

No. 20-828

In the Supreme Court of the United States

FEDERAL BUREAU OF INVESTIGATION, ET AL.,
PETITIONERS

v.

YASSIR FAZAGA, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

REPLY BRIEF FOR THE PETITIONERS

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Section 1806(f) of the Foreign Intelligence Surveillance Act of 1978 (FISA), 50 U.S.C. 1801 *et seq.*, provides an *in camera*, *ex parte* procedure that the Attorney General may invoke in certain circumstances for determining the admissibility of FISA-obtained or FISA-derived evidence that the government seeks to introduce in a court or other government proceeding. The decision below transforms that government-protective shield into a private sword that inventive litigants may seek to use to litigate the merits of any suit that relates in some manner to electronic surveillance. And the decision compounds that error by holding that whenever a private party successfully invokes that procedure, it displaces the federal government's authority and obligation to protect state secrets.

Although respondents attempt to defend the court of appeals' judgment, they distance themselves from its

reasoning. And while they attempt to downplay the significance of the decision for this case and others, they advance a view of the facts that is flatly inconsistent with the district court's undisturbed findings and a view of the law that would disregard decades of precedent on the government's authority to protect the Nation's most vital secrets. This Court's review is warranted now.

A. The Court Of Appeals' Decision Is Incorrect

The court of appeals erred in determining both that Section 1806(f) applies in the circumstances of this case and that the state-secrets privilege is displaced when Section 1806(f) applies. Pet. 16-29. Respondents' attempts to defend that decision are unpersuasive.

1. a. Contrary to the decision below, the Attorney General's formal invocation of the state-secrets privilege over certain information does not constitute notice that the government "intends to enter into evidence or otherwise use or disclose" that information "in" government proceedings "against an aggrieved person." 50 U.S.C. 1806(c). The government invokes the state-secrets privilege for the same reason any party invokes any evidentiary privilege—to *preclude* the use or disclosure of sensitive information in litigation. See *General Dynamics Corp. v. United States*, 563 U.S. 478, 485 (2011) ("The privileged information is excluded."). Indeed, it is precisely because the government has no intention of using or disclosing state secrets in this case that Section 1806(f)'s procedures for determining the admissibility of that information are irrelevant. See Pet. 18-19.

While respondents purport to defend the court of appeals' contrary conclusion, they do not actually endorse the court's upside-down suggestion that the government's assertion of privilege somehow provided notice of its "potential use" of that evidence at trial. Pet. App.

58a. Respondents recognize (Br. in Opp. 26) that the government sought to “*exclude* evidence,” not introduce it. Rather than resting their argument on the evidence’s “potential use” at trial, Pet. App. 58a, respondents argue that by asserting the state-secrets privilege, the government was *presently* using the information to “win dismissal” of respondents’ claims. Br. in Opp. 26 (emphasis omitted). But that argument is equally without merit.

Section 1806(c) speaks of the government’s “intend[ed]” use, not current use, and requires the government to provide notice of such intention at a “reasonable time prior to an effort to so disclose or so use the information.” 50 U.S.C. 1806(c). A motion to dismiss on state-secrets grounds cannot simultaneously serve as the government’s advance notice of its intended future use of state secrets *and* its actual use of those secrets. In seeking to dismiss a claim on state-secrets grounds, moreover, the government does not “use” the excluded evidence “in” the proceeding, *ibid.*; it relies on the fact that any such use would undermine national security as a reason to bring the litigation to an end.¹ And a motion to dismiss on state-secrets grounds does not seek to “win dismissal” against respondents. Br. in Opp. 26 (emphasis omitted). It seeks judicial recognition that, because the claim cannot be litigated without posing an unacceptable risk to national security, “neither party can obtain judicial relief.” *General Dynamics*, 563 U.S. at 486.

¹ Contrary to respondents’ contention (Br. in Opp. 27), Congress’s use of the phrase “enter into evidence or *otherwise* use or disclose” merely reflects that not every proceeding “before any court, department, officer, agency, regulatory body, or other authority of the United States,” to which Section 1806(c) applies, is governed by formal rules of evidence. 50 U.S.C. 1806(c) (emphasis added).

b. The court of appeals also erred in determining that respondents' prayer for relief seeking an order requiring the government to "destroy or return," Pet. App. 58a, any unlawfully obtained information amounted to a "motion or request * * * by an aggrieved person * * * to discover, obtain, or suppress" FISA-obtained or FISA-derived information within the meaning of Section 1806(f), 50 U.S.C. 1806(f). As evidenced by the rest of Section 1806, as well as its context and history, that ground for invoking Section 1806(f) serves only as a backstop to prevent private litigants from evading Section 1806(f)'s government-protective procedures through some "new statute, rule or judicial construction," unforeseen by Congress. S. Rep. No. 701, 95th Cong., 2d Sess. 63 (1978). It does not transform those procedures into a means of resolving the merits of a case. See Pet. 19-22.

Once again, although respondents purport to defend the court of appeals' contrary holding, they do not embrace its rationale. While the court held that respondents' complaint itself triggered Section 1806(f)'s procedures, respondents now posit (Br. in Opp. 28) that a *future* "motion for permanent injunctive relief" they may file "if they prevail[]" would qualify as a "motion * * * to discover, obtain, or suppress" FISA-obtained or FISA-derived evidence under Section 1806(f). Even if that were a plausible reading of Section 1806, however, it would at most trigger Section 1806(f)'s *in camera* and *ex parte* procedures to resolve that future motion. It could not justify the district court's use of those procedures to determine *whether* respondents prevail—*i.e.*, to resolve the merits of their claims.

Section 1806(f)'s requirement that a district court determine "whether the surveillance of the aggrieved

person was lawfully authorized and conducted” does not suggest that its procedures are designed to resolve the merits of a claim. Cf. Br. in Opp. 29. While those issues may be relevant to more than admissibility, Section 1806(f) provides a mechanism for resolving them only in specific circumstances, not whenever they may arise. And the only relief it authorizes, if the surveillance is found to be unlawfully authorized or conducted, is to “suppress the evidence * * * or otherwise grant [a] motion” to “discover [or] obtain” it, not to issue final judgment. 50 U.S.C. 1806(f) and (g).

Respondents repeat (Br. in Opp. 29) the court of appeals’ suggestion that the existence of Section 1810’s private cause of action for damages for criminal violations of FISA means that Section 1806(f) must be available to resolve the merits of such suits. But they offer no more explanation than the court of how a suit for “compensatory and punitive damages” (*ibid.*) could conceivably be described as a “motion or request * * * to discover or obtain applications or orders or other materials relating to electronic surveillance or to discover, obtain, or suppress evidence or information obtained or derived from electronic surveillance under this chapter,” 50 U.S.C. 1806(f). Whether Section 1806(f)’s procedures may be invoked in a Section 1810 suit just as they can be in any other suit, where the predicates of Section 1806(f) are met, says nothing about whether they could be used to resolve the merits of such a suit. For all the reasons explained here and in the petition, they could not.

2. The court of appeals compounded its error by holding that, whenever Section 1806(f)’s procedures apply, they displace the government’s ability to invoke the state-secrets privilege to remove any sensitive national-

security information from the case. The state-secrets privilege is a longstanding privilege, firmly rooted in the Constitution and the common law. Similar *in camera* procedures pre-dated FISA's enactment. There is nothing in Congress's codification of those procedures in this context that suggests an intent to displace the privilege—much less with the clarity that this Court would ordinarily require for such a fundamental shift in the “balance of powers among Congress, the Executive, and the Judiciary,” Pet. App. 110a (Bumatay, J., dissenting from denial of rehearing en banc). Pet. 22-29.

Like the court of appeals, respondents fail to identify anything in the text or legislative history of FISA that shows an intent to prevent the government from protecting national security by asserting the state-secrets privilege. They focus (Br. in Opp. 31) on Congress's use of the phrase “notwithstanding any other law” in Section 1806(f). But that phrase speaks only to the nature of any Section 1806(f) proceeding—it must be *in camera* and *ex parte*, “notwithstanding any other law” requiring an adversarial hearing. See Pet. 25. The phrase does not mean that a Section 1806(f) proceeding is required notwithstanding the government's state-secrets-based objection. After all, a district court is authorized to proceed *in camera* under Section 1806(f) only if the *Attorney General* invokes those procedures to *protect* national security. Like the rest of Section 1806(f), it is designed to preserve the Executive Branch's ability to safeguard national security, not hobble it.

B. The Court Of Appeals' Decision Warrants Immediate Review By This Court

The court of appeals' decision undermines the Executive's ability to protect sensitive national-security information and keep its promises to foreign allies. Pet.

30-33. As explained by the ten judges dissenting from the denial of rehearing en banc, the decision disrupts the careful balance this Court's cases have established between transparency and security, "in favor of inventive litigants and overzealous courts." Pet. App. 110a-111a (Bumatay, J., dissenting from denial of rehearing en banc). And it threatens to deprive the government of an essential means of safeguarding this Nation's most sensitive information.

1. Respondents err in contending that unresolved questions justify postponing this Court's review.

As respondents observe (Br. in Opp. 16-17), the government has argued in some lower courts that, even under the erroneous decision below, litigants may not invoke Section 1806(f)'s procedures without first establishing they are "aggrieved person[s]" within the meaning of FISA. See 50 U.S.C. 1806(f) (referring to, *e.g.*, when a "motion or request is made by an aggrieved person" to "discover, obtain, or suppress evidence"); 50 U.S.C. 1801(k) (defining "aggrieved person"). But the plaintiffs in those still-pending cases have argued that any such requirement is inconsistent with the decision below. See Appellant's Opening Br. 49-50, *Wikimedia Found. v. National Sec. Agency*, No. 20-1191 (4th Cir.); Appellants' Opening Br. 22, *Jewel v. National Sec. Agency*, No. 19-16066 (9th Cir.). Respondents have similarly argued that they have already made "any" showing that "FISA requires" to invoke Section 1806(f). Br. in Opp. App. 10a.

Contrary to respondents' assertion (Br. in Opp. 17-18), there is no open question about the scope of the government's privilege claim. The scope of that claim was set out in the Attorney General's formal invocation of the privilege in 2011. See Holder Declaration, D. Ct.

Doc. 32-3 (Aug. 1, 2011). The government has not since changed or suggested it intends to change the scope of that claim. What respondents cite as evidence of uncertainty about the scope of the claim actually reflects the government's cautious approach to state-secrets dismissals, see Mot. to Dismiss 4 (“At least at this stage of the proceedings, the Government believes that sufficient non-privileged evidence may be available to litigate [the search] claims should they otherwise survive the defendants’ motions to dismiss on non-privilege grounds.”), and uncertainty about the effect of the Ninth Circuit’s displacement holding on the ability to proceed exclusively on the basis of non-privileged evidence, while keeping privileged evidence entirely out of the case, see Br. in Opp. App. 31a-32a.

In any event, respondents do not (and could not) argue that any questions about the scope of the government’s privilege claim or respondents’ “aggrieved person” status would pose any obstacle to the Court’s resolution of the question presented. The precise scope of the privilege claim has no bearing on the purely legal questions resolved below, and the “aggrieved person” question is neither jurisdictional nor presented. Moreover, even if the government were able to prevail on aggrieved-person grounds on remand here and in each of the pending cases, avoiding invocation of Section 1806(f) procedures, the decision below would continue to pose a substantial obstacle to the Executive Branch’s ability to protect state secrets in future cases if plaintiffs can make the necessary showing. For that reason, the fact that the government might prevail on alternative grounds on remand, and thus deprive this Court of a vehicle to resolve the important question presented, is a reason to grant review, not to delay it.

2. Respondents' attempts to minimize the importance of the decision below are also unavailing.

Respondents insist (Br. in Opp. 17) that the decision displaces only the state-secrets "dismissal remedy," not the core of the privilege. But the decision itself makes clear that, if the case proceeds to judgment under Section 1806(f), the district court is to decide the merits of this case on the basis of the government's privileged evidence. See Pet. App. 92a-93a (instructing the district court to "review any 'materials relating to the surveillance as may be necessary,' *including the evidence over which the Attorney General asserted the state secrets privilege*, to determine whether the electronic surveillance was lawfully authorized and conducted") (emphasis added; citation omitted). Preventing courts from relying on privileged evidence to decide the merits of a suit is the core of any evidentiary privilege. The panel's decision displaces the privilege. That remains true even if the district court is able to determine, on the basis of privileged evidence, that the government prevails. Cf. Br. in Opp. 17. Indeed, that process and result itself could risk further disclosure of the privileged information. See Pet. 32-33.

Respondents reiterate (Br. in Opp. 17) the concurrence's view that, if the district court were to determine that the government's privileged evidence must be disclosed to respondents themselves "to make an accurate determination of the legality of the surveillance," 50 U.S.C. 1806(f), then the government could re-assert the state-secrets privilege at that time. But respondents provide no more basis in the text of the statute for this gerrymandered partial-displacement theory, nor any better justification. Cf. *United States v. Reynolds*, 345 U.S. 1, 10 (1953) (courts "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”).

Respondents’ contention (Br. in Opp. 19-21) that the decision below does not conflict with any decision of this Court or another court of appeals provides no basis for denying review. It is enough to note here that respondents’ view that state-secrets dismissals are appropriate only in “Government-contracting disputes” in which “the very subject matter of the action . . . [i]s a matter of state secret,” *id.* at 20 (citation omitted; brackets in original), would effect a sea change in the state-secrets jurisprudence that has developed over the past several decades.² And the need for this Court’s review is based not on a circuit conflict, but the threat to national security created by the decision below. That is not the sort of issue on which the Court should await further percolation.

Finally, respondents’ assertion (Br. in Opp. 18) that privileged information may not be necessary to litigate this case cannot be credited. It is flatly inconsistent with the district court’s finding (undisturbed by the

² See, e.g., *El-Masri v. United States*, 479 F.3d 296 (4th Cir.) (constitutional claims), cert. denied, 552 U.S. 947 (2007); *Sterling v. Tenet*, 416 F.3d 338 (4th Cir. 2005) (Title VII claims), cert. denied, 546 U.S. 1093 (2006); *Tenenbaum v. Simonini*, 372 F.3d 776, 777 (6th Cir.) (constitutional claims), cert. denied, 543 U.S. 1000 (2004); *Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir.) (Resource Conservation and Recovery Act claims), cert. denied, 525 U.S. 967 (1998); *Black v. United States*, 62 F.3d 1115, 1119 (8th Cir. 1995) (FTCA and *Bivens* claims), cert. denied, 517 U.S. 1154 (1996); *Bareford v. General Dynamics Corp.*, 973 F.2d 1138, 1140-1141 (5th Cir. 1992) (tort claims), cert. denied, 507 U.S. 1029 (1993); *Molerio v. FBI*, 749 F.2d 815, 825 (D.C. Cir. 1984) (constitutional claim).

Ninth Circuit), based on a careful review of respondents' allegations and the Attorney General's "comprehensive and detailed" classified declaration and memorandum, that "litigation of this action would certainly require or, at the very least, greatly risk disclosure of secret information." Pet. App. 165a. Even if respondents are willing to attempt to make their "*prima facie* case" on the basis of non-confidential information, Br. in Opp. 18; but see Pet. App. 92a (instructing the district court to proceed *ex parte* on remand), the government "will inevitably need the privileged information to defend" itself against respondents' claims. Pet. App. 166a.

Respondents' suggestion (Br. in Opp. 24) that, notwithstanding that finding, the government "can always forgo such use if it believes it too risky" to defend against respondents' claim, only serves as a powerful demonstration of why this Court's review is urgently needed. That is precisely the sort of gambit that the decision below enables by forcing the government to either litigate claims that implicate the Nation's most sensitive information or concede the case (with potentially far-reaching consequences for the Nation's intelligence activities). This Court has previously refused to enable such suits, referring to the practice as "graymail." *Tenet v. Doe*, 544 U.S. 1, 11 (2005). If Section 1806(f) is to be interpreted to allow plaintiffs in a civil case to put the government in this position, the decision should come from this Court.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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