhibit N [hereinafter ONI Report on "Japanese Question"].

posed no threat as a group, that any problems should be handled on an "individual," not "racial basis," and that there was adequate time for individual determinations of any suspected disloyalty.[72] All of these pivotal intelligence assessments refuting the need for mass racial treatment were strongly communicated to military leaders and executive officials at the highest levels *before* President Roosevelt's executive order initiating the forced mass removal and incarceration.[73]

Moreover, in the early 1980s, a historian and a congressional researcher discovered the *original* completed, printed, and partially distributed version of the 1943 DeWitt Final Report.[74] That original Final Report recounted DeWitt's actual rationale for the executive orders: not temporal exigency (it acknowledged that there had been sufficient time for handling disloyalty individually), but a conviction that race predetermined disloyalty—Japanese Americans belonged to an enemy race.[75] For General DeWitt, persons of Japanese ancestry, including American citizens, were all presumptively dangerous. And because the government could never "separate the sheep from the goats," all needed to be quickly locked up for the war's duration.[76]

The original DeWitt Report, if submitted publicly to the Supreme Court, would not only have entombed the Justice Department's legal arguments. It also would have revealed to the public and the courts the blatantly racist underpinnings of the entire removal and confinement—all while nearly 100,000 innocent Japanese Americans remained locked in desolate inland incarceration centers and while Roosevelt was campaigning for his fourth presidential term. Top officials in the War Department thus compelled DeWitt, in 1944, to call back his completed, printed, bound, and partially distributed Final Report and significantly alter its key language.[77] The aim: to mislead the Supreme Court into believing that the head of the Western Command had determined that

72. ONI Report on "Japanese Question," *supra* note 71.

73. *See* Memorandum from J. Edgar Hoover, *supra* note 71; Memorandum from James L. Fly, *supra* note 71; ONI Report on "Japanese Question," *supra* note 71.

74. PERSONAL JUSTICE DENIED: REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS 6 (1982–83).

75. DeWitt's original Report stated, "*It was not that there was insufficient time in which to make such a determination*; it was simply that . . . [a]n exact separation of the 'sheep from the goats' was unfeasible." IRONS, JUSTICE AT WAR, *supra* note 69, at 208 (emphasis added).

76. DEWITT, *supra* note 64, at 9.

77. IRONS, JUSTICE AT WAR, *supra* note 69, at 206–11.

"time was of the essence" and that there had been insufficient time for individual disloyalty charges and hearings.[78] The Justice Department belatedly presented the altered, falsified version of DeWitt's Report directly to the Court, via judicial notice, as the definitive proof of "pressing public necessity."[79]

The *coram nobis* litigation also revealed that the War and Justice Departments then executed a five-part cover-up characterized by Peter Irons as a "scandal without precedent in the history of American law."[80] First, recognizing the volatility of its alteration of key evidence, the War Department ordered the recall and destruction by burning of all damning documents, including all copies of the original DeWitt Report along with all galleys, notes, and memoranda.[81] Second, Justice Department lawyers intentionally suppressed FBI and FCC intelligence reports directly refuting intimations of Japanese American espionage.[82] Third, high-ranking officials in the Justice Department deliberately suppressed the ONI report's finding that Japanese Americans posed no group threat and its recommendation that any suspected disloyalty be handled individually.[83] The U.S. Solicitor General in particular ignored the vehement protests of the lead attorney drafting the government's *Korematsu* brief to the Supreme Court that the Justice Department's failure to alert the Court to the ONI assessment would "approximate the suppression of evidence."[84]

Fourth, War and Justice Department leaders squelched a whistle-blowing footnote in the government's then-final *Korematsu* Supreme

78. *See id.*

79. *See* Korematsu v. United States, 323 U.S. 214, 216 (1944).

80. IRONS, JUSTICE AT WAR, *supra* note 69, at viii.

81. *See id.*; *see also* Hirabayashi v. United States, 828 F.2d 591, 598 (9th Cir. 1987) ("Recent historical research, however, has uncovered in the National Archives a previously unknown copy of an original version of the report.").

82. Justice Department assistant John Burling protested to higher-ups that the intelligence assessments needed to be disclosed in briefings to the Supreme Court since they constituted "extremely detailed information" that "categorically denied" assertions in the DeWitt Report, to the extent of characterizing much of the DeWitt report as "intentional falsehoods." Memorandum from John L. Burling, Att'y, U.S. Dep't of Just., to Herbert Wechsler, Assistant Att'y Gen., U.S. Dep't of Just. (Sept. 11, 1944), re*printed in* Petition, Korematsu v. United States, 584 F. Supp. 1406, at Exhibit AA (N.D. Cal. 1984).

83. *See* Memorandum from Edward J. Ennis, Dir., U.S. Dep't of Just., to Charles Fahy, Solic. Gen., U.S. Dep't of Just. (Apr. 30, 1943), *reprinted in* Petition, *Korematsu*, 584 F. Supp., at Exhibit Q.

84. *See id.*

Court brief.[85] A chagrined Justice Department attorney, John Burling, in drafting the *Korematsu* brief, attempted to alert the Court to the DeWitt's Report's "intentional falsehoods" on crucial security matters, particularly those relating to intimations of Japanese American espionage.[86] The extraordinary "Burling footnote" had been incorporated into the initially printed version of the brief. It urged the Court not to take judicial notice of the government's "contradicted" national security evidence.[87] Upon learning of the Burling footnote, however, high officials called back the government's *Korematsu* brief and ordered revision of the footnote to state the opposite of what whistleblower Burling intended—instead informing the Court that it could rely on the Final Report's facts and analysis as the justification for the "evacuation."[88]

To cement the deception, Solicitor General Charles Fahy flat out lied to the justices during oral argument to the Court. In response to direct questions about whether any intelligence service investigations had contradicted the DeWitt Report's factual statements about the necessity for the forced mass removal, the Solicitor General falsely attested that the Report recounted the factual justification for the mass action and that "no person in any responsible position has ever taken a contrary position."[89]

The elaborate cover-up, along with the government's refusal to disclose probative undoctored evidence, enabled the exceedingly deferential *Korematsu* majority to passively accept the government's proffered national security "facts" and assessments, and to thereby place its rubber stamp of approval on the government's fraudulently grounded violation of the civil liberties of tens of thousands of still incarcerated Americans. Justice Jackson's ringing *Korematsu* dissent called out the hollowness of the majority's passive inquiry: "How does the Court know that these orders have a reasonable basis in necessity? No evidence whatever on that subject has been taken by this or any other court."[90] Indeed, Jackson declared, the "Court, having no real evidence before it,

85. *See* IRONS, JUSTICE AT WAR, *supra* note 69, at 288–92.

86. Memorandum from John L. Burling, *supra* note 82.

87. *Id.*

88. IRONS, JUSTICE AT WAR, *supra* note 69, at 288–92.

89. Hirabayashi v. United States, 828 F.2d 591, 603 n.13 (1987) (quoting Solicitor General Fahy in the *Korematsu* oral argument before the Supreme Court); Neal Kumar Katyal, *The Solicitor General and Confession of Error*, 81 FORDHAM L. REV. 3027, 3036 (2013) (quoting Solicitor General Fahy in the *Korematsu* oral argument before the Supreme Court).

90. Korematsu v. United States, 323 U.S. 214, 245 (1944) (Jackson, J., dissenting).

has no choice but to accept General DeWitt's own unsworn, self-serving statement, untested by any cross-examination, that what he did was reasonable."[91] By allowing the executive branch to hide its falsified national security justification behind a cry of "just trust us," Jackson presciently observed that the *Korematsu* majority's extreme judicial deference in validating the government's mass deprivation of civil liberties "lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible [even if exaggerated or falsified] claim of an urgent need."[92]

With Justice Jackson's "loaded weapon" warning in mind, and with the newly presented record documenting pervasive yet hidden government dissembling, the federal courts in the mid-1980s granted Korematsu's, Hirabayshi's, and Yasui's *coram nobis* petitions, vacating their forty-year-old convictions for resisting the World War II curfew and removal military orders.[93]

Korematsu "loom[ed] large" for the injustice that flows when the "judiciary lowers its guard on the Constitution" and shields the government's national security dissembling.[94] Indeed, Judge Marilyn Hall Patel, author of the *Korematsu coram nobis* opinion, reprimanded the government officials for "deliberately omit[ting] relevant information and provid[ing] misleading information . . . peculiarly within the government's knowledge," which "violate[d] their ethical obligations to the court."[95] She closed her opinion by eloquently calling for heightened scrutiny of ostensible national security justifications for curtailing civil liberties when "petty fears and prejudices . . . are so easily aroused."[96]

> As historical precedent [*Korematsu*] stands as a constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees. It stands as a caution that in times of distress the shield of military necessity and

91. *Id.*

92. *Id.* at 246; *see* Yamamoto, Berti, & Tokioka, *supra* note 63 (assessing the relevance of Justice Jackson's warning in the Trump era).

93. Korematsu v. United States, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984); Hirabayashi v. United States, 828 F.2d 591, 608 (9th Cir. 1987); Yasui v. United States, No. 83-151-BE (D. Or. Jan. 26, 1984).

94. *See* Doe v. Gonzales, 500 F. Supp. 2d 379, 414 (S.D.N.Y. 2007).

95. *Korematsu*, 584 F. Supp. at 1420.

96. *Id.*

> national security must not be used to protect governmental actions from close scrutiny and accountability.[97]

Following the *coram nobis* cases and the 1983 report of the congressional Commission on Wartime Relocation and Internment of Civilians,[98] and in response to grassroots and traditional political lobbying, the United States officially acknowledged its wrongdoing, apologized to incarcerated Japanese Americans, and conferred long-overdue reparations through the Civil Liberties Act of 1988.[99] Judges, scholars and journalists came to widely repudiate the Supreme Court's 1943–44 rulings as a cautionary tale.[100] Yet, "some courts and policy makers [continued to rely] on *Korematsu*, either explicitly or implicitly, as precedent for extreme judicial deference" in national security cases.[101]

In a "laudable and long overdue" "formal repudiation of a shameful precedent,"[102] Chief Justice Roberts in 2018 declared in *Trump v. Hawaii* that "*Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—'has no place in law under the Constitution.'"[103] But as detailed in Part V, Roberts's opinion actually denounced only a distorted characterization of *Korematsu,* and it redeployed *Korematsu*'s principle of near-blind judicial deference to the president and its claim of national security.

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97. *Id.*

98. PERSONAL JUSTICE DENIED, *supra* note 74.

99. Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 903 (codified as amended at 50 U.S.C. §§ 4211–20, 4231–39, 4251).

100. *See, e.g.*, Hassan v. City of New York, 804 F.3d 277, 306–07 (3d Cir. 2015) (citing *Korematsu* and urging courts to "apply the same rigorous standards even where national security is at stake"); Doe v. Gonzales, 500 F. Supp. 2d 379, 414–15 (S.D.N.Y. 2007) (labeling *Korematsu* as a wartime failure to safeguard civil liberties and, in contrast, carefully scrutinizing a PATRIOT Act provision); Erwin Chemerinsky, Korematsu v. United States*: A Tragedy Hopefully Never to be Repeated*, 39 PEPP. L. REV. 163, 166 (2011) (arguing *Korematsu* belongs on a list of the worst-ever Supreme Court rulings); Adam Liptak, *Travel Ban Case is Shadowed by One of Supreme Court's Darkest Moments*, N.Y. TIMES (Apr. 16, 2018), https://www.nytimes.com/2018/04/16/us/politics/travel-ban-japanese-internment-trump-supreme-court.html (charactering *Korematsu* as a "grave error").

101. Eric K. Yamamoto & Rachel Oyama, *Masquerading Behind a Façade of National Security*, 128 YALE L.J.F. 688, 689, 709–10 (2019) (citing Reno v. Flores, 507 U.S. 292, 345 n.30 (1993) (Stevens, J., dissenting); Harisiades v. Shaughnessy, 342 U.S. 580, 589 n.16 (1952)).

102. Trump v. Hawaii, 585 U.S. 667, 754 (2018) (Sotomayor, J., dissenting).

103. *Id.* at 710 (majority opinion) (quoting Korematsu v. United States, 323 U.S. 214, 248 (Jackson, J., dissenting)).

Moreover, the Court winked at the government's refusal to produce evidence of bona fide security threats in *Trump*—bolstered by an apparent reliance on the deliberative process privilege—and passively accepted the president's bald assertions of national security to uphold the sweeping Muslim-entry ban.[104] In a scathing realist dissent, Justice Sotomayor charged the *Trump* majority with "blindly accepting the Government's misguided invitation to sanction a discriminatory policy motivated by animosity toward a disfavored group, all in the name of a superficial claim of national security, [thus] redeploy[ing] the same dangerous logic underlying *Korematsu* . . . ."[105]

Acknowledging government officials' penchant for grossly exaggerating or even lying about national security, several federal courts endeavored to keep careful watch over civil liberties in the face of broadly asserted national security claims.[106] Yet even those efforts withered. Lurking in the dark shadows of the American legal process lay the expanding states secrets and deliberative process privileges.

III. THE FRAUDULENT ROOTS AND EXPANDING REACH OF THE STATE SECRETS PRIVILEGE

The expansively cast state secrets and deliberative process privileges, touched upon in the Prologue and Introduction, subvert independent judicial inquiry in national security-civil liberties controversies. The privileges shield from judicial and public view the ostensible factual bases of executive branch claims that national security justifies curtailing peoples' otherwise constitutionally protected liberties. The privileges effectively redeploy *Korematsu*'s dangerous logic of exceeding judicial deference and compel courts to turn a blind eye to the government's abject failure to produce credible facts substantiating its national security claim of "pressing public necessity."[107] As discussed in Part VI, unless reined in, the privileges will likely swallow up civil litigation efforts to hold presidential administrations constitutionally

104. *See id.* at 706–07; *see also infra* notes 378–80 and accompanying text.

105. *Trump*, 585 U.S. at 754 (Sotomayor, J., dissenting).

106. *See Reno*, 507 U.S. at 345 n.30 (Stevens, J., dissenting); *Harisiades*, 342 U.S. at 589 n.16.

107. *See* Korematsu v. United States, 323 U.S. 214, 216 (1944) (finding, effectively, that "pressing public necessity," unsupported by credible evidence, justified the forced removal of thousands of Japanese Americans during World War II).

accountable for security-related transgressions during prolonged periods of national stress.

This Part highlights the dubious genesis of the state secrets privilege: self-interested executive dissembling. It articulates the doctrine's nebulous legal framework, assesses the marked expansion of the privilege in modern cases and unravels the resultant impacts on the judiciary as a check on civil liberties abuses by the political branches. Building upon that legacy, the next Part scrutinizes how the Supreme Court's 2022 cases *Zubaydah* and *Fazaga* enshrined this expansive recasting of the privilege.

A. Manufacturing the State Secrets Privilege: United States v. Reynolds

The state secrets privilege itself originated in a lie. The story began in 1948, when a U.S. Air Force bomber mysteriously crashed in rural Georgia.[108] According to the Air Force, the aircraft took flight to test secret electronic equipment.[109] Civilian passengers were aboard as engineer employees.[110] One of the aircraft's engines caught fire and the plane crashed, killing six crew members and three civilian passengers.[111]

The widows of the deceased civilians filed wrongful death suits against the United States.[112] To obtain vital evidence about the crash, the widows sought discovery of written statements of witness survivors taken immediately after the accident and the Air Force's investigative report, all in the sole possession of the government.[113] The widows did not seek confidential information about tested equipment.[114] Nonetheless, the

108. United States v. Reynolds, 345 U.S. 1, 2–3 (1953). *See generally* Louis Fisher, *The Law: The State Secrets Privilege: From Bush II to Obama*, 46 PRESIDENTIAL STUD. Q. 173 (2016) (reviewing the contested roots of the state secrets privilege).

109. *Reynolds*, 345 U.S. at 3.

110. Fisher, *supra* note 108, at 177.

111. *Reynolds*, 345 U.S. at 3.

112. Brauner v. United States, 10 F.R.D. 468, 469 (E.D. Pa. 1950) (citing Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346, 2671 *et seq.*), *aff'd sub nom.* Reynolds v. United States, 192 F.2d 987 (3d Cir. 1951), *rev'd*, 345 U.S. 1 (1953). The district court consolidated the widows' actions. *Brauner*, 10 F.R.D. at 469.

113. *Brauner*, 10 F.R.D. at 470–71.

114. *See Reynolds*, 345 U.S. at 3 (stating that the widows only requested production of the official accident investigation and statements of the three surviving crew members).

government refused to produce any of the requested documents, claiming privilege.[115]

1. Lower Courts' Watchful Care in Narrowly Construing the Privilege

In ruling on the plaintiffs' motion to compel, U.S. District Court Chief Judge William Kirkpatrick acknowledged the widows' need for the evidence to prove their claims: the widows had "no knowledge of why the accident happened" and, moreover, "[s]o far as such knowledge [was] obtainable, the defendant ha[d] it."[116]

The judge scrutinized the government's privilege claim, originally framed as a privilege against the disclosure of the government's "housekeeping" investigations.[117] The government argued that a broad investigative privilege was needed to prevent a "deterrent effect upon the much desired objective of encouraging uninhibited statements in future inquiry proceedings instituted primarily in the interest of flying safety."[118] That legal process argument conveyed a thinly veiled threat: the courts should not require the government to disclose even highly probative investigative evidence because that would impel it to be less than candid in future investigations. Judge Kirkpatrick flatly rejected the Air Force's attempt to hamstring the judiciary, declaring that the court could "find no recognition in the law of the existence of such a privilege."[119] He ordered production of the documents.[120]

The Eisenhower administration pressed on. The Air Force's Judge Advocate General devised a new strategy, morphing the government's rationale from housekeeping to national security. He crafted what would later become the magic words for invoking the state

115. The government also claimed the plaintiffs did not have "good cause" to require production. *Brauner*, 10 F.R.D. at 469–70.

116. *Id.* at 470.

117. *See id.* at 471–72.

118. *Reynolds*, 192 F.2d at 994 (quoting Formal Claim of Privilege filed by Secretary of Air Force on Aug. 9, 1950, *Brauner*, 10 F.R.D. 468); *see also Brauner*, 10 F.R.D. at 471–72.

119. *Brauner*, 10 F.R.D. at 472.

120. *Id.*

secrets privilege: the requested documents "could not be furnished without seriously hampering *national security*."[121]

Judge Kirkpatrick then ordered the government to produce the requested documents for examination by the court *in camera* to determine "whether the disclosure 'would violate the Government's privilege against disclosure of matters involving the national or public interest.'"[122] When the executive once again refused to comply, Kirkpatrick imposed a stiff discovery sanction, finding the government negligent and entering judgment for the plaintiffs.[123]

As the appellate courts evaluated the government's national security claim, "fears of war with the Soviet Union undoubtedly underlay the then 'present-day standards of wisdom and justice.'"[124] Nonetheless, the Third Circuit, like the district court, scrutinized the government's proffered factual proof for its national security claim. Judge Albert Maris's opinion affirmed the district court's order, presciently worrying that without the court's confidential inquiry into the government's national security claim, "it would be 'but a small step' for the Executive 'to assert a privilege against any disclosure of records merely because they might prove embarrassing to government officers.'"[125]

2. Supreme Court's Deference in Shaping and Operationalizing the Privilege

The Supreme Court reversed, enlivening Judge Maris's warning.[126] Writing for the majority in *United States v. Reynolds*, Chief Justice Frederick Vinson announced that a "privilege which protects military and state secrets" categorically shielded the accident report from discovery.[127] The Court crafted the newly recognized privilege by drawing primarily from English common law, without accounting for the U.S. constitutional separation of powers.[128] According to Vinson, it "may

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121. *Reynolds*, 192 F.2d at 990 (emphasis added).

122. *Id.* at 990–91 (referencing Order filed Sept. 21, 1950, *Brauner*, 10 F.R.D. 468).

123. *Id.* at 991 (referencing Order filed Sept. 21, 1950, *Brauner*, 10 F.R.D. 468).

124. Brief for Professor Barry Siegel as Amicus Curiae Supporting Respondents at 10, FBI v. Fazaga, 595 U.S. 344 (2022) (No. 20-828) (quoting Funk v. United States, 290 U.S. 371, 382 (1933)).

125. *Id.* (quoting *Reynolds*, 192 F.2d at 995).

126. *See* United States v. Reynolds, 345 U.S. 1, 12 (1953).

127. *See id.* at 7–8, 12.

128. *See id.* at 7.

be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged."[129]

The Court then broadly cast what could have been a narrowly tailored privilege. Vinson declined to require even confidential disclosure to the judge to assess the factual foundation of the government's claim of security secrets. 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."[130] Purportedly seeking a compromise, Vinson formulated a loosely contoured test for this newly minted privilege, encapsulated by its vague "reasonable danger" threshold, hollow balancing test, and conspicuous rejection of *in camera* review.[131] The result: an apparently spineless test for the Air Force's claim of national security. Relying solely upon the Air Force's representation (which turned out to be falsified),[132] the Court surmised that there was a "reasonable danger that the accident investigation report would contain references to the secret electronic equipment which was the primary concern of the mission."[133] The bare conclusory assertions in the Air Force Judge Advocate General's affidavit that the report could not be safely disclosed without exposing national security secrets, together with the formal claim of privilege made by the Secretary of the Air Force, sufficed to cut off the widows' access to the report and witness accounts.

As an illusory aside, the Court noted that the widows could pursue alternative available evidence.[134] In so stating, it ignored the quandary noted by the lower courts that all evidence about the origins of the plane crash lay in the government's files. It also ignored the lower courts' determination that there was "nothing to suggest that the electronic equipment, in this case, had any causal connection with the accident" or was part of the discovery request.[135] The Court determined that judges should probe no further. "[E]ven the most compelling necessity cannot

129. *Id.* at 10.
130. *Id.* (emphasis added).
131. *See infra* Section III.B.1 (examining *Reynolds*'*s* three-part legal framework).
132. *See infra* Section III.A.3.
133. *Reynolds*, 345 U.S. at 10.
134. *Id.* at 11.
135. *See id.*

overcome the claim of privilege if the court is ultimately satisfied [without inquiry] that military secrets are at stake."[136]

Unwilling to passively accept the government's unsubstantiated assertion of national security secrets, Justices Hugo Black, Felix Frankfurter, and Robert Jackson dissented, calling for independent judicial inquiry.[137] The justices' dissent embraced Third Circuit Judge Maris's prescriptions and warning.[138]

One week before the district court ruled on the executive branch's "state secrets privilege" claim, the Air Force downgraded the classification of the disputed accident report from "secret" to "restricted"—meaning "for official use only" to preserve "administrative privacy."[139] Yet no one "informed *any* of the three courts reviewing the privilege assertion that the Air Force no longer believed the report implicated national-security concerns."[140]

Instead, the Air Force and Justice Department effectively defrauded the courts and the widows as they pushed the government's states secrets claim at each stage of the litigation. The Supreme Court compounded the deception by rejecting the district court's proposal for *in camera* review of the shielded documents. Without ascertaining whether the documents actually addressed bona fide state secrets—echoing the exceedingly deferential approach of the Black majority in *Korematsu*—Chief Justice Vinson took judicial notice "that this is a time of vigorous preparation for national defense. . . . [N]ewly developing electronic devices . . . must be kept secret if their full military advantage is to be exploited in the national interest."[141]

Still, the Court majority betrayed considerable discomfort with its ruling. In an ironically prophetic aside, the majority warned that judicial "control over the evidence in a case cannot be abdicated to the caprice of executive officers."[142]

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136. *Id.*

137. *See id.* at 12 (Black, Frankfurter, & Jackson, JJ., dissenting).

138. *Id.* (citing Reynolds v. United States, 192 F.2d 987 (3d Cir. 1951), *rev'd*, 345 U.S. 1 (1953)).

139. BARRY SIEGEL, CLAIM OF PRIVILEGE: A MYSTERIOUS PLANE CRASH, A LANDMARK SUPREME COURT CASE, AND THE RISE OF STATE SECRETS 133 (2008).

140. Brief for Professor Barry Siegel, *supra* note 124, at 2.

141. *Reynolds*, 345 at 10.

142. *Id.* at 9–10.

3. Subsequent Unmasking of Government Dissembling

Protecting the confidentiality of military and other state secrets is a legitimate, indeed compelling, executive task, particularly in times of war. Nevertheless, the aftermath of *Reynolds* (decided during supposed peacetime) highlights the risks to an independent judiciary of an evidentiary privilege that compels near-blind judicial deference to the executive branch and its claims of national security privilege. Lies sometimes fester beneath the veil of secrecy.

In 1996, three decades after *Reynolds*, the Air Force fully declassified the 1948 investigation report.[143] Appellate Judge Maris's warning sprung to life. "Instead of state secrets, the report contained an embarrassing array of [ordinary] Air Force negligence."[144] It contained nothing to do with testing of new secret equipment—nothing to do with national security at all.[145]

Scholars have since highlighted the continuing import of Judge Maris's warning. In an amicus brief supporting the surveilled Muslim communities in *Fazaga*, Professor Barry Siegel insightfully cautioned "the *actual* history underlying the assertion of the state-secrets privilege recognized in [*Reynolds*] underscores how an unchecked privilege can allow the Executive Branch to conceal its embarrassing mistakes, among other things."[146] Siegel called upon the Court to protect against falsified national security claims. "Deference assumes a fidelity to the record that was strikingly absent in *Reynolds*. Experience teaches that executive overreach is routine . . . ."[147]

Following these revelations, the *Reynolds* widows petitioned the courts for a writ of error *coram nobis* to rectify the fraud on the Court.[148] Unlike the courts in the *Korematsu*, *Hirabayashi*, and *Yasui coram nobis*

143. Brief for Professor Barry Siegel, *supra* note 124, at 11.

144. *Id.; see also* Barry Siegel, *Judging State Secrets: Who Decides—and How?, in* AFTER SNOWDEN: PRIVACY, SECRECY, AND SECURITY IN THE INFORMATION AGE 141, 145 (Ronald Goldfarb ed., 2015) (detailing some of the specific negligent acts contained within the declassified report).

145. Siegel, *supra* note 144, at 145.

146. Brief for Professor Barry Siegel, *supra* note 124, at 3.

147. *Id.* at 18.

148. Petition for a Writ of Error Coram Nobis to Remedy Fraud upon this Court, *In re* Herring, 539 U.S. 940 (2003) (No. 02-M76); Fisher, *supra* note 108, at 183–85.

cases, however, the courts refused to provide relief.[149] *Reynolds* still stands—not only for the formal birth of the state secrets privilege, but also for enabling government deployment of the privilege to at times perpetrate fraud on civilian litigants and the courts.

B. Morphing the "Evidentiary" Privilege Into a Mandate for Extreme Judicial Deference on the Substantive Issues

In subsequent lower court cases, the state secrets privilege morphed chameleon-like from a somewhat limited privilege in *Reynolds* to an apparent license for government national security excesses. The expansion of the privilege accelerated during the war on terror.

1. *Reynolds* Framework for State Secrets Privilege and Judicial Deference

Reynolds offered a malleable approach for ascertaining state secrets. According to the predominant view, *Reynolds* articulated a three-part framework.[150] The court must first determine whether the government satisfied the initial procedural requirements by formally invoking the privilege.[151]

Second, the court must decide "from all the circumstances of the case, [whether] there is a *reasonable danger* that compulsion of the evidence will expose military matters which, in the interest of national

149. *Compare In re Herring*, 539 U.S. 940 (2003) (denying the *Reynolds* widows' motion for leave to file petition for writ of error coram nobis), *and* Herring v. United States, No. 03-CV-5500-LDD, 2004 WL 2040272 (E.D. Pa. Sept. 10, 2004) (dismissing the *Reynolds* widows' action seeking relief from their post-*Reynolds* settlement agreement due to "fraud upon the court" under Federal Rules of Procedure 60(b)), *aff'd*, 424 F.3d 384 (3d Cir. 2005), *cert. denied*, 547 U.S. 1123 (2006), *with* Hirabayashi v. United States, 828 F.2d 591 (9th Cir. 1987) (granting the writ of error coram nobis because the government's withholding of key information without justification supported a reversal of the conviction under World War II curfew orders), *and* Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984) (granting the writ of error coram nobis because the government's withholding of key information without justification supported a reversal of the conviction under World War II exclusion orders).

150. *See, e.g.*, United States v. Zubaydah, 595 U.S. 195, 205 (2022).

151. The privilege "belongs to the [United States] Government and must be asserted by it; it can neither be claimed nor waived by a private party." United States v. Reynolds, 345 U.S. 1, 7 (1953). To invoke the privilege, the government must make a "formal claim of privilege, lodged by the department which has control over the matter, after actual personal consideration by that officer." *Id.* at 7–8.

security, should not be divulged."[152] Judges have acknowledged the challenge in making this threshold determination. Fourth Circuit Judge Robert B. King observed during the height of the war on terror that this "inquiry is a difficult one, for it pits the judiciary's search for truth against the Executive's duty to maintain the nation's security."[153] If it is uncertain whether there exists a reasonable danger of exposure of a security secret, the *Reynolds* Court developed a limited, if opaque, sliding scale, balancing guide for the lower courts.

> In each case, the showing of necessity which is made will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate. Where there is a strong showing of necessity [for the evidence], the claim of privilege should not be lightly accepted, but even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake.[154]

A court may thus investigate the privilege claim if the claimant makes a strong showing of necessity for the evidence *and* if it is unclear whether state secrets are in fact at stake. But the inquiry stops if there is a "reasonable danger" of exposure of a security secret. The privilege erects an absolute bar to discovery. No showing of "even the most compelling necessity" will suffice.[155]

Frontline judges, however, faced an overwhelming problem—how to make the crucial "reasonable danger" assessment in near darkness. According to the *Reynolds* majority, the "court should not jeopardize the security which the privilege is meant to protect by insisting

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152. *See id.* at 10.

153. El-Masri v. United States, 479 F.3d 296, 304 (4th Cir. 2007).

154. *Reynolds*, 345 U.S. at 11; *see also Zubaydah*, 595 U.S. at 205. In *Zubaydah*, the justices disagreed as to the correct order of this portion of the *Reynolds* framework. *Compare Zubaydah*, 595 U.S. at 205 (majority opinion) (specifying that the extent of judicial inquiry into allegedly privileged material is dependent on the showing of necessity of those materials to the requesting party), *with Zubaydah*, 595 U.S. at 219–21 (Thomas, J., concurring in part and concurring in the judgment) (contending the majority inverted the *Reynolds* test, and that courts should determine the requestor's need for allegedly privileged documents *before* considering the potential involvement of state secrets), *and Zubaydah,* 595 U.S. at 232–34 (Kavanaugh, J., concurring in part) (describing the *Reynolds* test to begin with a threshold inquiry into whether state secrets may be involved, but permitting no further inquiry into the executive's assertion without a strong showing of necessity).

155. *See Reynolds*, 345 U.S. at 11.

upon an examination of the evidence, *even by the judge alone*, in chambers."[156] In other words, the court must simply accept the government's conclusory assertion that disclosure will pose a danger to national security. End of story. The muddled "reasonable danger" test, along with the barrier to *in camera* review, sent an unmistakable signal to judges: you must trust the government and deny discovery access to civil liberties claimants seeking to hold the government accountable for grave transgressions.

In *Korematsu*, the Supreme Court majority relied on General DeWitt's duplicitous and altered Final Report and its manufactured claim of military necessity, despite vehement calls by the dissenters for actual bona fide proof of national security threats.[157] In a related fashion, the wobbly *Reynolds* formulation empowered the government to invoke the state secrets privilege—without verification—to fraudulently shield key documents from the claimants, courts, and public. How could courts determine whether an actual security secret is at risk without confidentially examining the targeted evidence? And how, if it is uncertain whether a security secret is at stake, could claimants show a "compelling necessity" for the evidence—an inordinately high bar, requiring proof of absence of alternatives—when they do not know exactly what that evidence says?

Finally, pursuant to *Reynolds*, if a court determines the information is privileged, it must still resolve the "ultimate question" of the consequences for the litigation at hand.[158] In some instances, following a successful state secrets privilege interposition, federal courts have permitted the claimants to proceed on the merits, albeit without the benefit of probative confidential evidence of government culpability.[159] In most other post-*Reynolds* cases, however, courts dismissed the substantive claims either because claimants lacked other evidentiary proof at the outset or because "the circumstances make clear that sensitive

156. *Id.* at 10 (emphasis added); *see also El-Masri*, 479 F.3d at 306 ("On this point, *Reynolds* could not be more specific . . . .").

157. *See supra* notes 61–92 and accompanying text.

158. *See, e.g.*, *El-Masri*, 479 F.3d at 304.

159. *See, e.g.*, Ellsberg v. Mitchell, 709 F.2d 51 (D.C. Cir. 1983) (reversing the district court's dismissal of all claims, and noting that the result of the state secrets privilege is "simply that the evidence is unavailable . . . and the case will proceed"); Maxwell v. First Nat'l Bank of Md., 143 F.R.D. 590 (D. Md. 1992) (granting the United States's motion for a protective order but noting that dismissal may be warranted), *aff'd*, No. 92-2393, 1993 WL 264547 (4th Cir. 1993).

military (or security) secrets would be so central to the subject matter of the litigation that any attempt to proceed will threaten disclosure of the privileged matters."[160]

In dismissing cases for the latter reason, courts tended to conflate the *Reynolds* evidentiary privilege with the *Totten* bar,[161] a justiciability-like doctrine which broadly precludes litigation in which the "very subject matter" of the case is a state secret.[162] The result—dismissal of plaintiffs' claims for government accountability at the outset. The opaqueness and anti-claimant tilt of *Reynolds* laid fertile ground for continual government efforts to expand the privilege.

2. Early Expansion to Non-Secrets: The Mosaic Theory

With "license to withhold evidence," executive assertions of the state secrets privilege at first increased gradually.[163] For "over two decades following *Reynolds*, the U.S. executive branch rarely asserted the privilege, perhaps in response to the Supreme Court's admonition that the privilege 'is not to be lightly invoked.'"[164] A notable early expansion of the privilege, in both frequency of usage and substantive contours, commenced in the late 1970s.[165]

In a series of pre-9/11 cases, federal courts extended the privilege's reach through the "mosaic theory," ostensibly to meet the

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160. *See El-Masri*, 479 F.3d at 306 (quoting Sterling v. Tenet, 416 F.3d 338, 348 (4th Cir. 2005)); *see also, e.g.*, Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070 (9th Cir. 2010); Kasza v. Browner, 133 F.3d 1159 (9th Cir. 1998); Black v. United States, 62 F.3d 1115 (8th Cir. 1995); Patterson v. FBI, 893 F.2d 595 (3rd Cir. 1990); Guong v. United States, 860 F.2d 1063 (Fed. Cir. 1988); Fitzgerald v. Penthouse Intern., Ltd., 776 F.2d 1236 (4th Cir. 1985); Molerio v. FBI, 749 F.2d 815 (D.C. Cir. 1984); Halkin v. Helms, 598 F.2d 1 (D.C. Cir. 1978) (affirming in part the district court's dismissal of the plaintiffs' claims that were "predicated" on privileged materials).

161. Totten v. United States, 92 U.S. 105 (1876).

162. Matthew Plunkett, Note, *The Transformation of the State Secrets Doctrine Through Conflation of* Reynolds *and* Totten*: The Problems with* Jeppesen *and* El-Masri, 2 U.C. IRVINE L. REV. 809, 813 (2012) (citing Terkel v. AT&T Corp., 441 F. Supp. 2d 899 (N.D. Ill. 2006)). *See generally* D. A. Jeremy Telman, *On the Conflation of the State Secrets Privilege and the Totten Doctrine*, 3 AM. U. NAT'L SEC. L. BRIEF 1 (2012).

163. Brief for Professor Barry Siegel, *supra* note 124, at 12.

164. Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 FORDHAM L. REV. 1931, 1938 (2007) (quoting *Reynolds*, 345 U.S. at 7).

165. "Between 1953 and 1976, there were only eleven reported cases addressing the privilege; between 1977 and 2001 there were fifty-nine reported cases." *Id.* (citing Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1248 (2007) [hereinafter Chesney, *State Secrets*]).

realities of computer technology.[166] The D.C. Circuit Court of Appeals in 1978 observed:

> [T]he business of foreign intelligence gathering in this age of computer technology is more akin to the construction of a mosaic than it is to the management of a cloak and dagger affair. Thousands of bits and pieces of seemingly innocuous information can be analyzed and fitted into place to reveal with startling clarity how the unseen whole must operate.[167]

In 1998, the Ninth Circuit Court of Appeals employed this theory to dismiss government workers' claims for exposure to toxic chemicals mishandled by the U.S. Air Force at a government facility.[168] The court declared that if "seemingly innocuous information is part of a classified mosaic, the state secrets privilege may be invoked to bar its disclosure."[169] Moreover, the court observed that it "cannot order the government to disentangle this information from other classified information."[170]

In practice, the mosaic theory meant that non-secret evidence, too, would be shrouded behind the veil of national security upon the executive branch's broad declaration of "state secrets."[171] Worse, as Professor Siegel pointed out, "the premise of the 'mosaic' theory is inherently speculative because courts are told that to evaluate the secret, they needed to understand an array of information they do not, and cannot, have; naturally, as a court's guesswork increases, so does deference."[172]

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166. *See, e.g.*, Halkin v. Helms, 598 F.2d 1 (D.C. Cir. 1978); Kasza v. Browner, 133 F.3d 1159 (9th Cir. 1998). *See generally* William G. Weaver & Robert M. Pallitto, *State Secrets and Executive Power*, 120 POL. SCI. Q. 85 (2005).

167. *Halkin*, 598 F.2d at 8.

168. *See Kasza*, 133 F.3d at 1159.

169. *Id.* at 1166.

170. *Id.*

171. Weaver & Pallitto, *supra* note 166, at 104.

172. Brief for Professor Barry Siegel, *supra* note 124, at 14 n.8.

3. Significant Contortion Post-9/11 to Effectively Compel Judicial Deference: Fourth Circuit's *El-Masri v. United States*

After 9/11, the executive branch accelerated its efforts to expand the privilege.[173] The executive's reach "hit a high point" in a key Bush-era state secrets case, *El-Masri v. United States*.[174] *El-Masri*, like *Zubaydah*, involved U.S. torture overseas in the investigation of suspected terrorist activity.[175] German citizen Khaled El-Masri sued the U.S. government for violating U.S. and international human rights laws when it abducted and tortured him as a part of its "extraordinary rendition" program.[176] The Fourth Circuit Court of Appeals employed an inflated version of the mosaic test to foreclose entirely El-Masri's claims for government accountability. The court must dismiss El-Masri's claims, Judge Robert King declared, because their very subject matter—unlawful U.S. torture—meant they could not be *litigated* without threatening the disclosure of state secrets.[177]

Executive efforts to expand the state secrets privilege, accommodated by some courts, generated pushback. Spurred by reported government abuses in the war on terror, Congress, the courts, voters, journalists and historians voiced concern, if not alarm, over diminished national security accountability, diminished litigants' rights, suppressed civil liberties and shrinkage of the judicial role.[178] In 2008, civil liberties advocates pushed for the State Secrets Protection Act to prescribe defined contours for the privilege and keep the executive branch in check.[179] The

173. *See, e.g.*, United States v. Zubaydah, 595 U.S. 195, 251 (2022) (Gorsuch, J., dissenting) ("The Government invoked the state secrets privilege only 16 times between 1961 and 1980. Yet it has done so at least 49 times between 2001 and 2021."); Carrie Newton Lyons, *The State Secrets Privilege: Expanding its Scope through Government Misuse*, 11 LEWIS & CLARK L. REV. 99 (2007) (tracing six war on terror state secrets cases to argue the courts have deviated from *Reynolds* in four ways); Weaver & Pallitto, *supra* note 166, at 90 (summarizing the historical explosion of the state secrets privilege). *But see* Chesney, *State Secrets*, *supra* note 165, at 1301–07 (disagreeing with other scholars' arguments that the state secrets privilege evolved in "substantive terms" in the period between 9/11 and 2006).

174. Steven D. Schwinn, *The State Secrets Privilege in the Post-9/11 Era*, 30 PACE L. REV. 778, 822 (2010) (citing El-Masri v. United States, 479 F.3d 296 (4th Cir. 2007)).

175. *See El-Masri*, 479 F.3d at 300.

176. *Id.*

177. *Id.* at 300, 308–11.

178. Brief for Professor Barry Siegel, *supra* note 124, at 12.

179. *See* S. 2533, 110th Cong. (2008). *See generally* Robert M. Chesney, *Legislative Reform of the State Secrets Privilege*, 13 ROGER WILLIAMS U. L. REV. 443 (2008).

bill ultimately died,[180] and the government's continued fervor in asserting the state secrets privilege heightened scholars' criticisms.[181]

Professor Steven D. Schwinn charted the swelling state secrets privilege post-9/11.[182] Nearly a decade after the New York and Washington, D.C. attacks, Schwinn described how the federal government displayed a disturbing shift in its position on the state secrets privilege, highlighted by *El-Masri*. During this turbulent political and economic period, Schwinn observed, the government dramatically expanded the privilege in four discrete dimensions.[183]

First, following 9/11, the Justice Department strategically situated the state secrets privilege in constitutional law rather than common law.[184] In *El-Masri*, it argued the privilege was rooted in the "President's Article II powers 'in the field of foreign relations' and the presumed role that the state secrets privilege played in furthering those powers."[185] No court had *ever* previously associated the state secrets privilege with the President's Article II powers.[186] Yet the Fourth Circuit seemingly accepted the government's novel theory, observing that "[a]lthough the state secrets privilege was developed at common law, it performs a function of constitutional significance, because it allows the executive branch to protect information whose secrecy is necessary to its military and foreign-affairs responsibilities."[187]

The Fourth Circuit's doctrinal shift, Schwinn observed, represented a breathtaking expansion of the executive's powers, at the expense of plaintiffs' interests and the courts' role. It meant that "the state secrets privilege, as a constitutional doctrine, trumps *any* consideration of a plaintiff's interests or need for evidence and crowds out *any* meaningful role for courts."[188] Indeed, "this extraordinary [expansion] means the Government could move for dismissal on the bare assertion

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180. *See* S. 2533, 110th Cong. (2008).
181. Brief for Professor Barry Siegel, *supra* note 124, at 12.
182. *See* Schwinn, *supra* note 174, at 779.
183. *Id.* at 779.
184. *Id.* at 779–80.
185. *Id.* at 820 (quoting Brief of the Appellee at 8, *El-Masri*, 479 F.3d 296 (No. 06-1667)).
186. *Id.* at 820.
187. *El-Masri*, 479 F.3d at 303.
188. Schwinn, *supra* note 174, at 810 (emphasis added).

that the very subject of a suit is a state secret, effectively evading any judicial oversight of the claim."[189]

In the second interrelated realm of expansion, the doctrinal shift minimized the judiciary's role in scrutinizing the government's deployment of the privilege.[190] *Reynolds's* minimalist approach at least expressly "*contemplated* a meaningful role for the judiciary" through its wobbly sliding scale test.[191] *El-Masri* reframed and sharply diminished the judiciary's checks and balances role. It rejected a vision of the "judiciary that possesses a roving writ to ferret out and strike down executive excess."[192] Instead, it formulaically recited the judiciary's obligation to "decide cases and controversies"—while dismissing the controverted case before it.[193] This abdication of the judiciary's role left El-Masri and others bereft of judicial safeguards. In deploying a sharply expanded state secrets privilege, the Fourth Circuit in *El-Masri* prescribed "utmost deference" to the executive branch despite the constitutional liberties at stake.[194]

Third, contravening *Reynolds's* limited balancing test, the government and "some courts have moved toward eliminating consideration of a plaintiff's need [for the information] as part of the state secrets calculus."[195] In *El-Masri*, the Fourth Circuit stated that under *Reynolds*, "*no* attempt is made to balance the need for secrecy of the privileged information against a party's need for the information's disclosure."[196] Justices Thomas's and Alito's partial concurrence in *Zubaydah* also effectively argued for the total elimination of consideration of plaintiffs' need for the evidence through a proposed reformulation of the *Reynolds* framework.[197]

This elimination of claimants from the privilege calculus bears stark consequences. It skews the balance essential in civil liberties-national security litigation—private litigants' constitutional rights and

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189. *Id.* at 822.

190. *See id.*

191. *Id.* at 822–23 (emphasis added). *Reynolds* declared that courts' approach "over the evidence in a case cannot be abdicated to the caprice of executive officers" and attempted to incorporate some basic level of judicial scrutiny in determining whether state secrets were at stake. *Id.* (quoting *Reynolds*, 345 U.S. at 9–10).

192. *El-Masri*, 479 F.3d at 312.

193. *See id.* at 312–13.

194. *See id.* at 305.

195. Schwinn, *supra* note174, at 823.

196. *El-Masri*, 479 F.3d at 306 (emphasis added).

197. *See infra* note 256 and accompanying text.

civil liberties pitted against the government's claims of national security.[198] And at times, as demonstrated by *Korematsu*, the fundamental rights of politically vulnerable U.S. communities are sacrificed to the political interests of presidential administrations, where the government grossly exaggerates or even fabricates its national security claims to justify popular political scapegoating.[199]

Fourth, interweaving the *Reynolds* evidentiary privilege with a justiciability-like doctrine articulated in *Totten*, the government "has argued consistently in the post-9/11 cases that courts should dismiss the cases because their very subject matter are state secrets."[200] Some courts have seemingly concurred, conflating the two doctrines. *El-Masri*, again, is illustrative. There, the Fourth Circuit muddled *Reynolds* and *Totten* to conclude "some matters are so pervaded by state secrets as to be incapable of judicial resolution."[201]

As originally crafted, the *Reynolds* privilege specifically targeted confidential information.[202] It allowed litigants to establish their cases with other non-confidential evidence.[203] The *Totten* doctrine, on the other hand, is "substantially stronger," constituting "an absolute ban on litigation dealing with certain issues or programs, even if non-privileged evidence exists to establish a claim."[204] By the government's reckoning, the *Totten* ban allows the government to evade lawsuits in their entirety. As Schwinn observed, the conflation of *Totten* and *Reynolds* is

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198. *See* Schwinn, *supra* note 174, at 823.

199. *See generally* YAMAMOTO, SHADOW OF KOREMATSU, *supra* note 49.

200. Schwinn, *supra* note 174, at 824–25. The Supreme Court "unanimously held in *Tenet v. Doe* that the *Reynolds* evidentiary privilege and the *Totten* bar are two distinct principles, even if they share some common ground." *Id.* at 826 (citing Tenet v. Doe, 544 U.S. 1, 8–9 (2005)). *See generally* D. A. Jeremy Telman, *Intolerable Abuses: Rendition for Torture and the State Secrets Privilege*, 63 ALA. L. REV. 429 (2012).

201. *El-Masri*, 479 F.3d at 306. Soon after *El-Masri*, early in the Obama administration, the Justice Department sought to carry the government's substantial Fourth Circuit gains to the Ninth Circuit. The Ninth Circuit at first resisted, attempting to disentangle the *Reynolds* privilege and *Totten* bar. *See* Mohamed v. Jeppesen Dataplan, Inc., 563 F.3d 992, 1000–06 (9th Cir. 2009), *amended & superseded by* 579 F.3d 943, *rev'd en banc*, 614 F.3d 1070 (2010). But the Ninth Circuit seemingly retreated upon rehearing, holding the state secrets privilege required dismissal of the lawsuit even while noting "it should be a rare case when the state secrets doctrine leads to dismissal at the outset of a case." *See Mohamed*, 614 F.3d at 1092.

202. *See* United States v. Reynolds, 345 U.S. 1, 10 (1953) (requiring the government establish "there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged").

203. Schwinn, *supra* note 174, at 825.

204. *Id.*

"problematic for three reasons: it lacks a solid basis in law, it confuses evidence and information, and it undermines a plaintiff's fundamental right to access the courts."[205] The ultimate consequence is that under the Fourth Circuit's rendition, the executive branch is empowered to trigger dismissal of civil liberties suits in entirety, *even where probative, non-privileged evidence* substantiates the claims of government abuse. All of this is accomplished "at the simple utterance of the phrase 'state secret'"[206]—precisely what the Supreme Court signaled as appropriate in its 2022 *Fazaga* decision.[207]

IV. ENSHRINING AN EXPANSIVE STATE SECRETS PRIVILEGE AND IMMUNIZING THE GOVERNMENT FOR NATIONAL SECURITY ABUSES—THE SUPREME COURT'S 2022 RULINGS

In 2022, the Supreme Court issued two rare opinions directly addressing the state secrets privilege. The cases, involving government-prescribed torture and extended disruptive surveillance of U.S. religious communities and persons, shed bright public light on the harsh real-life impacts of the state secrets privilege. And they enshrined into U.S. law a distorted post-9/11 incarnation of that privilege with stark consequences for the future of American democracy.

A. United States v. Zubaydah: *Expanding the "State Secrets" Privilege to Information Already Known to the Public to Mask Pivotal Torture Details*

In *United States v. Zubaydah*, the Supreme Court determined that the state secrets privilege thwarted Plaintiff Abu Zubaydah's subpoenas of two former CIA contractor psychologists.[208] Zubaydah sought under-oath statements about the specifics of their participation in his torture years earlier in a CIA detention site widely recognized to be located in Poland.[209] The government claimed the psychologists' statements would

205. *Id.*

206. Brief for Professor Barry Siegel, *supra* note 124, at 23.

207. FBI v. Fazaga, 595 U.S. 344, 359 (2022); *see also* United States v. Zubaydah, 595 U.S. 195, 252–53 (2022) (Gorsuch, J., dissenting) (criticizing the plurality for extending "utmost deference" to the executive's "mere assertion" of the privilege). *See generally infra* Section IV.B.

208. *Zubaydah*, 595 U.S. at 198–99 (majority opinion).

209. *Id.*

risk exposure of a state secret—that Poland was the site of Zubaydah's torture.[210]

In mandating dismissal of Zubaydah's discovery application, the Court foreclosed his access to highly probative evidence about the specifics of Zubaydah's torture to protect this ostensible state secret.[211] Information on the site of the torture, however, was already available to the public. The United States Senate published a 683-page report in 2014 in part about Zubaydah's torture, the European Court of Human Rights concluded in 2015 that the CIA tortured Zubaydah in Poland, the psychologists had already testified about Zubaydah's torture in separate cases, and the CIA even allowed one of the psychologists to author a book on the topic.[212] The Court, Gorsuch wrote in dissent, "should not pretend" it is "safeguard[ing] any secret."[213]

1. Publicly Known "Secrets"

Previewed in the Prologue, the Bush Administration's "war on terror" lies in the foreground of Zubaydah's story. The Pakistani government initially detained Zubaydah in March 2002 on behalf of the CIA, which suspected that Zubaydah was a "senior al Qaeda lieutenant likely to possess knowledge of future attacks against the United States."[214]

Pursuant to CIA directions, psychologists planned and carried out Zubaydah's torture at various black sites.[215] In his dissent, Justice Gorsuch described the impact of this torture. "Six days into his ordeal, Zubaydah was sobbing, twitching, and hyperventilating. During one waterboarding session, Zubaydah became 'completely unresponsive,

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210. *In re* Zayn Al-Abidin Muhammad Husayn, No. 2:17-CV-0171-JLQ, 2018 WL 11150135, at *6 (E.D. Wash. Feb. 21, 2018), *rev'd sub nom.* Husayn v. Mitchell, 938 F.3d 1123 (9th Cir. 2019), *rev'd sub nom. Zubaydah*, 595 U.S. 195.

211. *See Zubaydah*, 595 U.S. at 214 (remanding with instructions to dismiss Zubaydah's application).

212. *Id.* at 240–41 (Gorsuch, J., dissenting) (citing S. REP. NO. 113–288 (2014)); Husayn (Abu Zubaydah) v. Poland, No. 7511/13, Eur. Ct. H.R. at ¶ 234, (2014); Stipulation Regarding Discovery, Salim v. Mitchell, No. 2:15–cv–286 (E.D. Wash. 2015); JAMES E. MITCHELL & BILL HARLOW, ENHANCED INTERROGATION: INSIDE THE MINDS AND MOTIVES OF THE ISLAMIC TERRORISTS TRYING TO DESTROY AMERICA (2016). The CIA itself has never confirmed the location of the detention site. *Zubaydah*, 595 U.S. at 201 (majority opinion).

213. *Zubaydah*, 595 U.S. at 238 (Gorsuch, J., dissenting).

214. *Id.* at 199 (majority opinion). *See generally* Chesney, *No Appetite for Change*, *supra* note 15 (detailing Zubaydah's background story).

215. *See generally* DENBEAUX ET AL., *supra* note 16.

with bubbles rising through his open, full mouth.' He became so compliant that he would prepare for waterboarding at the snap of a finger."[216] The psychologists quickly concluded it was "'highly unlikely' that Zubaydah possessed the information they were seeking about terror attacks."[217] The CIA nevertheless reportedly ordered continued torture.[218]

In December 2002, the CIA transferred Zubaydah from another detention site to the Polish site at issue in the litigation. He remained there until September 2003, at which point he was transferred between various other sites until his final transfer to Guantánamo Bay in 2006.[219] An evidentiary gap existed concerning the details of Zubaydah's torture from December 2002 and September 2003.[220] Through his discovery application, Zubaydah sought to fill that gap.[221]

2. District Court's Utmost Deference to the Government's "Mere Assertion" of a "Secret"

The litigation arose out of the criminal prosecution of Polish nationals involved in Zubaydah's torture between December 2002 and September 2003. Polish prosecutors requested credible information about the torture from the CIA, but the United States refused to turn it over and the case was closed due to lack of evidence.[222] In 2015, the European Court of Human Rights stepped in. It determined that the CIA tortured Zubaydah in Poland and that Poland failed to adequately investigate the human rights violations.[223] In response to international pressure, Poland reopened its investigation.[224] When the United States again refused to provide prosecutors with information about Zubaydah's torture, the

216. *Zubaydah*, 595 U.S. at 239 (Gorsuch, J., dissenting).

217. *Id.* Justice Gorsuch concluded this assessment seems to be correct. *See id.* "Although Zubaydah's relationship with al Qaeda remains the subject of debate today, the authors of the Senate Report found that the CIA's records 'do not support' the suggestion that he was involved in the September 11 attacks." *Id.* (citing S. Rep. No. 113–288, at 410 (2014)).

218. *Id.*

219. *Id.* at 240–41. At the time of publication, Zubaydah remains at Guantánamo Bay. Marjorie Cohn, *Supreme Court Says Torture at CIA Black Site Is a "State Secret"*, TORTURE (Mar. 7, 2022), https://truthout.org/articles/supreme-court-says-torture-at-cia-black-site-is-a-state-secret/?eType=EmailBlastContent&eId=484dda2e-01bf-4607-974f-1764f6efae78.

220. *Zubaydah*, 595 U.S. at 241 (Gorsuch, J., dissenting).

221. *Id*. at 241–42.

222. *Id.* at 201 (majority opinion).

223. *Id.* at 202 (citing Husayn (Abu Zubaydah) v. Poland, No. 7511/13, Eur. Ct. H.R. at ¶ 234, (2014)).

224. *Id.*

prosecutors invited Zubaydah's attorneys to procure evidence to aid the prosecution.[225]

Zubaydah filed an *ex parte* discovery application in the United States District Court for the Eastern District of Washington, seeking to subpoena the CIA-retained psychologists to testify and produce documents about his detention and torture during the specified period.[226] Judge Justin Quackenbush initially granted Zubaydah's request.[227] The U.S. government intervened.[228] The Trump administration filed a motion to quash the subpoenas, asserting the state secrets privilege.[229] In support, the administration submitted a declaration of CIA Director Mike Pompeo.[230] Pompeo stated that any response from the psychologists would necessarily confirm whether Poland cooperated with the CIA in operating a black site within its borders.[231] This confirmation would considerably harm U.S. security relations with other cooperating countries.[232] Moreover, as a matter of process, the government asserted that the court must afford the "utmost deference" to high officials and accept as conclusive the national security facts they proffer.[233] Demonstrating that utmost deference, the district court accepted the CIA's factual contentions and assessments on their face and granted the motion to quash.[234]

Zubaydah's lawyers had stipulated that they would avoid any reference to Poland in the depositions and would accept redacted documents with any identifying indicators about place or people replaced with code names (a method the CIA accepted in other cases).[235] Without reviewing the documents in original or redacted form, Judge

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225. *Id.*

226. *In re* Zayn Al-Abidin Muhammad Husayn, No. 2:17-CV-0171-JLQ, 2018 WL 11150135, at *1 (E.D. Wash. Feb. 21, 2018). Zubaydah filed the application pursuant to title 28, section 1782 of the United States Code, which authorizes district courts to issue orders requiring the production of testimony or documents for use in a proceeding in a foreign tribunal. *See* 28 U.S.C. § 1782.

227. *In re Husayn*, 2018 WL 11150135, at *1.

228. *Id.*

229. *Id.*

230. *Id.* at *5.

231. *See id.* at *6.

232. United States v. Zubaydah, 595 U.S. 195, 207–08 (2022).

233. *See id.* at 246 (Gorsuch, J. dissenting).

234. *See In re Husayn*, 2018 WL 11150135, at 10–11 ("[A]fter review, the court defers to the CIA Director's assertion that the release of such information could reasonably pose a grave risk to national security.").

235. *See id.* at *9.

Quackenbush determined that the "*operational details* concerning the specifics of cooperation with a foreign government, including the roles and identities of foreign individuals" constituted state secrets.[236] The court then determined that the executive's invocation of the state secrets privilege required the dismissal of Zubaydah's application in its entirety.[237]

3. Ninth Circuit Urges Appropriate Accommodation of National Security and Public Transparency

On appeal, the Ninth Circuit panel majority observed the irony of the government's claim that the discovery sought constituted state secrets when the "secrets" were already known to the public.[238] The majority thus determined that three categories of requested information were not covered by the privilege: "the fact that the CIA operated a detention facility in Poland in the early 2000s;" "information about the use of interrogation techniques and conditions of confinement in that detention facility;" and "details of Abu Zubaydah's treatment there."[239] The majority criticized the district court for its "hasty dismissal" that undercut the judiciary's "special burden" of promoting justice by preserving "an open court system" and fostering principles of transparency, accountability, and justice in national security cases.[240] It declared:

> [The lower court] overlooked our "special burden to assure . . . that an appropriate balance is struck between protecting national security matters and preserving an open court system," . . . "[A]s judges, we strive to honor *all* of these principles [of justice, transparency, accountability and national security]," and while "there

236. *Id.* at *10 (emphasis added). Judge Quackenbush found unconvincing the Government's assertion "that merely confirming [that] a detention site was operated in Poland would pose a grave risk to national security" since the location was already "widely reported." *Id.* Nonetheless, he acceded to the government's contention that disclosing other "operational details" could pose such a risk. *Id.* at *9.

237. *Id.* at *10.

238. Husayn v. Mitchell, 938 F.3d 1123, 1132 (9th Cir. 2019), *rev'd sub nom.* United States v. Zubaydah, 595 U.S. 195 (2022) ("[S]ubstantial aspects of the information that the government insists are privileged are basically public knowledge.").

239. *Id.* at 1134.

240. *Id.* at 1137 (quoting Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1081 (9th Cir. 2010)).

> are times when exceptional circumstances create an irreconcilable conflict between them,"—on the limited record before us, this is not one of those times.[241]

4. Justice Breyer Passively Accepts Spurious State Secrets Claims

The Supreme Court rejected the Ninth Circuit's careful inquiry into the government's state secrets claim.[242] Writing for the seven-two majority, Justice Breyer delivered a formulaic recital of the *Reynolds* admonition that "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers."[243] Nevertheless, he embraced a posture of exceeding deference to the president, asserting that courts "must exercise the traditional 'reluctan[ce] to intrude upon the authority of the Executive in military and national security affairs.'"[244] Justice Breyer's nod to the import of careful scrutiny while displaying utmost deference to the executive branch echoed *Korematsu*'s earlier empty announcement of its intended strict scrutiny review of the government's claim of "pressing public necessity."[245]

Breyer framed the issue in *Zubaydah* as "only a narrow evidentiary dispute"[246]—and then proceeded to expand the state secrets privilege and ignore the consequences. He cited no support for his assertion that "information that has entered the *public* domain may nonetheless fall within the scope of the state *secrets* privilege."[247] Instead, without explaining how general information publicly revealed in several formal sources—including investigative reports by Congress and an international tribunal—could be deemed a secret and thus immune from discovery in civil litigation, Breyer recited only a Ninth Circuit statement that cut the other way: In "order to be a 'state secret,' a fact must first be a secret."[248]

241. *Id.* (quoting *Mohamed*, 614 F.3d at 1081).
242. *Zubaydah*, 595 U.S. at 199.
243. *Id.* at 205 (quoting United States v. Reynolds, 345 U.S. 1, 9–10 (1953)).
244. *Id.* (quoting Dep't of Navy v. Egan, 484 U.S. 518, 530 (1988)).
245. *See id.*; Korematsu v. United States, 323 U.S. 214, 216 (1944); *see also supra* notes 61–68 and accompanying text.
246. *See Zubaydah*, 595 U.S. at 205.
247. *Id.* at 207 (emphasis added).
248. *Id.* (quoting Husayn v. Mitchell, 938 F.3d 1123, 1133 (9th Cir. 2019)).

By insisting on the importance of keeping Poland's black site a secret, the majority seemingly erected and knocked down a straw person. Zubaydah's attorneys stressed that they were not interested in further identifying Poland as the site and offered to abide by established confidentiality procedures, such as the use of code names.[249] They only sought details—under oath—about Zubaydah's torture during the specified time period.[250]

Despite the earlier public disclosure of Zubaydah's torture (including the location of the detention site), the Court determined that the government satisfied the *Reynolds* states secrets requirements "*even if that information has already been made public through unofficial sources*."[251] Justice Breyer returned to the district court's off-kilter reasoning that "any response [psychologists] Mitchell and Jessen give to Zubaydah's subpoenas would tend to confirm (or deny) the existence of a CIA detention site in Poland."[252] In an effective reversal of the burden of proof, the majority found "nothing in the evidentiary record that casts doubt on our conclusion that the Government has met its burden" of showing the threatened disclosure of a secret that would "significantly harm national security interests."[253] As justification, Breyer accepted, without interrogating or factually verifying, CIA Director Pompeo's two-part conclusory declaration that the United States' "'sensitive' relationships with other nations are based on mutual trust that the classified existence and nature of the relationship will not be disclosed" and that to "confirm the existence of such a relationship would 'breach' that trust and have 'serious negative consequences'" for national security.[254]

Finally, a plurality of the Court brushed aside approved judicial procedures for protecting purported state secrets. It concluded that *no* procedure could sufficiently protect the secrecy of the CIA black site location.[255]

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249. *See In re* Zayn Al-Abidin Muhammad Husayn, No. 2:17-CV-0171-JLQ, 2018 WL 11150135, at *9 (E.D. Wash. Feb. 21, 2018); *Zubaydah*, 595 U.S at 203.

250. *See In re Husayn*, 2018 WL 11150135, at *8–9.

251. *Zubaydah*, 595 U.S. at 207 (emphasis added).

252. *Id.* at 206.

253. *Id.* at 209.

254. *Id.* at 207–08.

255. *See id.* at 213–14 (plurality opinion); *id.* at 245–46 (Gorsuch, J., dissenting) (discussing the Senate Report's use of code names when referring to various sites where

5. Justice Gorsuch's Scorching Dissent Echoes Cautionary Tales of National Security Dissembling from *Reynolds* and *Korematsu*

Zubaydah headlined the contested expansion of the state secrets privilege nearly eight decades after its emergence. Justice Thomas, joined by Justice Alito, concurred in part. Under Thomas's proposed reordering of the *Reynolds* test, the Court would first assess the plaintiffs' need for the evidence, and then consider the validity of the government's state secrets claim.[256] Justice Kagan concurred in part and dissented in part. She would have permitted the discovery application to move forward because the "District Court, using established methods, can segregate the two kinds of evidence—protecting classified information about location while giving Zubaydah access to probative unclassified information about detention conditions and interrogation methods."[257]

Finally, in a recalibration of the justices' usual political leanings, Justice Gorsuch, joined by Justice Sotomayor, authored a scathing dissent. Gorsuch's dissent linked the swelling state secrets privilege to the judiciary's extreme passivity in civil and human rights suits for government accountability. He chastised the plurality for "abdicating" even the "pretense of an independent judicial inquiry."[258] Echoing the Ninth Circuit's rejection of the secrecy designation of publicly known information, Gorsuch decried manufactured judicial ignorance and its damage to the Court's legitimacy. There "comes a point where we should not be ignorant as judges of what we know to be true as citizens. This case takes us well past that point."[259]

Justice Gorsuch recalled prior judicial warnings about feigned secrecy claims. He harkened back to Judge Maris's admonition in the *Reynolds* Third Circuit opinion. A judicial posture of utmost deference, Maris wrote, enables the executive to avoid production of highly relevant non-secret evidence merely because it "might prove embarrassing to government officers."[260]

Zubaydah was incarcerated, as well as pscyhologists Mitchell and Jessen's previous testimonies about their activities at detention sites using code names).

256. *See id.* at 216 (Thomas, J., concurring in part and concurring in the judgment).

257. *Id.* at 234 (Kagan, J., concurring in part and dissenting in part).

258. *Id.* at 252 (Gorsuch, J., dissenting).

259. *Id.* at 237–38 (citations omitted).

260. Brief for Professor Barry Siegel, *supra* note 124, at 10 (citing Reynolds v. United States, 192 F.2d 987, 995 (3d Cir. 1951)).

Noting the torture site information already in the public eye, Gorsuch called out what was really going on. The government wanted this "lawsuit dismissed because it hope[d] to impede the Polish criminal investigation and avoid (or at least delay) embarrassment for past misdeeds [particularly torture] . . . . But as embarrassing as these facts may be, there is no state secret here."[261] Gorsuch then crafted a stinging reminder of the courts' vital role to check executive lies about matters of national security. The Court's duty "is to the rule of search for truth. We should not let shame obscure our vision."[262]

Justices Gorsuch and Sotomayor cited *Korematsu* as *the* cautionary tale of intolerable abuses that flow from unchecked executive power. They drew a direct parallel between *Reynolds* and *Korematsu*, underscoring the deliberate government dissembling about national security abuses in both watershed cases that lay hidden for decades behind an illusory veil of secrecy.

In *Reynolds*, "a similar story unfolded."[263] As explained in previous sections, in *Reynolds*, Air Force officials and attorneys deceitfully represented that the plane accident investigative report contained state secrets and that the report could not be released even in redacted form without endangering national security.[264] But the military had *already* internally downgraded the report's classification as implicating no state secrets.[265] In *Korematsu*, the Commanding General's Final Report insisted that immediate mass removal and incarceration of Japanese American incarceration was "imperative to national security."[266] But all involved intelligence services and highest-level government officials "*knew* [the report] to be false at the time."[267] For dissenters Gorsuch and Sotomayor, the "[m]ore recent history" of the *Korematsu coram nobis* cases, like *Reynolds*, "reveals that executive

261. *Zubaydah*, 595 U.S. at 266 (Gorsuch, J., dissenting).

262. *Id.*

263. *Id.*

264. *See* Brief for Professor Barry Seigel, *supra* note 124, at 10.

265. *See id.* at 2.

266. *See Zubaydah*, 595 U.S. at 250 (Gorsuch, J., dissenting) (citing Korematsu v. United States, 323 U.S. 214, 235–36 (1944) (Murphy, J., dissenting)); *see also supra* notes 64–68 and accompanying text.

267. *See Zubaydah*, 595 U.S. at 251 (Gorsuch, J., dissenting).

officials can sometimes be tempted to misuse claims of national security to shroud major abuses . . . from public view."[268]

Sharp warnings of intolerable executive branch national security abuses throughout legal history rang loudly in the Court's 2022 *Zubaydah* decision.

B. FBI v. Fazaga: *Foreclosing* In Camera *Review to Enshrine an Expansive State Secrets Privilege*

The Court further enshrined the expanding state secrets privilege in a companion 2022 decision. In *FBI v. Fazaga*, the Court declared that the state secrets privilege effectively trumps the confidentiality regime of the Foreign Intelligence Surveillance Act of 1978 ("FISA").[269] FISA established special evidentiary procedures "for use when the Government wishes to conduct [foreign intelligence] surveillance" to protect both individuals' constitutional liberties and classified security information.[270]

By elevating the common law state secrets privilege above the congressionally established FISA regime, the Court hamstrung the Foreign Intelligence Surveillance Court ("FISC") (and federal courts generally) in performing authorized *in camera* reviews to determine the validity of the CIA's or FBI's state secrets claims—the method for separating confidential information from unprotected evidence that Justice Kagan cited in her *Zubaydah* concurrence.[271] After *Fazaga*, the FISC and other federal courts employing the Federal Rules of Civil Procedure appear to be bound to blindly accept as conclusive the government's factual contentions relating to the privilege.[272]

268. *Id.* at 250 (citing *Korematsu*, 323 U.S. 214). Gorsuch also observed that only decades later the executive branch acknowledged this, citing Acting Solicitor General Neal Katyal's 2011 Confession of Error and implicating the findings of the *Korematsu* and *Hirabayashi coram nobis* cases. *Id.* at 251 (citing Neal Katyal, *Confessions of Error: The Solicitor General's Mistakes During the Japanese-American Internment Cases*, U.S. DEPT. OF JUSTICE ARCHIVES (May 20, 2011)).

269. FBI v. Fazaga, 595 U.S. 344, 348 (2022).

270. *Id.* at 348.

271. *See Zubaydah*, 595 U.S. at 234–37 (Kagan, J., dissenting in part).

272. *See infra* notes 318–24 and accompanying text.

1. The FBI's Warrantless Electronic Surveillance of Americans

As mentioned in the Prologue, *Fazaga* arose from a dystopian story of prolonged warrantless electronic surveillance of Americans and disruption of community life based on religious affiliation.[273] In the wake of 9/11, the Bush Administration, through the FBI, conducted sweeping investigations of Muslim-American religious communities.[274] To gather information at scale, the FBI and other law enforcement agencies recruited over 15,000 informants.[275] They also pushed informants to blackmail other Americans into becoming informants through the threat of exposing personal information, "like an affair or someone being gay."[276]

Craig Monteilh became one such informant. In 1986, after he was caught stealing from drug dealers, the U.S. Drug Enforcement Agency gave Monteilh an ultimatum: "Go to prison, or become an informant."[277] Monteilh chose the latter, "launching a career as a professional snitch that lasted more than two decades."[278]

In 2006, the FBI directed Monteilh to join Operation Flex.[279] Monteilh posed as a Muslim convert named Farouk Aziz and "spent the next 18 months secretly recording conversations with unsuspecting Muslims and providing intelligence back to the FBI about scores of men and women whose only apparent transgression was practicing their religion."[280] At the FBI's direction, Monteilh targeted ten mosques in Orange County and befriended Muslim Americans under the pretext of offering services as a fitness instructor, including American citizens

273. *See supra* Prologue.

274. *See, e.g.*, Saher Khan & Vignesh Ramachandran, *Post-9/11 Surveillance Has Left a Generation of Muslim Americans in a Shadow of Distrust and Fsear*, PBS (Sept. 16, 2021, 4:56 PM), https://www.pbs.org/newshour/nation/post-9-11-surveillance-has-left-a-generation-of-muslim-americans-in-a-shadow-of-distrust-and-fear. *Cf.* USA PATRIOT Act, Pub. L. 107–56 (expanding permissible government surveillance in the wake of 9/11).

275. Aaronson, *supra* note 30.

276. Harris, *The Ex-FBI Informant*, *supra* note 32.

277. Aaronson, *supra* note 30.

278. *Id.*

279. *Id.*

280. *See id.*

Yassir Fazaga and Ali Malik and lawful permanent resident Yasser AbdelRahim.[281]

Unbeknown to his new "friends," who invited him into their places of worship, businesses, and homes, Monteilh secretly recorded their conversations and regularly left government recording devices behind in mosque rooms and offices.[282] Monteilh gathered thousands of hours of audio recordings and hundreds of hours of video recordings inside homes, mosques, and other private locations, as well as hundreds of phone numbers and thousands of email addresses of Muslim Americans.[283]

Monteilh discovered no national security threats in the surveilled communities.[284] In 2008, after mosque members filed a restraining order against Monteilh and reported him to the FBI for repeatedly inquiring about violent *jihad* and discussing access to weapons, Monteilh "blew the whistle" on Operation Flex, shocking Muslim American communities nationwide.[285]

2. District Court Displays "Utmost Deference" to the Executive by Dismissing Government Accountability Class Action

In 2011, Fazaga, Malik, and AbdelRahim filed a class action suit in the United States District Court for the Central District of California.[286] They aimed to hold the FBI accountable for warrantless, personally intrusive surveillance and traumatic religious community harassment, so that "this will never happen again."[287] The *Fazaga* plaintiffs maintained

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281. Harris, *What It's Like to Worship*, *supra* note 36; Lawrence Hurley, *U.S. Supreme Court Rules for FBI in Muslim Surveillance Dispute*, REUTERS (Mar. 4, 2022), https://www.reuters.com/world/us/us-supreme-court-rules-fbi-muslim-surveillance-dispute-2022-03-04/. Fazaga has lived in the United States for over 30 years and Malik was born and raised in Orange County. Brief for the Respondents at 7–8, FBI v. Fazaga, 595 U.S. 344 (2022) (No. 20-828). AbdelRahim is a lawful permanent resident born in Egypt. *Id.* at 8.

282. Harris, *What It's Like to Worship*, *supra* note 36.

283. FBI v. Fazaga, 595 U.S. 344, 351 (2022).

284. Harris, *What It's Like to Worship*, *supra* note 36.

285. Aaronson, *supra* note 30.

286. Fazaga v. FBI, 884 F. Supp. 2d 1022 (C.D. Cal. 2012).

287. *See* Harris, *What It's Like to Worship*, *supra* note 36. *Cf.* Transcript of Arguments on Coram Nobis Petition, Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984), *as reprinted in* PETER IRONS, JUSTICE DELAYED: THE RECORD OF THE JAPANESE AMERICAN INTERNMENT CASES 220–21 (Peter Irons ed.,1989) ("I would like to see the government admit that they were wrong and do something about it so this will never happen again to any American citizen of any race, creed, or color.").

that the FBI targeted them and their communities without cause five years after 9/11 because of their religion in violation of their civil liberties under the U.S. Constitution, federal statutes, and California law.[288] They requested court-ordered destruction or return of all personal information illegally obtained by the FBI, as well as compensation for the disruption and damage to their religious communities.[289]

Sidestepping the merits, the FBI invoked an expansively framed state secrets privilege.[290] It acknowledged Monteilh's service as an FBI informant but refused to produce recordings or disclose essential details about Operation Flex and Monteilh's activities in the targeted Muslim communities.[291] Those details, it contended, contained "highly sensitive information concerning counterterrorism matters that if disclosed reasonably could be expected to cause significant harm to national security."[292] In particular, the FBI maintained that the state secrets privilege prevented disclosure of three categories of information related to Operation Flex: (1) the identity of subjects of the surveillance; (2) the reasons for the FBI's surveillance of identified persons; and (3) the FBI's sources of intelligence information and counterterrorism methods.[293] The agency supported its state secrets claim with a classified declaration of its Assistant Director Mark F. Giuliano, a classified supplemental memorandum and a declaration of Obama administration Attorney General Eric H. Holder.[294]

The government also moved to dismiss the plaintiffs' religious discrimination claims in their entirety, arguing that dismissal was necessary because any litigation would risk disclosure of state secrets.[295] At the time of the motion, the plaintiffs had not made any discovery requests, and the plaintiffs' lawyers had stipulated they *did not need* privileged evidence to prove their civil liberties claims.[296]

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288. The plaintiffs argued the surveillance violated the First Amendment Establishment Clause, First Amendment Free Exercise Clause, Fourth Amendment, Equal Protection Clause, the Religious Freedom Restoration Act, the Privacy Act, FISA, and tort law under the Federal Tort Claims Act. *Fazaga*, 395 U.S. at 351.

289. *Fazaga*, 884 F. Supp. 2d at 1034.

290. *See id.* at 1041.

291. *Id.* at 1030.

292. *Id.*

293. *Id.* at 1041.

294. *Id.* at 1029.

295. *Id.* at 1029, 1033.

296. *Id.* at 1029, 1046.

Fazaga, Malik and AbdelRahim, like Zubaydah, raised the specter of *Korematsu*.[297] They argued that dismissal based on the state secrets privilege at this stage of the litigation would foreclose their civil liberties claims entirely and countenance unconstrained executive branch power.[298] Informed by *Korematsu* and its *coram nobis* revelations, as well as their experiences as members of politically vulnerable groups, the plaintiffs warned that the court's expansive deployment of the privilege would permit "any practice, no matter how abusive, [to] be immunized from legal challenge by being labeled as 'counterterrorism' and 'state secrets.'"[299]

Without reviewing the purportedly secret evidence, District Court Judge Cormac J. Carney granted the Justice Department's motion and dismissed the plaintiffs' suit in its entirety.[300] Carney rejected the plaintiffs' contention that FISA displaced the state secrets privilege. In other words, the FISA-prescribed procedures for judges' scrutiny of confidential information, including *in camera* and *ex parte* review, did not displace the privilege's more severe absolute bar to discovery.[301] He concluded that the privilege applied in this case and that its invocation required wholesale dismissal of nearly all claims, regardless of whether the plaintiffs might prove them through other evidence.[302]

Judge Carney expressly rejected the pertinence of *Korematsu*, declaring that he did not act merely as a "rubber stamp" on abusive government actions.[303] Instead, Carney declared, he "engaged in rigorous judicial scrutiny of the Government's *assertion of privilege* and thoroughly reviewed the public and classified filings with a skeptical eye."[304] But Carney ruled entirely and unconditionally on the facts framed and presented in the FBI's declarations and memorandum—*not* on a review of the contested documents or recordings, or any other pertinent evidence.[305] Hence the plaintiffs' evoking of *Korematsu*.

297. *See id.* at 1049.

298. *Id.*

299. *Id.*

300. *Id.*

301. *See id.* at 1037–39.

302. *See id.* at 1049. The district court dismissed all of the plaintiffs' claims except one based on the state secrets privilege. *Id.* It dismissed the FISA claim on sovereign immunity grounds—otherwise, the judge would have likely dismissed that claim, too, on state secrets grounds. *See id.* at 1029 n.1.

303. *Id.* at 1049.

304. *Id.* (emphasis added).

305. *See id.*

3. Ninth Circuit Acknowledges the Congressionally Prescribed FISA Procedures Mandate of *In Camera* Review Versus Dismissal

The Ninth Circuit reversed the district court's dismissal in part, holding that FISA displaced the common law state secrets privilege.[306] Writing for the panel, Judge Marsha S. Berzon identified the privilege's common law roots and operation "in the absence of an applicable Act of Congress."[307] The Ninth Circuit panel, however, determined that FISA's enactment in 1978 speaks "directly to the question otherwise answered" by the common law privilege and that the state secrets privilege no longer controls courts' handling of materials "relating to electronic surveillance."[308]

In reviewing FISA's legislative history, Berzon noted that "FISA was enacted in response to 'revelations that warrantless electronic surveillance in the name of national security ha[d] been seriously abused.'"[309] Indeed, the Church Committee, a highly publicized 1970s U.S. Senate task force, conducted an in-depth investigation of unlawful federal government surveillance and exposed "'a massive record of intelligence abuses over the years,' in which 'the Government ha[d] collected, and then used improperly, huge amounts of information about the private lives, political beliefs and associations of numerous Americans.'"[310] The Committee concluded that "these abuses had 'undermined the constitutional rights of citizens'" and the "checks and balances designed by the framers of the Constitution to assure accountability."[311] It made recommendations for significant legislative and judicial reforms, including *in camera* judicial review to foster security while promoting fairness.[312] A 2019 order by FISC Chief Judge Rosemary Collyer, described below, identified the same serious present-day pattern of national security abuses.[313]

306. Fazaga v. FBI, 916 F.3d 1202, 1230–34, 1254 (9th Cir. 2020).
307. *Id.* at 1230 (quoting City of Milwaukee v. Illinois, 451 U.S. 304, 313 (1981)).
308. *Id.* at 1230–31 (second quotation quoting 50 U.S.C. § 1806(f)).
309. *Id.* at 1233 (quoting S. REP. NO. 95-604, pt. 1, at 7 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 3904, 3908).
310. *Id.* (quoting S. REP. NO. 94-755, at 290 (1976)).
311. *Id.* (quoting S. REP. NO. 94-755, at 289).
312. *Id.* (citing S. REP. NO. 94-755, at 289, 337).
313. *See infra* Section IV.B.5.

Judge Berzon reiterated that Congress acted in direct response to these revelations of widespread civil liberties violations, "striking a careful balance between assuring the national security and protecting against electronic surveillance abuse."[314] The Ninth Circuit also rejected the district court's sweeping dismissal of the plaintiffs' claims because it undermined Congress's goal of "curb[ing] the practice by which the Executive Branch" makes "its own *unilateral* determination that national security justifies" warrantless surveillance.[315]

4. Unanimous Supreme Court Elides FISA Legislation and Enshrines an Expansive Common Law Privilege

The Supreme Court in *Fazaga* reversed, extending the boundaries of the already expansive state secrets common law privilege.[316] Justice Alito's unanimous opinion narrowly addressed whether section 1806(f) of FISA displaced the "longstanding" state secrets privilege.[317] The Court held it did not.[318] Yet, in doing so, the Court cast aside the FBI's long history of surveillance abuses, national security dissembling, and the disruptive impacts of unfounded surveillance of Fazaga, Malik, and AbdelRahim and their religious communities.

Ignoring context, the Court engaged in a formalist two-part displacement analysis.[319] First, it determined that the "text of FISA weighs heavily against [the plaintiffs'] displacement argument" because "FISA makes no [express] reference to the state secrets privilege."[320] Second, the Court determined that "nothing about the operation of [section 1806(f)] is at all incompatible with the state secrets privilege" because the inquiries required by the privilege and section 1806(f) are "fundamentally different," the relief prescribed differs, and the procedural structures are distinct.[321] The Court concluded that the

314. *Fazaga*, 916 F.3d at 1233–34 (citing H.R. REP. NO. 95-1283 pt. 1, at 21 (1978)).

315. *Id.* at 1237 (emphasis added) (quoting S. REP. NO. 95-604 pt. 1, at 8 (1978)).

316. *See* FBI v. Fazaga, 595 U.S. 344, 355 (2022).

317. *Id.* at 347, 359 (emphasizing the Court did not decide whether the government's evidence is indeed privileged).

318. *Id.* at 359.

319. *See id.* at 355–59.

320. *Id.* at 355.

321. *Id.* at 356. The Court noted distinctions between the state secrets privilege and FISA with differential effects on government accountability, the judiciary's separation of powers role and litigants' rights. *Id.* For example, the most expansive interpretation of

common law privilege survived FISA's enactment and that the two could operate in tandem.[322]

Under *Fazaga*, the state secrets privilege not only survived. It expanded. The Court ignored Congress' express intent that the federal courts guard against pervasive abusive surveillance practices through mandated procedural safeguards, stretching the privilege far beyond its common law roots.[323] As a result, when the government invokes the state secrets privilege, the federal courts—not only the Foreign Intelligence Surveillance Court—are strongly discouraged (if not banned) from employing FISA-prescribed *in camera* review procedures to confidentially determine whether purportedly secret information actually constitutes a secret.[324]

Moreover, once a court passively acquiesces to the government's secrecy contention, *Fazaga* instructs the court to dismiss the lawsuit's substantive claims in their entirety when the "case's very subject matter is secret,"[325] preventing ventilation of serious charges of security law violations and civil liberties transgressions—even where the plaintiffs may possess non-secret evidence proving their claims. This instruction to dismiss emerges from an unacknowledged conflation of the privilege's protection of ostensibly secret *evidence* (allowing the claimant to proceed with other evidence) and the vague *Totten* justiciability bar that requires dismissal of an entire suit if a secret forms the subject matter of the litigation.[326]

Reynolds (and the related *Totten* bar) sometimes authorized dismissal of all claims at the pleadings stage, as the district court ordered in *Fazaga*, whereas FISA never permits such dismissal at the pleadings stage. *Id.* at 357. In addition, the state secrets privilege, unlike section 1806(f), "may sometimes preclude even *in camera*, *ex parte* review of the relevant evidence." *Id* at 357–58.

322. *See id.* at 359.

323. *See id.*

324. Professor Robert Chesney points out that the Court's holding seems to render FISA's section 106(f) procedural protections superfluous. Chesney, *No Appetite for Change*, *supra* note 15, at 199–200.

325. *Fazaga*, 345 U.S. at 358–59.

326. See *supra* notes 200–07 and accompanying text for a discussion of the *Totten* bar and its conflation with the state secrets privilege. The Court remanded to the lower courts to determine whether state secrets are indeed involved and whether dismissal of the entire suit is warranted based on those state secrets, observing that dismissal is appropriate if "the cases's 'very subject matter is a secret.'" *Fazaga*, 395 U.S. at 357. The case on remand is now pending at the Ninth Circuit. *See* Fazaga v. FBI, No. 12-56867 (9th Cir. 2023).

5. Pervasive National Security Dissembling Concealing Illegal Surveillance of U.S. Citizens: A Look Behind the FISC Confidentiality Curtain

The significance of the Court's *Fazaga* ruling is further illuminated by a 2019 order from the United States Federal Intelligence Surveillance Court and a follow-up investigation revealing pervasive national security dissembling in government surveillance applications.[327] While the *Fazaga* plaintiffs litigated their claims in the lower courts, in a separate case, FISC Chief Judge Rosemary Collyer issued an extraordinary order calling out U.S. intelligence agencies for fraudulently procuring warrants for extended intrusive surveillance of U.S. persons.[328]

Chief Judge Collyer had initially approved the FBI's application for authorization to electronically surveil former Trump aide Carter Page.[329] Collyer did so without a hearing based on the FBI's certification that surveillance was necessary to investigate whether the Trump campaign colluded with Russia during the 2016 presidential election.[330] In support of its initial and renewal applications, the FBI swore that it met the strict statutory requirements of FISA, the FISC Rules of Procedure,[331] and the FBI's own internal policy mandating that submitted documents contain all material facts and be "scrupulously accurate."[332]

An audit by the U.S. Office of Inspector General ("OIG") revealed that the FBI deliberately misrepresented significant facts and withheld key security information detrimental to its Carter Page applications.[333] The applications contained seventeen substantial inaccuracies and omissions crafted to wrongfully secure judicial approval.[334] During the drafting of the final renewal application, for

327. *See* Order In Re Accuracy Concerns Regarding FBI Matters Submitted to the FISC, No. 19-02 (FISA Ct. Dec. 17, 2019), https://www.fisc.uscourts.gov/sites/default/files/MIsc%2019%2002%20191217.pdf.

328. *See id.*

329. OFF. OF INSPECTOR GEN., DEP'T OF JUST., REVIEW OF FOUR FISA APPLICATIONS AND OTHER ASPECTS OF THE FBI'S CROSSFIRE HURRICANE INVESTIGATION (Dec. 9, 2019), at 156 [hereinafter OIG REPORT].

330. *Id.* at 153–54, 156.

331. U.S. FOREIGN INTELL. SURVEILLANCE CT. R. P. 13(a) (requiring the government to immediately notify the court about a submission's misstatement or omission of material).

332. *See* OIG REPORT, *supra* note 329, at 39–43 (detailing the FBI's procedures designed to prevent constitutional violations).

333. *Id.* at 413.

334. *Id.*

example, an Office of General Counsel ("OGC") attorney blatantly altered the text of a CIA email to suppress key exonerating facts about Page's communications with Russian agents.[335] The court's final order granting the FBI permission to spy on a U.S. citizen without careful scrutiny, it turns out, had hinged on deliberately and crucially altered evidence.[336]

In an eviscerating public order from the typically secretive and temperamentally restrained court,[337] FISC Chief Judge Collyer publicly slammed the FBI for its deliberate misrepresentations. She declared that "'[c]andor is fundamental' for the FISC to correctly determine whether there is probable cause to conduct surveillance and, thus, for the court to 'provide an external check on executive branch decisions'" and "protect the Fourth Amendment rights of U.S. persons" against intrusive government surveillance.[338] Chief Judge Collyer sharply contrasted this democratic imperative with the FBI's blatant misconduct:

> The FBI's handling of the Carter Page applications . . . was antithetical to th[is] heightened duty of candor . . . . The FISC expects the government to provide complete and accurate information in *every* filing with the Court. Without it, the FISC cannot properly *ensure that the government conducts electronic surveillance for foreign intelligence purposes only when there is a sufficient factual basis*."[339]

Collyer excoriated the OGC Attorney, criticizing him for engaging in "conduct that apparently was *intended to mislead* the FBI agent who ultimately swore to the facts in that application."[340]

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335. *Id.* at 254–56.

336. *See id.* at 254–56, 413.

337. Charlie Savage, *Court Orders F.B.I. to Fix National Security Wiretaps After Damning Report*, N.Y. TIMES (Dec. 17, 2019), https://www.nytimes.com/2019/12/17/us/politics/fisa-court-order-fbi-surveillance.html?smid=url-share.

338. Order In Re Accuracy Concerns Regarding FBI Matters Submitted to the FISC, No. 19-02, at 2 (FISA Ct. Dec. 17, 2019) (first quoting Memorandum Opinion & Order at 59, No. [REDACTED] (FISA Ct. Nov. 6, 2015), https://repository.library.georgetown.edu/bitstream/handle/10822/1052707/gid_c_00121.pdf?sequence=1&isAllowed=y; and then quoting Order & Memorandum Opinion at 14, No. [REDACTED] (FISA Ct. Apr. 3, 2007), https://repository.library.georgetown.edu/bitstream/handle/10822/1052774/gid_c_00012.pdf?sequence=1&isAllowed=y [https://perma.cc/G5QV-R8U2]).

339. *Id.* at 3 (second emphasis added).

340. *Id.* (emphasis added).

Most significant, according to Chief Judge Collyer, the "frequency with which representations made by FBI personnel turned out to be unsupported or contradicted by the information in their possession, and with which they withheld information detrimental their case, call[ed] into question" the legitimacy of *all* FBI applications.[341] Collyer demanded that the FBI explain why *any* of its future applications should be viewed as reliable.[342] Confirming the Chief Judge's sweeping distrust of the FBI's factual declarations on national security, the OIG's subsequent audit of nearly every FISA application submitted by the FBI to the FISC from 2015 to 2020 revealed an astonishing array of evidentiary gaps and deliberate misrepresentations about national security—tainting at least 183 applications.[343]

Called to account, FBI Director Christopher Wray acknowledged these practices and offered procedural fixes to end the agency's pattern of misconduct.[344] Internal corrective actions were a necessary first step toward safeguarding the fundamental rights of U.S. persons targeted by FISA surveillance. They did not, however, generate structural changes within FBI operations designed to prevent continued violations of Americans' civil liberties. Without an external judicial check on asserted government-proffered facts, the implementation of administrative policy changes left the door ajar for future government transgressions.

Chief Judge Collyer's order and the subsequent audit exposed pervasive FBI dissembling and highlighted a pressing need for active judicial superintendence over civil liberties to constrain governmental power abuses. *Zubaydah* and *Fazaga*, though, cut decisively the other way. Together, the 2022 Supreme Court cases enshrined an increasingly expansive state secrets privilege with minimal assurances of government transparency and accountability that—along with the far-reaching

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341. *See id.*

342. *Id.* at 4.

343. OFF. OF INSPECTOR GEN., U.S. DEP'T OF JUST., No. 21-129, AUDIT OF THE FEDERAL BUREAU OF INVESTIGATION'S EXECUTION OF ITS WOODS PROCEDURES FOR APPLICATIONS FILED WITH THE FOREIGN INTELLIGENCE SURVEILLANCE COURT RELATING TO U.S. PERSONS, at i-ii (Sept. 2021) [hereinafter OIG AUDIT].

344. *See generally* Letter from Christopher Wray, Dir., Fed. Bureau of Investigation, to Michael Horowitz, Inspector Gen., U.S. Dep't of Just. (Dec. 6, 2019), *in* OIG REPORT, *supra* note 329, app. 2 at 424–34. These "corrective actions" included an added checklist for FISA Request forms, increased participation from FBI attorneys and a revised training program of the new FISA protocols. *Id.*

deliberative process privilege, described below—bears the potential for swallowing up American litigants' civil liberties claims.

V. TRUMP ADMINISTRATION'S MARKED EXPANSION OF DELIBERATIVE PROCESS PRIVILEGE

A second expansive executive privilege threatens independent judicial inquiry in national security-related cases in tandem with the state secrets privilege. The deliberative process privilege aims to "prevent injury to the quality of agency decisions" and "encourage free exchange of ideas during the process of deliberation and policy making."[345]

A. The Deliberative Process Privilege

President Dwight Eisenhower is credited with formulating the rationale for the deliberative process privilege.[346] Amid Senator Joseph McCarthy's communist "witch-hunts" in the early 1950s, Eisenhower forbade his subordinates from complying with McCarthy's threatening demands for testimony.[347] Eisenhower declared that "it is essential to efficient and effective administration that employees of the Executive Branch be in a position to be completely candid in advising with each other on official matters."[348] Hence, he concluded, "it is not in the public interest that any of their conversations or communications, or any documents or reproductions, concerning such advice be disclosed."[349]

A U.S. federal court in *Kaiser Aluminum & Chemical Corp. v. United States*[350] agreed, formally recognizing the deliberative process

345. 26A CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5680 (1992) (quoting 2 JACK WEINSTEIN & MARGARET BERGER, WEINSTEIN'S EVIDENCE 509–84 (1980) ("free exchange"); and MURL A. LARKIN, FEDERAL TESTIMONIAL PRIVILEGES 5–18 (1986) ("prevent injury")). A third, lesser-employed executive privilege, the presidential communications privilege, protects from civil discovery the president's confidential communications with advisors. *See generally* United States v. Nixon, 418 U.S. 683 (1974). Analysis of that privilege is beyond the scope of this article.

346. Gerald Wetlaufer, *Justifying Secrecy: An Objection to the General Deliberative Process Privilege*, 65 IND. L.J. 845, 865 (1990).

347. *Id.*

348. *Id.* at 866 (quoting Letter to the Secretary of Defense, PUB. PAPERS 483 (May 17, 1954)).

349. *Id.* (quoting Letter to the Secretary of Defense, PUB. PAPERS 483–84 (May 17, 1954)).

350. 157 F. Supp. 939 (Ct. Cl. 1958).

privilege for the first time in 1958.[351] After that, government assertions of the privilege "spread like wildfire."[352]

Courts initially cast the privilege within defined boundaries, protecting only communications that were pre-decisional, deliberative, and among high level officials.[353] Furthermore, the protection was qualified. The party seeking disclosure could still confidentially obtain protected material if it demonstrated that "its need for the information outweigh[ed] the regulatory interest in preventing disclosure."[354]

From the outset, legal scholars doubted the legitimacy of the privilege.[355] Nevertheless, maneuvering officials and acquiescent courts entrenched the privilege.[356] Steady "doctrinal creep" followed, loosening the pre-decisional deliberations requirement, which blurred the line between high-level policymaking and after-the-fact information

351. *Id.* at 869 (citing *Kaiser Aluminum & Chem. Corp.*, 157 F. Supp. 939).

352. *Id.* at 867.

353. *See, e.g.*, FTC v. Warner Commc'ns Inc., 742 F.2d 1156, 1161 (9th Cir. 1984) (identifying the "predecisional" and "deliberative" requirements); Resol. Tr. Corp. v. Diamond, 773 F. Supp. 597, 603–04 (S.D.N.Y. 1991) ("[T]he deliberative-process privilege must be personally asserted by the head of the agency or by a designated high-ranking subordinate."). The U.S. Supreme Court recently defined documents as "'predecisional' if they were generated before the agency's final decision on the matter," and as "'deliberative' if they were prepared to help the agency formulate its position." U.S. Fish & Wildlife Serv. v. Sierra Club, 592 U.S. 261, 268 (2021). "There is considerable overlap between these two prongs because a document cannot be deliberative unless it is predecisional." *Sierra Club*, 592 U.S. at 268 (citing N.L.R.B. v. Sears, Roebuck & Co., 421 U.S. 132, 150–52 (1975); Renegotiation Bd. v. Grumman Aircraft Eng'g Corp., 421 U.S. 168, 184–86, 190 (1975)).

354. Russell L. Weaver & James T.R. Jones, *The Deliberative Process Privilege,* 54 MO. L. REV. 279, 315 (1990). Lower courts developed five factors for this balancing test:

> (1) the relevance of the documents to the litigation; (2) the availability of other evidence that would serve the same purpose as the documents sought; (3) the government's role in the litigation; (4) the seriousness of the litigation and the issues involved in it; and (5) the degree to which disclosure of the documents sought would tend to chill future deliberations within government agencies, that is, would hinder frank and independent discussion about governmental policies and decisions.

K.L. v. Edgar, 964 F. Supp. 1206, 1209 (N.D. Ill. 1997); *see also, e.g.*, Exp.-Imp. Bank v. Asia Pulp & Paper, 232 F.R.D. 103, 109 (S.D.N.Y 2005).

355. *See generally* Edward J. Imwinkelried, *The Government's Increasing Reliance on—and Abuse of—The Deliberate Process Evidentiary Privilege: "[T]he Last Will Be First,"* 83 MISS. L.J. 509, 517–23 (2014) (summarizing early criticisms of the deliberative process rationale).

356. *Id.* at 523–24.

gathering.[357] In practice, some judges effectively discarded litigants' competing interests and operated as if the privilege was virtually absolute.[358]

In accordance with this trend, when the Trump administration relied upon a broadened version of the deliberative process privilege in 2017, a deferential Supreme Court bowed to the president and tacitly embraced its expansion.[359]

B. Expanding the Deliberative Process Privilege to Hide Post Hoc "Deliberations" about the Muslim Ban: Trump v. Hawaii

In *Trump v. Hawaii*, the Supreme Court enlivened Justice Jackson's warning that *Korematsu*'s "principle of extreme judicial deference would lie about like a 'loaded weapon'" in the hands of opportunistic policymakers, unethical lawyers, and passive courts.[360] The Court declined to "substitute [its] own assessment for the Executive's" in validating President Trump's "Muslim ban," a series of executive orders denying entry into the United States to people from designated Muslim-majority countries.[361] In refusing to closely scrutinize the Trump administration's national security justification, the Court effectively countenanced an expansive deliberative process privilege.[362]

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357. *Id.* at 523–31. In 2021, the U.S. Supreme Court held that the deliberative process privilege protects the EPA's "draft biological opinions" from disclosure under the Freedom of Information Act because they are predecisional and deliberative. *Sierra Club*, 592 U.S. at 272–73; *see* Freedom of Information Act (FOIA), 5 U.S.C. § 552 (requiring federal agencies to disclose documents requested under FOIA unless they fall under an exemption, and exempting documents covered by the deliberative process privilege). *See generally* Comment, *Freedom of Information Act—Administrative Law—Deliberative Process Privilege*—U.S. Fish & Wildlife Service v. Sierra Club, 135 HARV. L. REV. 451 (2021). "Draft" label notwithstanding, though, such opinions appear to reflect the "final" decision of the agency. *See Sierra Club*, 592 U.S. at 274 (Breyer, J., dissenting). Justice Breyer, joined by Justice Sotomayor, dissented to the majority's expansive application of the "predecisional" and "deliberative" requirements. *See id.* at 273–78.

358. *See* Arthur Piacenti, Note, *The Deliberative Process Privilege: Preserving Candid Communications or Facilitating Evasion of Justice?*, 12 REV. LITIG. 275, 290 (1992).

359. *See* Trump v. Hawaii, 585 U.S. 667 (2018)

360. *E.g.*, Yamamoto & Oyama, *supra* note 101, at 711 (quoting Korematsu v. United States, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting)).

361. *Trump*, 585 U.S. at 708.

362. *See id.* at 745 (Sotomayor, J., dissenting) ("[T]he majority empowers the President to hide behind an administrative review process that the Government refuses to disclose to the public.").

As a presidential candidate, Trump voiced strident anti-Muslim animus, calling for a "total and complete shutdown of Muslims entering the United States."[363] After Trump became president, the Justice Department crafted a "watered down, politically correct version" of the Muslim entry ban.[364] The initial order barred nationals from seven predominantly Muslim countries—Iran, Iraq, Libya, Somalia, Syria, Sudan, and Yemen—from entering the United States.[365] It conspicuously omitted other friendly, wealthy countries—notably Saudi Arabia, the country of citizenship of the 9/11 attackers—bolstering skepticism about the motivation for the ban.[366] After federal courts struck down the first executive order, the Trump administration declared that it designed the order to improve "screening and vetting protocols"[367] and drafted a seventeen-page report that ostensibly detailed an extensive, worldwide national security justification for the ban seemingly as a legal afterthought.[368]

Amid challenges to the revised executive orders, the Trump administration declined to disclose the underlying factual bases for its claim that those seeking entry from the designated Muslim-majority countries posed an imminent threat to the nation's security.[369] By refusing to produce its seventeen-page post hoc factual analysis of the supposed security threats, the administration relied on an expansive version of the deliberative process privilege. The administration's lawyers only alluded to the privilege in passing, most likely because the withheld report was

363. Jeremy Diamond, *Donald Trump: Ban all Muslim Travel to U.S.,* CNN (Dec. 8, 2015, 4:18 AM), https://www.cnn.com/2015/12/07/politics/donald-trump-muslim-ban-immigration/index.html.

364. President Trump tweeted, "The Justice Dept. should have stayed with the original Travel Ban, not the watered down, politically correct version they submitted to S.C." Donald Trump (@realDonaldTrump), X (June 5, 2017, 12:29 AM), https://twitter.com/realDonaldTrump/status/871675245043888128?s=20.

365. Exec. Order No. 13769, 82 Fed. Reg. 20 (Feb. 1, 2017). The third version of the ban removed Sudan from this list; *see also* Proclamation No. 9645, 82 Fed. Reg. 186 (Sept. 27, 2017); Zainab Ramahi, Note, *The Muslim Ban Cases: A Lost Opportunity for the Court and a Lesson for the Future*, 108 CALIF. L. REV. 557, 562 (2020).

366. Ramahi, *supra* note 365, at 572 ("Saudi Arabia, a self-declared Islamic theocracy and close ally of the Trump administration, could not feasibly have been included on the list of banned countries.").

367. Exec. Order No. 13780, 82 Fed. Reg. 45 (Mar. 9, 2017).

368. *See* Trump v. Hawaii, 585 U.S. 667, 746 (2018) (Sotomayor, J., dissenting) (noting that the government's report was drafted *after* its review process and questioning "[t]hat the Government's analysis of the vetting practices of hundreds of countries boiled down to such a short document").

369. *See id.* at 746–48.

drafted *after* the initiating executive order and therefore did not meet the privilege's pre-decisional requirement.[370]

The lower courts rejected the Trump administration's entreaty to turn a blind eye to its wrongdoing.[371] District Judge Theodore D. Chuang of the District of Maryland harshly questioned the attorney for the Justice Department. How can the court know if there is a legitimate security basis if the president refuses to disclose its report ostensibly justifying the executive orders?[372] Just trust us, the Justice Department effectively implored.[373] Judge Chuang declined. With the altered DeWitt Report and the suppressed intelligence assessments apparently in mind, he asked the government's lawyer, "How is this different than *Korematsu*?"[374]

On appeal to the Supreme Court, former National Security Officials filed an amicus brief maintaining that the Muslim ban "did not emerge from a careful interagency policy and legal review involving the considered judgment of national security and foreign policy officials."[375] The hidden report, they said, was not part of a genuine deliberative process warranting protection from disclosure.[376] Accordingly, the brief concluded, the "Court should not allow Petitioners to shield Travel Ban 3.0 from meaningful judicial review by cloaking discrimination in a thin veil of national security."[377]

The Court majority in *Trump*, as an integral part of its exceeding deference to the president, did just that. Without reviewing the underlying

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370. Letter from Sharon Swingle, Att'y for President Trump, U.S. Dep't of Just., to Patricia S. Connor, Ct. Clerk, 4th Cir. (Nov. 24, 2017), https://anewmerckreviewed.files.wordpress.com/2017/11/life-irap-trump-fourth-11-24-17.pdf ("The reports requested by the Court . . . contain national-security information that has been classified at the Secret level . . . In addition, [they] are protected by various privileges, including the presidential-communications privilege and the *deliberative-process privilege*." (emphasis added)).

371. *See* Hawaii v. Trump, 265 F. Supp. 3d 1140 (D. Haw. 2017), *vacated in part*, 878 F.3d 662 (9th Cir. 2017), *rev'd*, 585 U.S. 667 (2018); Int'l Refugee Assistance Project v. Trump, 241 F. Supp. 3d 539 (D. Md. 2017), *vacated in part*, 857 F.3d 554 (4th Cir. 2017), *vacated*, 583 U.S. 912 (2017).

372. *See* Josh Gerstein, *Federal Judge Hears Challenge to Third Version of Trump's Travel Ban*, POLITICO (Oct. 16, 2017, 7:06 PM), https://www.politico.com/story/2017/10/16/trump-travel-ban-judge-maryland-243840.

373. *See id.*

374. *Id.*

375. Brief of Amici Curiae Former National Security Officials in Support of Respondents at 2–3, Trump v. Hawaii, 585 U.S. 667 (2018) (No. 17-965) ("[T]he Executive's national security and foreign policy experts played no role at all in the development of Travel Ban 1.0. Travel Bans 2.0 and 3.0 so closely mirror the original ban in form and substance that any additional 'process' the Government now cites cannot dispel this original sin.").

376. *Id.* at 11–12.

377. *Id.* at 4.

report purportedly reflecting the administration's deliberations, the majority concluded the exclusion order was "expressly premised on legitimate [national security] purposes."[378] It refused to scrutinize the factual bases for the order and "substitute [its] own assessment for the Executive's predictive judgments on such matters, all of which 'are delicate, complex, and involve large elements of prophecy.'"[379]

The majority's refusal to view the claimed supporting evidence, along with the president's overt expressions of religious animus, prompted Justice Sotomayor's stinging characterization of the majority decision as legitimating religious bigotry "masquerad[ing] behind a facade of national security."[380] Sotomayor denounced the majority's deferential posture as "empower[ing] the President to hide behind an administrative review process that the Government refuses to disclose to the public."[381] She thereby underlined the danger an expansive deliberative process privilege poses to judicial independence and America's checks and balances democracy.

Echoing Judge Chuang, Justice Sotomayor also outlined "stark parallels" between *Trump* and *Korematsu*.[382] First, Sotomayor recalled that in *Korematsu*, as in *Trump*, "the Government invoked an ill-defined national-security threat to justify an exclusionary policy of sweeping proportion."[383] Second, in *Korematsu*, as in *Trump*, "the exclusion order was rooted in dangerous stereotypes about, *inter alia,* a particular group's supposed inability to assimilate and desire to harm the United States."[384] Third, as in *Trump*, "the Government was unwilling to reveal its own intelligence agencies' views of the alleged security concerns to the very citizens it purported to protect."[385] And finally, as in *Trump*, "there was

378. Trump v. Hawaii, 585 U.S. 667, 706 (2018).

379. *Id.* at 707–08 (quoting Chi. & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948)).

380. *Id.* at 728 (Sotomayor, J., dissenting). *See generally* Yamamoto & Oyama*, supra* note 101.

381. *Trump*, 585 U.S. at 745.

382. *Id.* at 752–54 (citing Korematsu v. United States, 323 U.S. 214 (1944)).

383. *Id.* (citing Brief for Japanese American Citizens League as Amicus Curiae at 12–14, *Trump*, 585 U.S. 667 (No. 17-965)).

384. *Id.* (citing *Korematsu,* 323 U.S. at 236–40 (Murphy, J., dissenting)).

385. *Id.* at 753 (first citing Korematsu v. United States, 584 F. Supp. 1406, 1418–19 (N.D. Cal. 1984); then citing Brief for Japanese American Citizens League as Amicus Curiae, *supra* note 383, at 17–19; then citing Int'l Refugee Assistance Project v. Trump*,* 883 F.3d 223, 268 (4th Cir. 2018); and then citing Brief for Karen Korematsu et al. as Amici Curiae at 35–36, n.5, *Trump*, 585 U.S. 667 (No. 17-965)).

strong evidence that impermissible hostility and animus motivated the Government's policy."[386]

Chief Justice Roberts, writing for the *Trump* majority, acknowledged but rejected these comparisons.[387] In an apparent diversionary tactic, Roberts intoned that the "dissent's reference to *Korematsu* . . . affords this Court the opportunity to make express what is already obvious: *Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—'has no place in law under the Constitution.'"[388]

But, as Sotomayor recognized and scholars later assessed, "the Court's renunciation of *Korematsu* was crucially—and misleadingly—limited."[389] Roberts rejected *only* "*Korematsu's* validation of the 'forcible relocation of U.S. citizens to concentration camps solely and explicitly on the basis of race.'"[390] And in distinguishing *Trump* from *Korematsu*, Roberts "badly mischaracterized the 1944 decision."[391] Only "by distorting what the *Korematsu* Court said and did was Chief Justice Roberts able to declare 'wholly inapt' the likening of key aspects of *Korematsu* to *Trump*, and to thereby reject *Korematsu* while upholding the entry ban on those from Muslim-majority countries."[392]

In attempting to distinguish Trump's executive orders, Roberts wrongly described *Korematsu*'s executive order as issued "explicitly on the basis of race."[393] But the exclusion orders in *Korematsu* and *Trump* were both facially neutral.[394] Roberts described *Korematsu* as only about abuse of U.S. citizens, but "the forced removal, like Trump's exclusion orders, targeted foreign nationals, too."[395] Roberts characterized the culpable act in *Korematsu* as confinement in "concentration camps," but *Korematsu*, like *Trump*, also authorized "blanket restriction and

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386. *Id*.

387. *Id.* at 710 (majority opinion).

388. *Id.* (quoting *Korematsu*, 323 U.S. at 248 (Jackson, J., dissenting)).

389. Yamamoto & Oyama, *supra* note 101, at 714; *see also Trump*, 585 U.S. at 753–54 (Sotomayor, J., dissenting).

390. Yamamoto & Oyama, *supra* note 101, at 714 (quoting *Trump*, 585 U.S. at 710 (majority opinion)).

391. *Id.*

392. *Id.* at 715 (quoting *Trump*, 585 U.S. at 710).

393. *See Trump*, 585 U.S. at 710.

394. Yamamoto & Oyama, *supra* note 101, at 714 (first quoting *Trump*, 85 U.S. at 710; and then citing Korematsu v. United States, 323 U.S. 214, 217–20 (1944)).

395. *Id.* (citing *Korematsu*, 323 U.S. at 216–17).

exclusion."[396] And finally, "as in *Trump, Korematsu* expressly justified the exclusionary executive order not on impermissible racial or religious grounds but on a claim of national security—albeit unsubstantiated."[397]

Most significantly, Roberts entirely failed to acknowledge—or overrule—"the most dangerous aspect of *Korematsu*": the Court's "unconditional deference" to a deceptive and politically motivated executive branch.[398] Instead, he "engaged in a cheap parlor trick: purporting to 'overrule' a narrow, distorted version of *Korematsu* while simultaneously embracing and replicating that decision's actual logic."[399]

Indeed, just as the Court in *Korematsu* failed to closely scrutinize the duplicitous DeWitt Final Report, the Court in *Trump* permitted the presidential administration to wholly conceal its post hoc, factually contested security assessment under an expansive version of the deliberative process privilege. Instead of operating as qualified protection for high-level executive pre-decisional deliberations, the doctrine morphed into a sprawling post-decisional near-absolute privilege.

With profound regret, Justice Sotomayor laid bare what was really going on. "By blindly accepting the Government's misguided invitation to sanction a discriminatory policy motivated by animosity toward a disfavored group, the Court redeploy[ed] the same dangerous logic underlying *Korematsu* and merely replace[d] one 'gravely wrong' decision with another."[400] Hence, a "crucial part of *Korematsu* survives in *Trump*"—together with an expanded deliberative process privilege, it compels blind acceptance of "'the Government's . . . superficial claim of national security' . . . [that] stands as a *reloaded* weapon ready for the hand of an authority with a plausible, even if unfounded, claim of urgent need."[401]

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396. *Id.* at 714–15 (citing *Korematsu*, 323 U.S. at 217–18, 223).

397. *Id.* at 715.

398. *Id.*

399. Anil Kalhan, Trump v. Hawaii *and Chief Justice Roberts's "*Korematsu *Overruled" Parlor Trick*, AM. CONST. SOC'Y (June 29, 2018), https://www.acslaw.org/acsblog/trump-v-hawaii-and-chief-justice-robertss-korematsu-overruled-parlor-trick.

400. *See* Trump v. Hawaii, 585 U.S. 667, 754 (2018) (Sotomayor, J., dissenting).

401. Yamamoto & Oyama, *supra* note 101, at 716 (quoting *Trump*, 585 U.S. at 754 (Sotomayor, J., dissenting)).

C. Expanding the Deliberative Process Privilege to Hide Post Hoc "Deliberations" About the Transgender Ban

In subsequent cases, the Trump administration explicitly urged courts to expand the deliberative process privilege.[402] It expressly deployed the privilege to hide administration documents prepared after President Trump announced on X (at the time, Twitter) a ban on transgender individuals serving in the military, colloquially known as the "transgender ban."[403]

> After consultation with my Generals and military experts . . . the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. Military. Our military must be focused on decisive and overwhelming victory and cannot be burdened with the tremendous medical costs and disruption that transgender [persons] in the military would entail.[404]

For ostensible national security reasons, the ban meant "trans service members staying in the closet, even when it's dangerous for their service and their personal health and safety; trans troops being discharged or abused; and trans Americans more broadly receiving yet another signal that society still doesn't accept or tolerate them."[405]

Trump's pronouncement abruptly reversed an Obama-era policy permitting transgender Americans to openly serve in the military that followed extensive studies on the favorable impacts on military readiness.[406] The Trump administration subsequently clambered to craft

402. *See* Stone v. Trump, 356 F. Supp. 3d 505, 516 (D. Md. 2018), *amended on recon*., 402 F. Supp. 3d 153 (D. Md. 2019); Karnoski v. Trump, 328 F. Supp. 3d 1156, 1160 (W.D. Wash. 2018), *vacated*, 926 F.3d 1180 (9th Cir. 2019).

403. *Stone*, 356 F. Supp. 3d at 510; *Karnoski*, 328 F. Supp. 3d at 1158–60.

404. Donald Trump (@realDonaldTrump), X (July 26, 2017, 2:55 AM), https://twitter.com/realDonaldTrump/status/890193981585444864?s=20 [hereinafter @realDonaldTrump, Transgender Ban].

405. German Lopez, *Trump's Ban on Transgender Troops, Explained*, VOX (Jan. 22, 2019, 11:12 AM), https://www.vox.com/identities/2017/7/26/16034366/trump-transgender-military-ban.

406. *See* Memorandum from Dep't of Def., to Secretaries of Military Departments et al., Directive-type Memorandum (DTM) 16-005, on Military Service of Transgender Service Members (June 30, 2016), https://dod.defense.gov/Portals/1/features/2016/0616_policy/DTM-16-005.pdf; Agnes Gereben Schaefer et al., *Assessing the Implications of Allowing*

factual and legal grounds for the action, asserting post hoc justifications of "military readiness and lethality."[407] The asserted grounds, however, appeared far more indicative of transphobia and political scapegoating.

Existing and prospective transgender servicemembers filed suits in four federal district courts, challenging the apparently groundless curtailment of their civil rights and liberties.[408] They sought in part to compel the administration to produce evidence on its motivation for the ban.[409] The administration refused, citing the deliberative process privilege.[410]

In *Stone v. Trump*[411] and *Karnoski v. Trump*,[412] Judge George L. Russell, III, and Judge Marsha J. Pechman independently assessed the administration's privilege claims. Both judges acknowledged the centrality of the requested evidence to the plaintiffs' claims and ordered production of the documents.[413] They carefully scrutinized the administration's contentions, accommodating both the executive's professed national security needs and transgender persons' right to equality.

The plaintiffs' victories were short-lived. In *Karnoski*, the Ninth Circuit, in a per curiam decision, reversed Judge Pechman's order.[414] The

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Transgender Personnel to Serve Openly, RAND CORP. (2016), https://www.rand.org/content/dam/rand/pubs/research_reports/RR1500/RR1530/RAND_RR1530.pdf; *Transgender Policy*, U.S. DEP'T. DEF., https://dod.defense.gov/News/Special-Reports/0616_transgender-policy-archive/ (last visited Sept. 24, 2022).

407. Memorandum from James N. Mattis, Sec'y Def., U.S. Dep't of Def., to the President Donald Trump on Military Service by Transgender Individuals (Feb. 22, 2018).

408. *See* Doe 1 v. Trump, 275 F. Supp. 3d 167 (D.D.C. 2017), *vacated sub nom.* Doe 2 v. Shanahan, 755 F. App'x 19 (D.C. Cir. 2019); *Stone*, 356 F. Supp. 3d 505; *Karnoski*, 328 F. Supp. 3d 1156; Stockman v. Trump, No. EDCV 17–1799, 2017 WL 9732572 (C.D. Cal. Dec. 22, 2017).

409. *See Stone*, 356 F. Supp. 3d at 510; *Karnoski*, 328 F. Supp. 3d at 1159. The plaintiffs also sought a preliminary injunction. *See Stone*, 356 F. Supp. 3d at 509; *see also* Karnoski v. Trump, No. C17-1297-MJP, 2017 WL 6311305, (E.D. Wash. Dec. 11, 2017).

410. *Stone*, 356 F. Supp. 3d at 510; *Karnoski*, 328 F. Supp. 3d at 1159.

411. 356 F. Supp. 3d 505 (D. Md. 2018).

412. 328 F. Supp. 3d 1156 (W.D. Wash. 2018).

413. In *Stone*, Judge Russell determined the deliberative process privilege did not apply because the government's intent was the heart of the issue, 356 F. Supp. 3d at 515, and in *Karnoski*, Judge Pechman applied the deliberative process privilege balancing test and determined the plaintiffs' need for the evidence outweighed the executive's interests in non-disclosure, 328 F. Supp. 3d at 1161–62.

414. The Ninth Circuit panel sua sponte proclaimed, "[t]he district court appears to have conducted a single deliberative process privilege analysis covering all withheld documents, rather than considering whether the analysis should apply differently to certain categories." Karnoski v. Trump, 926 F.3d 1180, 1206 (9th Cir. 2019).

Maryland district court subsequently granted the government's motion for reconsideration in *Stone* and vacated its earlier rejection of the president's deliberative process privilege claim.[415]

These rulings enabled the Trump administration to hide key evidence under the blanket assertion—plainly untrue—that thousands of documents were part of the expansive deliberative process informing the president's decision. Indeed, the circumstances of and public evidence about the transgender ban indicated that the Trump administration advanced two fundamental lies to successfully push the ban through the judicial system: first, that Trump's announcement was the logical result of, rather than the initiator of, national security research and deliberation; and second, that the ban was driven by actual military necessity.[416]

To construct a façade of political legitimacy, Trump claimed in his initial X announcement that the transgender ban resulted from consultation with "his" "Generals and military experts."[417] But public evidence showed otherwise. U.S. Secretary of Defense James Mattis apparently had only one day's notice about Trump's policy, was on vacation at the time of the announcement, and was "appalled" by it.[418] Several weeks later, when questioned about the details of the ban, Mattis informed reporters that *after* the "president's order arrived at the Pentagon, he and others would 'study it and come up with what the policy should be.'"[419]

Mattis declined to explain why Trump reversed the Obama-era policy without a rationale or supporting facts in place.[420] Congressional and other White House representatives, though, acknowledged that the sudden decision "was, in part, a last-ditch attempt to save a House

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415. Stone v. Trump, 402 F. Supp. 3d 153, 158–59 (D. Md. 2019) (citing *Karnoski*, 926 F.3d at 1206).

416. *See generally* Lopez, *supra* note 405 (reporting that the ban was more about politics than policy).

417. @realDonaldTrump, Transgender Ban*, supra* note 404.

418. Alex Lockie, *Mattis Was on Vacation When Trump Tweeted Transgender Ban, and He Was Reportedly 'Appalled' by It*, BUS. INSIDER (Jul. 27, 2017, 10:36 AM), https://www.businessinsider.com/mattis-vacation-appaulled-trump-trans-ban-2017-7.

419. Alex Ward, *Reports: Mattis Froze the Transgender Military Ban. Reality: No, He Didn't.*, VOX (Aug. 30, 2017, 12:30 PM), https://www.vox.com/policy-and-politics/2017/8/30/16225716/mattis-transgender-military-ban-freeze-statement (quoting Dan Lamothe, *Mattis Says the Pentagon is Still Studying Transgender Military Service, Three Weeks After Trump Called for a Ban*, WASH. POST (Aug. 14, 2017, 7:33 PM), https://www.washingtonpost.com/news/checkpoint/wp/2017/08/14/mattis-leaves-door-open-to-some-transgender-military-service-says-pentagon-is-still-studying-the-issue/).

420. Lamothe, *supra* note 419.

proposal full of [Trump's] campaign promises that was on the verge of defeat," including funding for the wall on the Mexican border.[421] The legislation had stalled when some House Republicans pushed to include a ban on Pentagon-funded gender-affirming surgeries.[422] Trump removed the legislative obstacle by banning transgender individuals from serving altogether. The House bill then advanced through Congress.[423]

The suspect order of events—beginning with Trump's political scheming for border wall funding, followed by the X announcement and the subsequent expert panel directive—strongly suggests that the panel was established *not* to rigorously study the actual need for the ban, but to provide a post hoc legal justification for it.[424] In scrutinizing the executive branch's arguments in one of the lawsuits challenging the ban, Maryland District Court Judge George L. Russell aptly recognized that the "timeline of these events would, therefore, make it reasonable to conclude that the Panel of Experts was born of President Trump's Tweets"—not the other way around.[425] The documents thus could not have embodied evidence of *pre-decisional* deliberations.

Reputable research into transgender servicemembers suggests a second fundamental lie foisted upon the public and courts by the Trump administration: the evidence showed no actual military necessity for the ban. The *amici* Surgeons General in *Karnoski* parsed the Department of Defense post hoc report, and concluded that the report's stated rationales for the transgender ban were "speculative and unsupported" and cast aside "decades of relevant peer-reviewed research."[426] And extensive studies completed following the implementation of the ban determined the action harmed, not assisted, U.S. military readiness.[427] In *Korematsu*, bigotry and political gain masqueraded behind a façade of "pressing

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421. Rachel Bade & Josh Dawsey, *Inside Trump's Snap Decision to Ban Transgender Troops*, POLITICO (Jul. 26, 2017, 9:49 PM), https://www.politico.com/story/2017/07/26/trump-transgender-military-ban-behind-the-scenes-240990.

422. *Id.*

423. Emmarie Huetteman, *House Approves Spending Package, Border Wall and All*, N.Y. TIMES. (July 27, 2017), https://www.nytimes.com/2017/07/27/us/politics/house-spending-bill-border-wall.html.

424. *See id.*; Lamothe, *supra* note 419.

425. Stone v. Trump, 356 F. Supp. 3d 505, 512 (D. Md. 2018), *amended on recon.*, 402 F. Supp. 3d 153 (D. Md. 2019).

426. Brief of Amici Curiae Vice Admiral Donald C. Arthur, USN (Ret.) et al. in Support of Plaintiffs-Appellees and Intervenor-Plaintiff Appellee at 8, 12, Karnoski v. Trump, 926 F.3d 1180 (9th Cir. 2019) (No. 18-35347).

427. VICE ADMIRAL DONALD C. ARTHUR ET AL., PALM CENTER, DOD'S TRANSGENDER BAN HAS HARMED MILITARY READINESS 1 (2020).

public necessity."[428] So, too, the Trump administration's ban on transgender people from the military—enabled by an expansive deliberative process privilege.

After extensive legal and political battles nationwide, the Biden administration reversed Trump's transgender ban and reinstated the inclusive Obama-era policy.[429] But the Ninth Circuit's expansive interpretation of the deliberative process privilege remains a threat to civil liberties everywhere.

VI. ABDICATING INDEPENDENT JUDICIAL INQUIRY IN "NATIONAL SECURITY" CASES: EXPANDING EVIDENTIARY PRIVILEGES TO COMPEL BLIND COURT DEFERENCE TO THE PRESIDENT

As developed in Parts IV and V, the expansive state secrets and deliberate process evidentiary privileges now effectively mandate exceeding judicial deference to presidential administrations asserting national security as justification for curtailing the fundamental liberties of people in the United States. Government invocation of the privileges for unsubstantiated national security reasons forecloses discovery of sometimes vital evidence, ending lawsuits for personal loss and government responsibility at the starting gate. That erosion of personal rights and government accountability also eats away at the very structure of American democracy. As Justice Gorsuch's *Zubaydah* dissent underscored, the "Constitution did not create a President in the King's image but envisioned an executive regularly checked and balanced by other authorities. Our Founders knew from hard experience the 'intolerable abuses' that flow from unchecked executive power."[430]

In envisioning the United States as a constitutional democracy, James Madison declared in the Federalist Papers that the "accumulation of all powers, legislative, executive, and judiciary [in one branch] . . . may justly be pronounced the very definition of tyranny."[431] The three independent yet overlapping branches were founded on mutual

428. Korematsu v. United States, 323 U.S. 214, 216 (1944). *See generally* Yamamoto & Oyama, *supra* note 101.

429. *Biden Overturns Trump Transgender Military Ban*, BBC (Jan. 25, 2021), https://www.bbc.com/news/world-us-canada-55799913.

430. United States v. Zubaydah, 595 U.S. 195, 50 (2022) (Gorsuch, J., dissenting) (quoting United States v. Reynolds, 345 U.S. 1, 8 (1953).

431. THE FEDERALIST NO. 47 (James Madison).

commitments to security and liberty.[432] The executive needs extensive national security powers not routinely second-guessed by the judiciary.[433] But when the president or executive officials abuse those powers for personal or political gain, transgressing the constitutional liberties of those in America, the Founders envisioned the judiciary as the ultimate protector of those liberties.[434] Since *Marbury v. Madison*,[435] American jurisprudence has accepted the judiciary as final arbiter.[436]

A. Jurisprudential Framework for Accommodating National Security and Civil Liberties

In *In the Shadow of Korematsu: Democratic Liberties and National Security*, drawing on a deep jurisprudential tradition, Professor Yamamoto elaborated upon how the constitutional separation of powers informs judicial scrutiny in national security controversies.[437] In light of the president's extensive national security powers, in most instances, the courts should defer to the executive's security actions.[438] For example, the executive makes decisions about where and how to deploy security forces, the kinds of equipment purchased, the funding and staffing of investigations and prosecutions, or coordination among agencies or foreign governments.[439]

But passive judicial review bears distinct limits. In a "constitutional democracy, with a bill of rights, the president's national security power cannot encompass the scapegoating and vilification of unpopular groups or lying to the public and [the courts] to legitimate aggression against innocent people at home or abroad."[440] Courts are impelled to closely scrutinize a president's national security justifications

432. *See id.*

433. Eric K. Yamamoto, *White (House) Lies: Why the Public Must Compel the Courts to Hold the President Accountable for National Security Abuses*, 68 L. & CONTEMP. PROBS. 285, 289 (2005) [hereinafter Yamamoto, *White (House) Lies*].

434. *See* Buckley v. Valeo, 424 U.S. 1, 122 (1976) (per curiam).

435. 5 U.S. 137 (1803).

436. *Marbury*, 5 U.S. at 177–78.

437. *See generally* YAMAMOTO, SHADOW OF KOREMATSU, *supra* note 49.

438. *Id.* at 85.

439. *Id.* at 84.

440. Yamamoto, *White (House) Lies*, *supra* note 433, at 289.

for curtailing people's fundamental democratic liberties.[441] History, and indeed *Korematsu* and the *coram nobis* cases, demonstrates this imperative.

With this in mind*, In the Shadow of Korematsu* offered an analytical framework clarifying how courts might productively approach the judicial role in reviewing civil liberties challenges to national security constraints.[442] Initially, pursuant to existing constitutional doctrine, a court identifies the restricted right or liberty.[443] Where the government apparently curtails a fundamental right or liberty or a suspect or quasi-suspect class's right to equal treatment, as defined by case law, careful judicial scrutiny kicks in.[444] Otherwise, more deferential review applies, thus affording the government wide latitude in most national security matters given its broad war, national security, and foreign policy powers.[445]

If close scrutiny is appropriate, a court does not attenuate the intensity of its review even where the government asserts national security as a justification for its actions—unlike the Court's exceedingly deferential approach employed by the Justice Black majority in *Korematsu*.[446] Instead, a court carefully assesses the government's claim of pressing public necessity for its actions. This analytical step entails three sub-inquiries into the actual danger, the government's tailoring of restrictions, and any additional relevant considerations.

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441. In the famous footnote four, Chief Justice Harlan Stone called for "more searching judicial inquiry" of actions that restrict the rights or liberties of "discrete and insular minorities" because those groups tend to be excluded from the political processes that benefit the majority. United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938). *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

442. YAMAMOTO, SHADOW OF KOREMATSU, *supra* note 49, at 95–106.

443. *Id.* at 96 (citing Thomas v. Collins, 323 U.S. 516, 529–30 (1945)).

444. *Id.* (citing Hassan v. City of New York, 804 F.3d 277, 299–300 (3d Cir. 2015)). Fundamental liberties or rights encompass civil liberties grounded in the Constitution, including the rights: to speech and association, to privacy reflected in protection from unwarranted searches and seizures and from bodily invasion, to militias' bearing arms, to due process and equal protection, to freedom from enslavement, to counsel in criminal cases, to trial by jury, and to vote. *Id.* at 96 n.8. "A 'suspect classification' for equal protection analysis is one that targets a class or group of vulnerable minorities, most often racial minorities deprived of meaningful access to political power." *Id.* at 96 n.9 (citing San Antonio Independent Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973)). "A 'quasi-suspect' classification, according to case law, targets gender." *Id.* (citing Ball v. Massanari, 254 F.3d 817, 823 (9th Cir. 2001)).

445. *Id.* at 95–96.

446. *Id.* at 97.

First, a court determines "whether credible information establishes that those targeted pose an imminent and serious threat to important or significant government security interests."[447] Second, if "an imminent and serious danger to those government security interests exists—shown by probative evidence"—the court examines "how carefully the restriction is tailored in light of the danger (considering the severity of the threat and the degree of likely damage to those restricted) and the availability of feasible alternatives (judged according to the circumstances, including timing, burdens, and likely impacts)."[448] Finally, in making close calls, the court considers "whether additional considerations are relevant to the court's careful review—for instance, whether procedural protections can accommodate a genuine need for secrecy, whether the political branches acted in concert or separately, or whether the challenged measure targets citizens, only noncitizens, or a mixture."[449]

Consistent with this approach and in recognition of the grave injustices generated by the convergence of government dissembling and judicial passivity, some judges strive to carefully scrutinize government claims of national security where civil liberties are at stake. In the heated aftermath of 9/11, District Court Judge Victor Marrero declined to rubber stamp the Bush Administration's actions under the PATRIOT Act. In *Doe v. Gonzales*,[450] Judge Marrero struck down the administration's issuance of "national security letters" to internet service providers (rather than court subpoenas) that required the providers to produce broadly requested customer records for government inspection. Marrero highlighted the *Korematsu* Court's failure "amidst public passions" during wartime to "safeguard[] American liberties and democratic principles," later "much regretted."[451] In scrutinizing the relevant PATRIOT Act provision, he echoed *Korematsu coram nobis* Judge Marilyn Hall Patel's call to vigilance in identifying the "potentially deleterious [*Korematsu*] precedent of the courts' bowing unjustifiably to extraordinary actions of other branches of government."[452]

447. *Id.*
448. *Id.*
449. *Id.* at 106.
450. 500 F. Supp. 2d 379 (S.D.N.Y. 2007).
451. *Id.* at 414.
452. *Id.* at 414–15 (citing Korematsu v. United States, 584 F. Supp. 1406, 1420 (N.D. Cal.1984)).

More recently, the U.S. District Court and Court of Appeals in *Trump v. Hawaii* and related cases similarly adopted a posture of careful scrutiny in light of the fundamental liberty at stake (freedom from religious vilification) and the multiple expressions of then-presidential candidate Trump's religious animus.[453] The courts' search for factual support for the president's claim of national security threats yielded next to nothing.[454] Citing *Korematsu* as a cautionary tale, the courts rejected a judicial posture of unconditional deference and approved a nationwide preliminary injunction blocking the president's executive orders.[455]

> Here and elsewhere, the Government would have us end our inquiry without scrutinizing either [the orders'] stated purpose or the Government's asserted interests, but [affording] "unconditional deference to a government agent's invocation of 'emergency' . . . has a lamentable place in our history," and is incompatible with our duty to evaluate the evidence before us.[456]

This kind of careful scrutiny falls well within the competence of the federal courts. Court of Appeals Judge Stephen Reinhardt aptly described the judge's role in national security cases:

> [The judge's role] national security cases is essentially no different from . . . any other important or controversial matter—maybe a little more difficult, maybe a little more daunting, maybe a little more perilous, but in the end, it is simply a matter of what good jurists regularly do—

453. *See supra* Section V.B.

454. *See, e.g.*, Hawaii v. Trump, 878 F.3d 662, 692–94 (9th Cir. 2017), *rev'd*, 585 U.S. at 710 (2018) (concluding the president failed to explain why permitting entry of nationals from the designated countries "would be detrimental to the interests of the United States"); Int'l Refugee Assistance Project v. Trump, 241 F. Supp. 3d 539, 558–64 (D. Md. 2017), *vacated in part by* 857 F.3d 554 (4th Cir.), *vacated by* 583 U.S. 912 (concluding the plaintiffs were likely to succeed on the merits of their Establishment Clause claim because it appeared likely that religious grounds, rather than national security, was the primary purpose of the ban).

455. *See* Hawaii v. Trump, 245 F. Supp. 3d 1227 (D. Haw. 2017), *vacated in part by* 878 F.3d 662 (9th Cir. 2017), *rev'd*, 585 U.S. at 710 (2018); *Int'l Refugee Assistance Project*, 241 F. Supp. 3d 539.

456. Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 603 (4th Cir. 2017) (quoting Petrolmen's Benevolent Ass'n v. City of New York, 310 F.3d 43, 54 (2010) (citing Korematsu v. United States, 323 U.S. 214, 223 (1944))), *vacated by* 138 S. Ct. 353.

weighing, balancing, exercising independent judgment, and safeguarding the Constitution.[457]

B. *Expansive Executive Privileges Portend Court-Countenanced Presidential Tyranny*

This calibrated, constitutionally-embedded approach to judicial review of national security and civil liberties controversies now teeters on the edge.

As highlighted by the Supreme Court's 2022 state secrets cases, the expanded executive privileges thwart judicial checks on executive abuses. They compel even judges who embrace a calibrated approach to judicial review to accept government assertions of security secrets on their face. In *Zubaydah*, the Ninth Circuit initially scrutinized the government's contrived state secrets claim, finding the location of Zubaydah's torture already in the public domain.[458] But the Supreme Court swept aside the Ninth Circuit's effort to promote government transparency even though genuine national security secrets were not at risk.[459] Likewise, in *Fazaga*, the Ninth Circuit reinstated the litigants' civil rights claims and simultaneously safeguarded security interests by calling for *in camera* review to determine if privilege protection was genuinely needed.[460] The Supreme Court, though, frustrated the Ninth Circuit's and Congress's efforts to guard against surveillance abuses targeting vulnerable communities.[461]

Similarly, in *Trump*, the lower courts held a tight rein on the Trump administration's unsubstantiated post hoc assertions of "national security" as justification for broadly excluding a politically unpopular group from entry into the United States.[462] The Supreme Court's 2018 decision, however, foreclosed judicial probing into the validity of those post hoc legal and factual justifications.[463]

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457. Stephen Reinhardt, *The Judicial Role in National Security*, 86 B.U. L. REV. 1309, 1313 (2006).

458. *See supra* Section IV.A.3.

459. *See supra* Section IV.A.4.

460. *See supra* Section IV.B.3.

461. *See supra* Section IV.B.4.

462. *See supra* notes 269–73, 454–57 and accompanying text.

463. *See supra* Section V.B.

After *Zubaydah*, *Fazaga*, and *Trump*, the courts—even those desirous of heightened scrutiny—apparently *must* accept the government's unproven assertion that it possesses bona fide national security bases for its restrictive actions. The combined expansive state secrets and deliberative process privileges at times leave targeted politically vulnerable groups without viable access to the courts to prove and remediate claims of serious government abuses.

As this article has intimated, the dual executive privileges, expansively construed, are poised to subvert judicial independence in security-liberty controversies. They undercut the judiciary's pivotal role in exercising watchful care over U.S. persons' civil liberties. At its core, the civil liberties regime entails "freedom from coercive or otherwise intrusive governmental actions designed to secure the nation against real, or sometimes imagined internal and external enemies."[464] An independent judiciary enlivens those civil liberties by preventing or at least curbing "actions that may get out of hand, creating a climate of fear, oppressing the innocent, stifling independent thought, and endangering democracy."[465] Absent the judiciary's necessary check, vulnerable communities are left exposed to intolerable abuses. At the government utterance of "national security secret," accompanied by a plausible explanation but without evidentiary backing, the Supreme Court now commands the lower courts not to scrutinize the underlying factual basis for the privilege, even where claimant civil liberties are at stake. And the courts may be foreclosed from redacting the confidential information to open the non-confidential remainder to discovery.[466]

In Justice Gorsuch's words, the Court has "replaced independent inquiry with a rubber stamp"[467]—a ragged step toward tyranny.

C. *Historical Cautions for Unbounded Executive Privileges*

As the legal community and public reassess the appropriate role for the courts in these types of cases, particularly where executive

464. RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 4 (2006).

465. *See id.* at 4–5.

466. *See* Zubaydah v. United States, 595 U.S. 195, 214 (2022) (plurality opinion) (declining to order production of the requested information with the use of code names).

467. *Id.* at 263 (Gorsuch, J., dissenting).

privileges are at play, *Korematsu* and *Reynolds* offer salient lessons on the consequences of blind deference to the executive whenever it intones "national security." Those cases present watershed accounts of national security dissembling enabled by a judicial rubber stamp of approval. They are not, however, aberrations. As Justice Gorsuch warned about executive privileges, "[m]ore recent history bears its cautions too."[468] The Trump administration's Muslim-entry and transgender-servicemember bans, Chief Judge Collyer's FISC order, and many other reports documenting national security shams in myriad forms are illustrative.[469]

Collyer's eviscerating court order, in particular, laid bare the FBI's pattern of intentional misrepresentations to the Foreign Intelligence Surveillance Court. As explained in Section IV.B, the OIG's subsequent audit of FISA application submitted by the FBI to the court from 2015 to 2020 revealed widespread evidentiary gaps and deliberate national security misrepresentations, tainting over 183 applications. FBI Director Christopher Wray ultimately conceded the FBI's regular misrepresentations to the national security court.[470]

Reports cited in Justice Gorsuch's *Zubaydah* dissent and in *Fazaga*, too, offer past and present snapshots of the pervasiveness of executive branch dissembling on national security—to the litigants, courts, policymakers and public. In acknowledging the need for careful scrutiny of government secrecy claims in *Zubaydah*, Justice Gorsuch highlighted the executive branch's estimates that "*between 50% and 90%* of classified material does not merit that treatment."[471] And the Congressional Church Committee investigative report cited in *Fazaga* documented "a massive record of intelligence abuses over the years."[472]

In *Zubaydah*, after reviewing *Korematsu*, *Reynolds* and other cases of national security dissembling, Justice Gorsuch, a legal realist, acknowledged that it "may be understandable that those most responsible for the Nation's security will seek to press every tool available to them to maximum advantage."[473] The judiciary and public should expect the

468. *Id.* at 251.

469. *See e.g.*, *supra* Section IV.B.5 (summarizing the revelations of dissembling in Chief Judge Collyer's FISC order); Section V (summarizing the Trump administration Muslim and transgender ban litigation).

470. *See supra* note 344 and accompanying text.

471. *Zubaydah*, 595 U.S. at 252 (Gorsuch, J., dissenting) (emphasis added).

472. *See supra* notes 310–12 and accompanying text (summarizing the Church Committee's findings and recommendations relied upon by Congress in enacting FISA).

473. *Zubaydah*, 595 U.S. at 252 (Gorsuch, J., dissenting).

executive branch "to test 'the outer limits of its power.' . . . It may be nothing less than human nature."[474] Yet, the antidote for this tendency toward power abuses lies less in the tepid internal reforms FBI director Wray offered the FISA court.[475] Rather, it lies in the Constitution's framework. The Founders anticipated power overreaches by presidential administrations—to the detriment of people and democracy. Thus, they created an independent judiciary to adjudicate the balance of power in order to accommodate both security and liberty.[476]

Accordingly, Justices Gorsuch and Sotomayor challenged the Court to reclaim its judicial independence in national security cases. They effectively shamed the *Zubaydah* plurality for abdicating even a "pretense of an independent judicial inquiry."[477] And they called for firm boundaries to cabin the state secrets privilege. To do otherwise, they maintained, would encourage "utmost deference" to the president, "more claims of secrecy in doubtful circumstances" and the "loss of liberty and due process [that] history shows very often follows."[478]

D. Rejecting Tyranny: Toward a Constitutionally Appropriate Accommodation of State Secrets, the Deliberative Process and Civil Liberties

According to the analytical framework discussed in the previous section, in most instances courts are to defer to the executive branch on national security matters traditionally within the president's domain—for example, the deployment of security personnel and the funding and staffing of investigation and prosecutions.[479] When the government invokes "national security" to justify sweeping curtailments of civil liberties, however, the courts play a critical role in safeguarding the constitutional liberties of people in America.

A proper accommodation of civil liberties does not necessitate sacrificing national security. Professor Siegel underscored in his *Fazaga* amicus brief that the public "need not trust the Executive Branch to make

474. *Id.* (quoting INS v. Chadha, 462 U.S. 919, 951 (1983)).
475. *See supra* note 342 and accompanying text.
476. *See* THE FEDERALIST No. 47, *supra* note 431.
477. *Zubaydah*, 595 U.S. at 252–53 (Gorsuch, J., dissenting).
478. *Id.*
479. *See supra* notes 437–41 and accompanying text (outlining Yamamoto's framework for judicial scrutiny in national security-civil liberties cases).

unilateral and unchecked determinations of secrecy when judges regularly and effectively protect sensitive information."[480] Carefully prescribed judicial procedures, including those enumerated in FISA and regularly employed by the surveillance court, already work to safeguard security information.[481] David Scharia, the United Nations Security Council's former lead counterterrorism lawyer, concluded after thoroughly reviewing high court opinions that that "judicial review in real time or in close proximity . . . of a certain national security policy is feasible and that deference to the Executive in national security matters is not a must."[482]

In a democracy, civil liberties are integrally linked to security.[483] On the international stage, as a leading democracy, the United States uplifts its resistance against oppression; its commitment to the rule of law; its protection of fundamental civilian rights and liberties, including the freedoms of speech, assembly and religion, freedom from unreasonable searches and seizures; and its guarantees of due process of law and equal protection of laws.[484] The balanced accommodation of both security and liberty marks an essence of American democracy. And the protections of civilian liberties, enshrined in the Bill of Rights,[485] is essential to people's assent to the workings of that democracy.

VII. CONCLUSION

Informed by historical injustices and pervasive national security dissembling, this article expands upon other scholars' and judges' work to call for the sharp cabining of the expansive state secrets and deliberative process privileges. For decades, the privileges operated in quiet. Indeed, after *Reynolds*, the Supreme Court lay nearly silent on the

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480. Brief for Professor Barry Siegel, *supra* note 124, at 4.

481. *Id.*

482. DAVID SCHARIA, JUDICIAL REVIEW OF NATIONAL SECURITY, at xv (2014) (assessing Israeli courts' handling of national security cases).

483. For former Israeli Supreme Court President Aharon Barak, "[p]reserving the rule of law and the recognition of individual liberties constitute an important component of [democracy's] understanding of security." AHARON BARAK, THE JUDGE IN A DEMOCRACY 283 (2006).

484. *Cf.* Richard Delgado, *Explaining the Rise and Fall of African American Fortunes—Interest Convergence and Civil Rights Gains*, 37 HARV. C.R.-C.L. L. REV. 369 (2002) (positing that Black Americans' civil rights gains resulted not from altruism, but from the United States's self-interest in international appearances and Cold War gains).

485. *See* U.S. Const. amends. I–X.

state secrets privilege until *Zubaydah* and *Fazaga* in 2022.[486] The Court's resounding stamp of approval of an expansive state secrets privilege in those cases begs the question: Are the "evidentiary" privileges operating to shred independent judicial inquiry into claimed national security justifications for the government's curtailment of the constitutional liberties of people in America?

In the wake of the Court's recent state secrets privilege rulings, a new political opportunity arises. An opportunity for people to reclaim liberty and for the courts to accommodate both national security and civil liberties—"a balance consistent with the Constitution's design."[487] An American polity concerned about its constitutional democracy needs to organize and demand heightened judicial scrutiny of ostensible national security measures that curtail fundamental civilian liberties—at least in the absence of the confluence of the government powers over national security, immigration, and foreign affairs.[488] The time has come for scholars, public officials, and the public to compel the courts and legislatures to pare back the privileges.

In *White (House) Lies: Why the Public Must Compel the President Accountable for National Security Abuses*, after reviewing the multitude of Bush Administration lies during the early stage of the war on terror, Professor Yamamoto posed a pressing question about the future of civil liberties for those living in America.[489] "If the task of holding the executive accountable to constitutional standards ultimately falls on the courts, how does the American public hold the judiciary accountable?"[490] In other words, given the dark history of government dissembling on national security and the judiciary's penchant at times for blindly deferring to the president on national security claims, how do people of

486. Since *Reynolds*, the Supreme Court has occasionally addressed related issues, including the *Totten* bar and the presidential communications privilege. *See, e.g.*, Totten v. United States, 92 U.S. 105 (1875); United States v. Nixon, 418 U.S. 683 (1974); Kerr v. U.S. Dist. Ct. for N. Dist. Cal., 426 U.S. 394 (1976) (affirming the lower court's denial of writ of mandamus related to a state secrets privilege claim, but not addressing the privilege claim on the merits); Tenet v. Doe, 544 U.S. 1 (2005) (*Totten* bar case); Gen. Dynamics Corp. v. United States, 563 U.S. 478 (2011) (*Totten* bar case).

487. *See* United States v. Zubaydah, 595 U.S. 195, 255–56 (2022) (Gorsuch, J., dissenting) (arguing the *Reynolds* balancing test as originally framed is consistent with separation of powers).

488. *See* Yamamoto & Oyama, *supra* note 101, at 718 (interpreting *Trump v. Hawaii* to mean that courts are obligated to fully defer to the executive *only* where governmental powers over immigration, foreign affairs and national security converge).

489. Yamamoto, *White (House) Lies*, *supra* note 433, at 287.

490. *Id.*

the United States assure "that the courts actually scrutinize, rather than blindly accept, the executive's proffered justification for ostensible national security restrictions of our most basic freedoms?"[491]

And, for purposes of this article's concerns, how do Americans hold courts accountable for closely assessing the veracity of executive privilege claims—and maintain closely bounded contours for the privileges—rather than bowing to ever-expanding executive assertions of "state secrets" and "deliberative process" as a prelude to the threshold dismissal of bona fide civil and human rights claims for government accountability?

In the heat of post-9/11 security measures, *White (House) Lies* outlined a "strategic blueprint" for responding to these queries by aiming to build the "political coalitions and cultural momentum needed to impel close judicial scrutiny of executive national security claims."[492] A judge's choice between heightened or minimal scrutiny ("an ostensibly neutral aspect of the legal process") is actually influenced both by established legal methods (precedent and legislation), and, where those leave room for interpretation and flex in operation, by politics.[493] "Critical legal advocacy and public pressure about the necessity for executive accountability in courts of law, in light of the particular controversy, often provide the tipping point" in the courtroom.[494] The American public similarly plays a critical role in calling for the sharp curtailing of the state secrets and deliberative process privileges.

White (House) Lies also suggested focusing public advocacy in two realms. First, lawyers and civil and human rights organizations need to craft and advance a critical legal framework "aimed at shaping judges' threshold selections of the level of judicial scrutiny, and ultimately the judges' [heightened scrutiny of] the specific legal challenges to executive action" to expose "what is really going on" and how people are really impacted.[495] Second, public advocacy pressures the judiciary as an institution to embrace this scrutiny as a key aspect of judicial independence, lest it risk further loss of judicial legitimacy. It can do this through "public education: journalist essays, pundit commentaries, public letters to the editor, clergy sermons, scholars' op-ed pieces, community

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491. *Id.*
492. *Id.*
493. *Id.* at 291.
494. *Id.*
495. *Id.* at 291, 293.

workshops and school forums, all critically analyzing and advocating the need for the courts to carefully scrutinize the Executive's national security actions."[496]

These dual strategies do not aim to pressure a court to reach a particular legal result in a given case. Rather, the blueprint aims to pressure courts generally to undertake five "process" tasks. First, it seeks to compel courts "to employ tools of critical legal inquiry to unearth and then explain what is really going on in the [legal] controversy and to articulate what is at stake politically and socially."[497] Second, as highlighted by the stories recounted in this article, it pushes the courts to "acknowledge that sometimes a presidential administration distorts information and even lies to unduly expand its power and shield national security abuses from public view."[498] The third task is for courts to "recognize that traditional legal analysis, often largely devoid of context and visible value judgments, does not itself dictate a politics-free, neutral result."[499] In reality, and in judicial decision-making, politics often matters.

And the fourth task is for courts to "scrutinize executive actions with dual goals in mind: to afford the executive broad leeway in its efforts to protect the nation's people, and simultaneously to call the executive to account publicly for apparent transgressions of civil liberties and human rights under the possibly false mantle of national security."[500]

In light of the Supreme Court's recent *Zubaydah*, *Fazaga* and *Trump* decisions, a fifth and final task emerges. It is to integrate the other four tasks and to place on center stage the judiciary's legitimacy as an institution and as a cornerstone of American democracy.

The recent string of overtly partisan political rulings by an aggressively conservative Supreme Court majority has further torn the fabric of the Court's legitimacy in the eyes of many lawyers and much of the general public.[501] Dramatically declining public faith in the Court as

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496. *Id.* at 292.
497. *Id.* at 293.
498. *Id.*
499. *Id.*
500. *Id.* at 293–94.
501. The Court's string of ultra-conservative decisions jettisons settled precedent with the crucial votes of Trump appointees. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (holding there is no right to abortion under the U.S. Constitution and overruling Roe v. Wade, 410 U.S. 113 (1973) and Planned Parenthood of Se. Pa. v. Casey,

the independent branch of government mars the legal-political landscape.[502] This is significant. "Waning legitimacy imperils the court and the country," diminishing the public's willingness to assent to the rulings of its courts as arbiters of the country's commitment to the rule of

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505 U.S. 833 (1992)); West Virginia v. EPA, 597 U.S. 697 (2022) (holding the Clean Air Act did not authorize EPA to employ a "generation shifting" approach to regulate carbon dioxide emissions from power plants); Kennedy v. Bremerton Sch. Dist., 587 U.S. 507 (2022) (holding the school district violated the Free Exercise and Free Speech Clauses by suspending a coach for praying with players at midfield, effectively abandoning the traditional Establishment Clause test from Lemon v. Kurtzman, 403 U.S. 602 (1971)); Carson v. Makin, 596 U.S. 767 (2022) (holding the "nonsectarian" requirement in Maine's tuition assistance program for private schools violated the Free Exercise Clause); N.Y. Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1 (2022) (holding New York's "proper-cause" requirement for granting concealed-carry licenses violated the Second and Fourteenth Amendments); Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023) (holding the affirmative action admissions programs employed by Harvard College and the University of North Carolina violated the Equal Protection Clause); 303 Creative LLC v. Elenis, 600 U.S. 570 (2023) (holding a wedding website designer could decline to create websites for same-sex partners under the Free Speech Clause); Biden v. Nebraska, 143 S. Ct. 2355 (2023) (holding the Biden administration's student loan forgiveness program exceeded statutory authority).

502. *See* Keith, *supra* note 50; Waldman, *supra* note 51; Jones, *supra* note 51. The court's legitimacy has also suffered following recent ethics controversies surrounding Justice Clarence Thomas. *See, e.g.*, Devin Dwyer & Lucien Bruggeman, *Clarence Thomas Reportedly Received Years of Gifts From GOP Donor, Stirring New Ethics Scandal*, ABC NEWS (Apr. 7, 2023, 11:38 AM), https://abcnews.go.com/Politics/supreme-court-justice-clarence-thomas-received-gifts-republican/story?id=98406201 (reporting on Justice Thomas's failure to disclose gifts from billionaire Harlan Crow); Nina Totenberg, *Legal Ethics Experts Agree: Justice Thomas Must Recuse in Insurrection Cases*, NPR (Mar. 30, 2022, 5:00 AM), https://www.npr.org/2022/03/30/1089595933/legal-ethics-experts-agree-justice-thomas-must-recuse-in-insurrection-cases. With the Court's legitimacy in the public eye, several of the justices have addressed the public's intensifying perception that their decisions are politically driven. *See, e.g.*, Mark Sherman & Jessica Gresko, *Poll Numbers Down, Justices Say They Aren't Politicians*, AP NEWS (Sept. 25, 2021, 8:41 AM), https://apnews.com/article/religion-amy-coney-barrett-courts-us-supreme-court-judiciary-208d93c503545713964fe8f171a2679a. Justice Barrett, for example, proclaimed that the Supreme Court "is not comprised of a bunch of political hacks." Devin Dwyer, *Justice Amy Coney Barrett Picking Up 'Mores' of Supreme Court, Breyer Says*, ABC NEWS (Sept. 13, 2021, 12:58 AM), https://*abcnews.go.com/Politics/justice-amy-coney-barrett-picking-mores-supreme-co*urt/story?id=79991415. Justice Breyer echoed Barrett on this point. *Id.* But the public remained unconvinced—especially in light of the Court's recent rulings. *See id.*; cases cited *supra* note 501. Judges, too, apparently hold little faith in the nation's highest court. A recent survey by the National Judicial College found that an astounding over 40 percent of judges expressed "very little" confidence in the Supreme Court. *Of Judges Who Responded to our Poll, Most Expressed Very Little or Only Some Confidence in the Supreme Court*, NAT'L JUD. COLL. (June 30, 2023), https://www.judges.org/news-and-info/supreme-court-isnt-highly-regarded-by-most-judges-either/.

law.[503] The state secrets and deliberative process privileges, unless cabined, "add fuel to that fire."[504]

The price is high for failing to build the coalitions and generate the social momentum needed to restrain the dual executive privileges and the unconditional judicial deference they engender. That price is paid by institutions: pervasive presentation of falsified national security facts to surveillance courts (Chief Judge Collyer's order), and badly impaired democratic legitimacy reflected in a "weak judiciary, unfettered presidential power, and civil liberties disasters in waiting."[505] It is also a price paid by American people living in an increasingly authoritarian society: prolonged torture (*Zubaydah*); sweeping intrusive warrantless government surveillance of religious communities (*Fazaga*); religious bigotry barring entry to the United States (*Trump*); and exclusion from military service rooted in transphobia (*Karnoski* and *Stone*). And of course, earlier, mass forced removal and racial incarceration (*Korematsu*).

People and communities in the United States should not have to pay this price. At stake is American democracy at the intersection of security and liberty.

How might the judiciary or Congress narrow the state secrets and deliberative process privileges' boundaries? Justice advocates could organize around *Fazaga* and educate public constituencies to push for legislation about judicial review in national security cases. Dean Robert M. Chesney noted that a "skeptical Congress looking for reforms . . . might well take up the implicit challenge laid down by the Court in *Fazaga*, revising FISA to make clear an intent to subject claims of that kind to [FISA] procedures notwithstanding the privilege."[506] Such legislation would expressly displace or sharply limit the state secrets privilege where FISA applies, with appropriate procedural safeguards like *in camera* review and protective orders.

Tightening the privileges in federal courts generally could entail revising their required elements (solidifying the claimant's need for the

503. Ed. Bd., Opinion, *One Way to Repair the Supreme Court*, WASH. POST (Sept. 17, 2022, 7:00 AM), https://www.washingtonpost.com/opinions/2022/09/17/roberts-kagan-supreme-court-term-limits/.

504. *See* United States v. Zubaydah, 595 U.S. 195, 252–53 (2022) (Gorsuch, J., dissenting).

505. Yamamoto, *White (House) Lies*, *supra* note 433, at 287.

506. Chesney, *No Appetite for Change*, *supra* note 15, at 205–06.

evidence as integral to the privilege calculus) or clarifying or shifting burdens of proof (assuring the government's burdens of production and persuasion in claiming the privileges).[507] It might simply mean that judges explicitly accept their duty to exercise heightened judicial scrutiny over the actual "facts" to determine whether the privileges are invoked for bona fide security reasons and whether invocation in a given case would reflect an appropriate accommodation of national security *and* civil liberties.[508] Most concretely, this all might encompass efforts to revitalize the political and educational campaigns for passage of some version of the proposed States Secrets Protection Act, which was introduced in 2008 but withered on the legislative vine during the recession.[509]

Whatever the form, only when the public and critical legal advocates compel the judiciary or Congress to curtail the executive evidentiary privileges, in doctrine and practical application, for jurisprudential and realpolitik reasons, will U.S. courts be able to enliven their constitutionally prescribed role as guardian against "intolerable abuses."[510] Only then might they halt their slide into "abdicating independent inquiry" and resurrect judicial independence as a

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507. Scholars earlier suggested returning to the tighter contours of the privileges as originally formulated. *See, e.g.*, Lyons, *supra* note 173 (calling for a return to the original *Reynolds* framework absent post-9/11 doctrinal expansions). Other scholars suggested rejecting the deliberative process privilege in its entirety. *See* Wetlaufer, *supra* note 346; WRIGHT & GRAHAM, *supra* note 345.

508. *See, e.g.*, *Ex parte* Milligan, 71 U.S. 2 (1866) (scrutinizing the facts and identifying the courts' role of "watchful care" in the face of presidential claims of national security as justification for President Lincoln's curtailment of citizens' right of access to open and functioning federal courts as a seminal case on the judicial role); Trump v. Hawaii, 265 F. Supp. 3d 1140 (D. Haw. 2017), *vacated in part by* 878 F.3d 662 (9th Cir. 2017), *rev'd*, 585 U.S. 667 (2018) (undertaking heightened factual scrutiny, the district court judge determined President Trump's unsubstantiated claim that national security, rather than religious animus, motivated the 2017 Muslim-entry ban); Hassan v. New York, 804 F.3d 277 (3d Cir. 2015) (rejecting calls for "unconditional deference" to the government's national security justification for prolonged police surveillance and harassment of New York Muslim communities after 9/11). S*ee generally* YAMAMOTO, SHADOW OF KOREMATSU, *supra* note 49, at 95–107 (laying out an analytical framework that clarifies how courts might productively approach judicial review of civil liberties challenges to national security constraints). *See generally* Elizabeth Alderson, *A Survey of Solutions: Curtailing the Over-use of the State Secrets Privilege through "In Camera" Review*, 51 STETSON L. REV. 187 (2023) (advocating for judges to use *in camera* review to curtail the executive's overuse of the state secrets privilege).

509. *See* State Secrets Protection Act, S. 2533, 110th Cong. (2008) (failing passage in the U.S. Senate).

510. *See* United States v. Zubaydah, 595 U.S. 195, 249–51 (2022) (Gorsuch, J., dissenting) (quoting United States v. Reynolds, 345 U.S. 1, 8 (1953)).

cornerstone of their legitimacy. Only then might the United States start to reclaim its role as a leading democracy committed to both security *and* liberty.