AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 12: The Contemporary Era – Separation of Powers/Presidential War and Foreign Affairs Powers

**Federal Bureau of Investigation v. Fazaga, \_\_ U.S. \_\_** (2022)

*Yassir Fazaga was a member of a Muslim community in southern California. He believed that the Federal Bureau of Investigation had directed an informant to gather information from the members of his community, including by recording conversations in mosques and homes. Fazaga believed that the FBI ended the operation when members of the community reported the informant himself to the FBI because he began initiating conversations about a violent* jihad*.*

*In 2011, Fazaga filed a civil lawsuit against the FBI arguing that the government had violated their constitutional right to free exercise of religion by targeting them for investigation simply because of their religious beliefs. The government sought to dismiss the suit in part on the basis of state secrets doctrine, arguing that revealing information about any investigation would damage national security. The district court found that litigation risked disclosure of secret information and dismissed the suit. A circuit court reversed that ruling, holding that the congressional adoption of the Foreign Intelligence Surveillance Act of 1978 displaced the state secrets privilege with regard to electronic surveillance. The Supreme Court unanimously reversed the circuit court, holding that the procedures laid out in FISA did not displace state secrets privilege when such a privilege can be appropriately invoked.*

JUSTICE ALITO delivered the opinion of the Court.

. . . .

Respondents do not dispute that §1806(f) applies when the Government seeks to introduce evidence and a private party seeks to prevent such use, but they argue that §1806(f) is also sometimes triggered when “a civil litigant seeks to obtain such secret information.” . . .

. . . .

[E]ven as interpreted by respondents, §1806(f) does not displace the state secrets privilege.

First, the text of FISA weighs heavily against respondents’ displacement argument. FISA makes no reference to the state secrets privilege. It neither mentions the privilege by name nor uses any identifiable synonym, and its only reference to the subject of privilege reflects a desire to avoid the alteration of privilege law.

Even if respondents’ interpretation of §1806(f) is accepted, nothing about the operation of that provision is at all incompatible with the state secrets privilege. . . .

As an initial matter, it seems clear that the state secrets privilege will not be invoked in the great majority of cases in which §1806(f) is triggered. Section 1806(f) is most likely to come into play when the Government seeks to use FISA evidence in a judicial or administrative proceeding, and the Government will obviously not invoke the state secrets privilege to block disclosure of information that it wishes to use. Section 1806(f) is much more likely to be invoked in cases of this sort than in cases in which an aggrieved person takes the lead and seeks to obtain or disclose FISA information for a simple reason: individuals affected by FISA surveillance are very often unaware of the surveillance unless it is revealed by the Government.

With these cases out of the way, what is left are cases in which an aggrieved party, rather than the Government, triggers the application of §1806(f), but even under respondents’ interpretation of that provision, there is no clash between §1806(f) and the state secrets privilege. The statute and the privilege (1) require courts to conduct different inquiries, (2) authorize courts to award different forms of relief, and (3) direct the parties and the courts to follow different procedures. . . . Under §1806(f), the central question is the lawfulness of surveillance. . . .

By contrast, when the state secrets privilege is asserted, the central question is not whether the evidence in question was lawfully obtained but whether its disclosure would harm national-security interests. . . .

. . . . Under §1806, a court has no authority to award any relief to an aggrieved person if it finds that the evidence was lawfully obtained, whereas a court considering an assertion of the state secrets privilege may order the disclosure of lawfully obtained evidence if it finds that disclosure would not affect national security (assuming that the information is otherwise subject to disclosure). . . .

In addition, the state secrets privilege, unlike §1806, sometimes authorizes district courts to dismiss claims on the pleadings. . . .

. . . . [T]he state secrets privilege may be invoked not just by the Attorney General [as FISA requires] but by “the head of the department which has control over the matter, after actual personal consideration by that officer.” . . .

The procedures used to evaluate assertions of the state secrets privilege may also, in some circumstances, be more protective of information than the procedures prescribed by §1806(f). . . . [T]he state secrets privilege, unlike §1806(f), may sometimes preclude even *in camera*, *ex parte* review of the relevant evidence.

For those reasons, we conclude that Congress did not eliminate, curtail, or modify the state secrets privilege when it enacted §1806(f).

. . . . [W]e decide whether the Government’s evidence is privileged or whether the District Court was correct to dismiss respondents’ claims on the pleadings. . . .

*Reversed*.