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EXAMINING THE STATE SECRETS PRIVILEGE: PROTECTING NATIONAL SECURITY WHILE PRESERVING ACCOUNTABILITY

HEARING

BEFORE THE

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UNITED STATES SENATE

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WEDNESDAY, FEBRUARY 13, 2008

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:13 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Kennedy, Feingold, Whitehouse, Specter, and Hatch.

OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT, CHAIRMAN, COMMITTEE ON THE JUDICIARY

Chairman LEAHY. I apologize to everybody for being late. I was at the dentist, as I was telling Mr. Fisher and Justice Wald and some others. Then the road I'd normally take, a tree had gone down, and so on and so forth.

But somehow—in my own State, I live on a dirt road, up a long mountain road. We can have two feet of snow overnight and everything still goes on time. I won't even get into the snow stories that Vermonters like to tell when there's any weather down here.

But we have a very important issue, the state secrets privilege. As a common law doctrine, as all the panelists know, the government can claim in court to prevent evidence that could harm national security, prevent it from being publicly revealed.

To start off, I want to thank both Senators Kennedy and Senator Specter, both former chairmen of this Committee who did a great deal in helping to plan this hearing. I commend them for their work on the legislation to create uniform standards to guide courts in evaluating state secrets privilege claims. Both Senators have done, I believe, enormous service to the courts and to the country.

We're here because, over the past 7 years, the administration has aggressively sought to expand executive power in alarming ways. We have always gone on the sense of public accountability, but that's been repeatedly frustrated because so many of the administration's actions have been cloaked in secrecy. Time and again, they've fought tooth and nail to stop not only Congress, but the American people at large from having information about policies and practices.

After all, it wasn't from anything we found out in the Congress from the administration, but it's through the press that we learned about the secret surveillance of Americans by their own government in the years after 9/11, or the secret renditions abroad that violated U.S. law, secret prisons abroad, secret decisions to fire some of the Nation's top prosecutors and the secret destruction of interrogation tapes that may have evidence of torture.

That was all because of an overly expansive, and I believe self-justifying view, of executive power. But now they seek secrecy protections. They've taken a legal doctrine that was intended to protect sensitive national security information, but they want to expand it to evade accountability for misdeeds. State secrets privileges have been used in recent years to stymie litigation at its very inception in cases alleging egregious government misconduct, extraordinary rendition, warrantless eavesdropping.

Reflecting on this, the New York Times observed, "To avoid accountability, the Bush administration has repeatedly sought early dismissal of lawsuits that might expose government misconduct, brandishing the flimsy claim that going forward would put national security secrets at risk."

Of course, the clearest example of that was short-circuiting litigation in the 2006 case of Khalid al-Masri. Mr. al-Masri is a German citizen of Lebanese descent. He claimed he was kidnapped on New Year's Eve in 2003 in Macedonia, transported against his will to Afghanistan, detained, and tortured as part of the Bush administration extraordinary rendition program. He sued the government over this detention and harsh treatment.

A District Court judge in Virginia dismissed the entire lawsuit on the basis of an ex parte declaration from the Director of the CIA, and despite the fact that the government admitted publicly that the rendition program exists. An ex parte declaration. Not even a hearing in chambers with both parties to argue this.

So he had no other remedy. The justice system is off limits to him. No judge ever reviewed, either in camera or in the courtroom, what the evidence was. The state secrets privilege serves important goals when it's properly invoked, but like all things, it's going to disappear if it's used in a way just to cover one's mistakes. You can't have a case where the courthouse doors are closed forever, regardless of the severity of injury. Courts should be able to make a choice.

Now, Senator Specter and Senator Kennedy and I introduced a bill to help guide the courts. We don't restrict the government's ability to assert the privilege in appropriate cases, but we at least say what standards should be followed, allowing judges to look at the actual evidence that government submits so that neutral judges, not self-interested executive branch officials, would render the ultimate decisions.

When I think about the administration's expansive use of the state secrets privilege, I'm reminded of another secretive administration involved in the Watergate scandal and the Pentagon papers case. That was a case about the government's attempt to hide an historical study of this country's involvement in Vietnam. The Nixon administration contended that knowledge of the study posed grave and immediate danger to the security of the United States.

Fortunately, the U.S. Supreme Court decided otherwise when they decided the Pentagon papers case. In his concurring opinion, Justice Black noted, "The guarding of military diplomatic secrets at the expense of an informed representative government provides no real security for our Republic." So, it's critical that Federal judges not advocate that role in our system of checks and balances.

I'll put my whole statement in the record.

[The prepared statement of Senator Leahy appears as a submission for the record.]

Chairman LEAHY. Senator Specter.

STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. Thank you, Mr. Chairman.

We are living in an era of extraordinary expansion of executive authority. I believe, at some point in the future, people will look back at this decade and comment about the need for expanded executive authority, but also raise questions about the response of checks and balances.

Regrettably, the congressional oversight factor has been totally ineffective in restraining the expansion of executive authority. Now, I do not doubt or deny the need for the expansion of executive authority, but I think there has to be a check and a balance.

The Terrorist Surveillance Program was put into effect with the President explicitly claiming that his Article 2 powers superseded legislation. Similarly, the President disregarded the National Security Act of 1947 in failing to inform the Intelligence Committees of both Houses, as required by law. We've had the signing statements, and the only restraint has been the courts. When we were considering retroactive immunity for the telephone companies, the issue arose as to a state secret defense.

Senator Kennedy, Senator Leahy, and I put our heads together and decided that we really ought to have some congressional intervention here. I thank Senator Kennedy and his staff for the leadership on the issue, and the Chairman for setting up these hearings. This Committee is loaded with ex-chairmen. We have four ex-chairmen on this Committee. In fact, Senator Leahy has—

Chairman LEAHY. You have three ex-chairman. One is still Chairman. Good Lord, don't push me out that fast!

[Laughter].

Senator SPECTER. Well, I'd like to, but I can't.

[Laughter].

Nothing personal. In fact, the personal relationship is extraordinarily good.

Chairman LEAHY. Thank you.

Senator SPECTER. I would disagree with my learned colleague, Senator Leahy, on the grounds that he has two capacities: notwithstanding the fact that he's a chairman, he's also an ex-chairman.

Chairman LEAHY. You're right.

Senator SPECTER. So he serves in a dual capacity. There are four ex-chairmen on this Committee.

Chairman LEAHY. I stand corrected. You're absolutely right.

Senator SPECTER. And we are going to move ahead. I believe that the pending legislation is very salutary because it brings the court

into the picture to make a determination on whether there is a state secret. It's up to the Congress to define what a state secret is. We have done that.

As I looked back over the case of *United States* v. *Reynolds*, a Supreme Court decision in 1953 where the government claimed that there was a state secret involved in a lawsuit brought by three widows whose husbands died in the crash of a B–29 bomber, and later it developed that there was no state secret and the injured parties sought redress at a later time, and the Third Circuit still upheld the claim of state secrets. It's a little mystifying to me as to how that happened.

So I think it's really important, where we deal with this issue, that there be a legislative determination of the standard and procedures to deal with it, and ways to get some of the information examined in camera, and to have a substitute and perhaps redacted information.

Pending is the Foreign Intelligence Surveillance Act. The effort to substitute the government for the telephone companies was unsuccessful in the Senate yesterday. We'll see what happens in conference. It seems to me that that was a good example of a way to maintain national security, because the telephone companies would continue to provide whatever information they are and the courts would be kept open.

Senator Leahy is quoted in this morning's paper as saying that "sometimes Senators get cold feet to contest what the government has to say, and we need some foot warmers around here." That's our job. That's our job. If we can't do it, then we've been totally ineffective. Senator Leahy and I sent a letter to the Attorney General and want to know about the CIA-destroyed tapes. We get back some comment, "Well, it's political." I don't quite understand that, but it's political.

Then the Federal court has a case involving the CIA tapes and issues an order to provide the material. Well, the court's not political. The Attorney General doesn't have to obey the court, but he has taken an appeal and eventually it gets to Rasoul, and eventually the courts are involved. I think we have to be very careful when we exclude the judicial process in the determination of these issues, and this legislation goes a significant step in that direction.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you.

Senator SPECTER. Thank you former Mr. Chairman.

Chairman LEAHY. Actually, this is the third time I've been Chairman, once for 2 weeks.

Senator Kennedy.

STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS

Senator KENNEDY. Will you guys get it straight so we can get on with the hearing?

Thank you, Senator Leahy. I want to thank you very sincerely for having this hearing today. It's long past time for the Committee to address the state secrets privilege, and I look forward to the testimony of the distinguished panel of witnesses.

Chairman Leahy, Senator Specter, and I have recently introduced a bill to regulate judicial review of the privilege, and the bill is called the State Secrets Protection Act. I thank Senator Leahy and Senator Specter for their commitment to this effort. By working together, we can make real bipartisan progress on this fundamental issue.

The goal of our bill is to protect legitimate state secrets from disclosure, prevent misuse of the privilege, and allow litigants to have their day in court. Federal judges already handle sensitive information under the Classified Information Procedures Act, and the the Freedom of Information Act, and the Foreign Intelligence Surveillance Act, and there is no reason why they can't do so in civil cases as well.

Our bill has already been endorsed by a number of legal groups and scholars. As the New York Times editorial stated, "It will give victims fair access to the courts and make it harder for the governments to hide illegal or embarrassing conduct behind unsupported claims. Of course, legitimate secrets need to be protected, and the legislation contains safeguards to ensure that." Similar editorials have been published by the San Francisco Chronicle, the Salt Lake Tribune, and numerous legal blogs. This hearing will provide valuable insight on the bill as we move towards mark-up.

With the Chairman's permission, there are a number of items I'd like to have included in the record to help clarify the issues we'll be discussing today. All of the documents show why there is a need for Congress to take action on the state secrets privilege. First, a letter to Congress by 23 eminent scholars last October. They wrote that "legislation action on the privilege is essential to restore and strengthen the basic rights and liberties provided by our constitutional system of government."

Second is a bipartisan report released by the Constitution Project last May: "Reforming the State Secrets Privilege." The report explains the problems with the current law on the privilege and concludes, "There is a need for new rules designed to protect the system of checks and balances, individual rights, national security, fairness in the courtroom, and the adversary process."

Third is a report last August by the American Bar Association along the same lines, "urging Congress to enact legislation governing Federal civil cases implicating the state secrets privilege."

Fourth a statement by the American Bar Association's president-elect, prepared 2 weeks ago for a hearing in the House, endorsing our bill.

Fifth is a statement submitted for this hearing by William Webster, who was a Federal District Judge for 3 years, Appellate Judge for 5 years, Director of the FBI for 9 years, and Director of the CIA for 4 years. If anyone knows the state secrets privilege from both the executive and judicial perspective, it's William Webster.

In his letter he says, "As a former Director of the FBI and Director of the CIA, I fully understand and support our government's need to protect sensitive national security information. However, as a former Federal judge, I can also confirm that judges can, and should, be trusted with sensitive information. They are fully competent to perform an independent review of executive branch assertions of the state secrets privilege."

He concludes by saying, "Granting executive branch officials unchecked discretion to determine whether evidence should be the subject of the state secrets privilege provides too great a temptation for abuse. It makes much more sense to require the executive branch to submit such evidence to the courts for an independent assessment on whether the privilege should apply. Courts, not executive branch officials, should be entrusted to make these determinations and thereby preserve our constitutional system of checks and balances."

The sixth item is an analysis sent to me on February 8 by William Weaver and Danielle Escontrias. Professor Weaver is a leading expert on the state secrets privilege. His analysis responds to an empirical study published by one of our witnesses, Robert Chesney. Professor Weaver raises some concerns about Professor Chesney's methodology and finds that "exploitation of the privilege over the last several decades represents a serious threat to congressional oversight and the ends of justice."

Finally, I'd like to put in the record two personal letters I received. Many in the room are aware that the leading case on the state secrets privilege is *U.S.* v. *Reynolds*, which has been heavily criticized.

I'll include a very personal, lovely letter from Patricia Reynolds Herring in the record. Senator Specter has referred to it. I'll just read the last paragraph: "I'm very grateful and hopeful to see S. 2533, the State Secret Protection Act. I'm confident this bill can be a positive step in creating a safeguard to balance *U.S.* v. *Reynolds*. This would give me great comfort."

Also, a very moving letter from Susan Parker Brauner, whose father was killed in the Reynolds airplane crash. Ms. Brauner's letter concludes, "Correcting the flaws currently in the state secrets privilege will not give back the life that a young couple", Ms. Brauner's parents, "had hopefully planned together all those years ago. It will, however, most certainly provide a measure of justice for all the families whose loved ones were killed on the flight."

Each of these documents, Mr. Chairman, helps make clear why this hearing is so important. It's not just about abstract principles of separation of powers, open government, and constitutional rights. It's also about whether real people can achieve justice in our courts.

I look forward to the discussion, and I thank you again.

Chairman LEAHY. Well, thank you very much, Senator.

Our first witness would be Carl Nichols, the Deputy Assistant Attorney General in the Department of Justice's Civil Division's Federal Programs Branch. I understand, Mr. Nichols, you've been there since March of 2005. Is that correct?

Mr. Nichols. That is correct.

Chairman LEAHY. He oversees and coordinates the branch's trial litigation on behalf of the Federal Government regarding constitutional challenges to Federal statutes.

Prior to joining the Department he was a partner in the well-known and respected Washington, DC office of Boies, Schiller & Flexner. He attended Dartmouth College in my neighboring State, eastern State—east as compared to Vermont—and received his law degree from the University of Chicago Law School.

Mr. Nichols, thank you for taking the time. We're delighted to have you here. Please go ahead.

STATEMENT OF CARL J. NICHOLS, DEPUTY ASSISTANT ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE, CIVIL DIVISION, WASHINGTON, DC

Mr. NICHOLS. Thank you very much. Chairman Leahy, Ranking Member Specter, and members of the Committee, thank you for the opportunity to testify concerning the important subject of today's hearing, the state secrets privilege.

Since March 2005, I have served in the Department of Justice as the Deputy Assistant Attorney General for the Civil Division's Federal Programs Branch. In that capacity I've been involved in the decision-making process regarding whether, and when, the executive branch will assert the state secrets privilege in civil litigation.

As the Committee is aware, the state secrets privilege is a well-established legal doctrine that plays a vital role in protecting the national security by ensuring that civil litigation does not result in the disclosure of information that, if made public, would cause serious harm to the United States. This privilege plays an important role in times of war and times of peace, has been asserted by the executive branch, and has been recognized by the courts, since the 19th century, and is subject to review by the judiciary.

While the judiciary plays an important role in assessing any assertion of the state secrets privilege, the privilege does have a constitutional pedigree. The Supreme Court made that clear in *United States* v. *Nixon* when it stated that "a claim of privilege on the ground that information constitutes military or diplomatic secrets"—that is,—the state secrets privilege—necessarily involves areas of Article 2 duties assigned to the President. It is important to emphasize—however—I think it is very important to emphasize that although the state secrets privilege emanates from the President's constitutional authority, the privilege is neither limitless nor unchecked. It is also important to emphasize that the executive branch asserts the privilege selectively, and when doing so details the specific harms to national security that would occur if sensitive information is publicly revealed, and it is important to emphasize that not every assertion of the state secrets privilege results in the dismissal of a pending case.

Any assertion of the state secrets privilege involves a rigorous procedural and judicial process to ensure that the privilege is not, in the words of the Supreme Court, lightly invoked. To begin, several formal requirements apply to the privilege assertion. The privilege can be invoked only by the United States, only through a formal claim of privilege, only by the head of the department which has control of the matter, and only after that official has given actual personal consideration to the question.

Meeting these requirements typically requires several layers of substantive departmental review and coordination, an important part of which is the agency head's—often Cabinet official's—personal review of various materials, including the declaration or declarations that he or she must sign, under penalty of perjury, in order to assert the privilege.

Once it has been decided that it is appropriate to assert the privilege in a particular case, the judicial branch plays a vital role in assessing whether the privilege will be upheld. Specifically, the court must decide whether the invocation of the privilege is predicated upon a reasonable danger that disclosure of the information will harm national security.

In making that determination, a court often reviews not just publicly available materials, but also classified declarations and other information providing further detail for the court's review. A common misperception is that classified information is never, or only rarely, shared with the courts and that the courts are therefore asked to uphold the privilege based on trust and non-specific claims of national security. That is simply inconsistent with our practice. In every case of which I am aware, we have made available to the courts both unclassified and classified declarations that justify, often in considerable detail, the bases for the privilege assertions.

Once a court has concluded that the information is privileged, the information is removed from the case and the court plays a second and equally important role. It must decide whether, and if so how, the case can proceed without that information. Sometimes a case must be dismissed because it is obvious that the case could not proceed without information that would harm the United States.

However, in other cases, and contrary to a popular misconception, the privileged information is peripheral and the case can proceed without it. Thus, rather than playing a passive role in accepting at face value blanket executive assertions of the state secrets privilege, courts play a vital role in determining whether the privilege will be upheld and adjudicating how and when cases can proceed if sensitive national security information is excluded. These dual roles underline the crucial role of the judiciary in checking assertions of the state secrets privilege and assuring against the disclosure of national security that would cause serious harm to the United States.

Mr. Chairman, I would like to conclude with the following point. While there may be disagreement as to when this privilege ought to be asserted, rigorous executive branch safeguards and judicial review ensure that it is invoked and upheld only in circumstances necessary to protect the national security of the United States. On this point there should be no disagreement: such a privilege is not only desirable, but necessary to avert serious harm to national security.

Thank you for the opportunity to appear before the Committee. I would be pleased to answer any questions you may have.

[The prepared statement of Mr. Nichols appears as a submission for the record.]

Chairman LEAHY. Thank you. We will go back to questions. Although I could not help but think, listening to this rigorous review, if you have an ex parte, in camera review, I must admit, during my years as a prosecutor, I would love to have been able to have that advantage, to be able to argue ex parte. But we'll get back to that. That's just so you know some of the areas where I'm going to ask.

Judge Patricia Wald was a Circuit Judge on the U.S. Court of Appeals for the D.C. Circuit from 1979 to 1999, and 5 years as Chief Judge. She's the author of over 800 judicial opinions. More recently, she served as a U.S. Judge on the International Criminal Tribunal for the former Yugoslavia in Hague, and she was given well-deserved international recognition for her significant decisions in the field of international humanitarian law.

She's received numerous honors and awards. She's served on the boards of several commissions, including the President's Commission on U.S. Intelligence Capabilities Regarding Weapons of Mass Destruction from 1999 to 2001. She went to Connecticut College, and got her law degree from Yale Law School.

Judge Wald, you're no stranger to us here. Please go ahead.

STATEMENT OF HON. PATRICIA M. WALD, FORMER CHIEF JUDGE, U.S. COURT OF APPEALS FOR THE D.C. CIRCUIT, WASHINGTON, DC

Judge WALD. Thank you, Chairman Leahy, Senator Specter, Senator Kennedy, Senator Feingold, Senator Hatch.

The state secrets privilege is a common law privilege which has been entirely administered by the judges up to this point. A review of these cases I think will indicate, as the American Bar Association report and the American Constitution Project statement illustrated, the decisions have varied in the scope and in the procedures that judges have used in administering the privilege. Some of them have been very cautious, but in others it seems almost as though it were enough that if the government should raise the privilege, that it would be recognized.

As a result, there has not been uniformity in the case law surrounding what the judges should do in administering the privilege. There's no serious question that I know of that Congress does have the right, pursuant to the Constitution, Article 3, Section 2, to regulate rules of evidence for the Federal courts, consistent with the Constitution and due process, obviously. That is what this bill sets out to do, as I read it.

Now, the Supreme Court has said in Reynolds that it is the judge and not the executive branch that is the final decision-maker in the application of the privilege. I think that this bill has admirably incorporated that view when it says that the judge shall decide whether the government's claim is valid.

I see this bill essentially as an enabling bill because it enables the judges to use all of the techniques which have developed since Reynolds, and sometimes in the context of other types of national secret cases, such as Exemption 1 under FOIA where you do have these kinds of classified information coming up, and in CIPA, which regulates the classified information in criminal cases.

Out of those cases have come a variety of techniques, most of which, or many of which, are elucidated in the bill. They include not only the regular techniques of sealing, protective orders, separating segregated from non-segregated information, but also some of the more innovative ones, such as the Vaughn Index, which is specifically set out in this bill in which a government affidavit does have to go, almost line by line, through the material sought to be

excluded in trying to justify witholding. Particularly useful, I think, is the encouragement of masters.

I presided in one case in the Court of Appeals where the government had initially said, no, we can't disclose, I think it was hundreds of thousands of pages dealing with the hostage crisis at the end of the Carter administration and the aborted attempt to get the hostages. Judge Oberdorfer appointed a screened—an intelligence-screened master, who then sampled the documents and gave to the judge sample categories of the information and the arguments, pro and con witholding; he didn't even make recommendations.

As a result of that, something like 60,000 of those pages were ultimately agreed to be released, including one that I always like to mention which had originally been classified, and that was the fact that milk carried in cartons in the helicopters curdled. Many of these techniques are set out here.

There are two things that the bill does that I think are especially important, in that it requires the court to proceed as far as it reasonably can without the secret evidence. In other words, it permits the judge to go forward, allow discovery of the non-secret evidence, and see if, as in some cases, the question can then be decided on a legal basis. So even though underneath there may be some state secret claim, you don't have to get to those because there is a legal basis, rather than dismissing it at the front and saying, oh, boy, this case involves state secrets, over and out.

The last thing I want to point out is that there are two areas, I think, that the Committee will want to look at especially in terms of the courts. One, is what will be the standard of review that the court will look at? In other words, one could have a spectrum going all the way from—I think one witness in the House talked about utmost deference to the affidavits and to the case that the government puts on. I would not endorse, myself, that kind of standard.

I believe your bill talks about the judge deciding, if the claim is valid in a de novo review. I believe Judge Webster's letter endorses that as well. An independent evaluation and a de novo review. That does not, of course, mean that the judge should not, and will not give substantial weight to the case laid out in the affidavits by the government, since clearly they will be experts in many of the areas of the intelligence and should be given the deference that is due to an expert witness. But I think it's important that the judge make the decision de novo, giving substantial weight to the government. That, indeed, is the standard which we now have in Exemption 1.

This is the last point. I would say there's one interesting question that has arisen, which is, should the judge have to look at the secret evidence before invoking the privilege? Now, Reynolds suggested that in not all cases should he have to, it would depend upon whether there were other alternatives available. In that case, the alternative was, they could interview some of the witnesses.

Your bill talks about ensuring that the basic evidence is available for review by the judge, and Mr. Nichols has suggested that in many of the cases—many, if not all—it is made available and the judge can review it. I think that's very important because many parts of the bill suggest that the judge, if he thinks it is genuinely

a state secret may ask the government to try and come forth with an unclassified statement that will still allow the case to go forward and allow a due process hearing for the claimant, but will not contain any state secrets.

I think it would be very difficult for a judge to decide whether or not such a statement is possible without actually looking at the material itself. So summing up, I do think Federal judges are capable of administering the state secrets privilege in a way that is set forth in the bill. I think it will be helpful to them to have a protocol, to have a series of steps they must go forward with. I think it will produce more uniform results.

Chairman LEAHY. Thank you.

[The prepared statement of Judge Wald appears as a submission for the record.]

Chairman LEAHY. I also note that Senator Kennedy asked to put a number of items in the record. Of course, without objection that will be done.

Senator KENNEDY. Thank you.

[The documents appear as a submission for the record.]

Chairman LEAHY. Our next witness, Louis Fisher, is Specialist in Constitutional Law.

I'm delighted to see Senator Whitehouse here, who has joined our panel.

Louis Fisher is a Specialist in Constitutional Law at the Law Library of the Library of Congress. He formerly worked at the Congressional Research Service from 1970 to 2006. He is the author of 17 books dealing with constitutional law and national security. He has won numerous awards for his writing. He's testified before Congress also numerous times on a wide range of issues, including NSA surveillance, executive privilege, and war powers.

He received his doctorate in Political Science at the New School for Social Research, and has taught at a number of universities and law schools.

On a personal note, during my years at Georgetown Law School, when it was in the old building—Judge Wald may remember that building.

Judge WALD. I do.

Chairman LEAHY. I spent many, many hours and many evenings in the Law Library at the Library of Congress, with fond memories, some bordering on panic as I was preparing for final exams.

Mr. Fisher, go ahead, please.

STATEMENT OF LOUIS FISHER, SPECIALIST IN CONSTITUTIONAL LAW, LAW LIBRARY OF THE LIBRARY OF CONGRESS, WASHINGTON, DC

Mr. FISHER. Thank you, Mr. Chairman. Thank you for your leadership.

This is an important hearing. It is a technical area, state secrets privileges, but it really goes to the heart of constitutional government about a system—a very American system—of checks and balances, independent judiciary, and giving private parties an opportunity in court to challenge government illegalities and unconstitutional action. So this is about as basic an area that we could look at today.

What's new about this area? I wouldn't look at past state secrets privilege cases and current ones and do a numbers game here and say this has gotten more or less, but I think it is different today. I've looked at all the state secrets cases over the years, and the ones that we've seen in recent years are those in which people are charging government with illegal and unconstitutional actions of violating statutes, violating treaties, violating provisions of the Constitution. So I think we are in a new area.

As was said earlier today, the executive branch does have powers, and at a certain point can exercise them. At another point, when it's pushed to an extreme—which I think has been done now—you start to lose it and you require Congress to legislate. We've seen that history for decades.

I think the bill introduced by Senator Specter and Senator Kennedy protects the principles in the Constitution of checks and balances, of giving litigants an opportunity in court. We also have the other important constitutional principle of state secrets. I think we all recognize that they have to be protected.

The problem with state secrets is that over the decades the executive branch has gone into court with information that's not reliable—in fact, is false. There have been opportunities for the executive branch to correct the record and the executive branch doesn't always do it. So to accept the statement by the executive branch as fact is very risky in this area. I provide many examples in my statement, a lot of appendices I put on my statement.

I think that the state secrets privileges today, the way it's been exercised, has done damage to the executive branch. It, therefore, does damage to government. It does damage to the United States here and abroad, and I think it does damage to the judiciary to the extent that courts are seen not as independent players, but as not much more than an arm of the executive branch.

Judge Wald spoke about deference. What kind of standard should apply? I think the executive branch would like the utmost deference standard. I would not accept that. I would question even the need for deference because, as you know, on a national security case the executive branch already goes into court with quite a bit of advantage with their expertise. They also have the advantage, Mr. Chairman, as you mentioned, of ex parte, in camera proceedings. So they've already got an advantage. You can't have private citizens go into court knowing that the game is almost over before it starts.

So I would say that the standard would certainly be one of respect, not deference, and it would not be respect just for the executive branch, but respect for both sides. I call to your attention the al-Haramain case from last November, where the Ninth Circuit said: "We take very seriously our obligation to review the documents with a very careful, indeed a skeptical, eye, and not to accept at face value the government's claim or justification of privilege. Simply saying "military secret", "national security", "terrorist threat", or invoking the ethereal fear that disclosure will threaten our Nation is insufficient to support the privilege." Yet a few lines later, the court says: "That said, we acknowledge the need to defer to the Executive on matters of foreign policy and national security and surely cannot legitimately find ourselves second guessing the

Executive in this arena." So you can see the need for legislation to get some guidance.

The bill defines state secret in this manner: "any information that, if disclosed publicly, would be reasonably likely to cause significant harm to national defense or foreign relations of the United States." I think the definition favors executive power. There aren't too many judges who are going to say to executive officials "I substitute my notion for national security and foreign affairs for yours."

So I would like to see a second sentence in the definition that says: "The assertion of a state secret by the executive is to be tested by independent judicial review." That puts up front the independent quality you expect, and uses the word "assertion", which is the appropriate one.

I would also like a third sentence: "The state secrets privilege may not shield illegal or unconstitutional activities." We have a need for state secrets. I don't know why we need a state secrets privilege that would shield illegal activity.

Section 4055. I won't go into the details, but it seems to me it gives defendants, such as the telecoms, an opportunity to avoid litigation if state secrets are involved. I think that's a serious matter, that you would have people in the private sector and government acting illegally and made immune because state secrets are involved in the case.

Thank you.

Chairman LEAHY. Thank you. Thank you very much, Mr. Fisher.

[The prepared statement of Mr. Fisher appears as a submission for the record.]

Chairman LEAHY. Professor Robert Chesney teaches at Wake Forest University School of Law. He specializes in national security law. He has published in numerous academic journals, including the Michigan and North Carolina Law Reviews.

He's the founder and moderator of National Security Law. Is that correct?

Professor Chesney. Yes.

Chairman LEAHY. A list serve on national security issues. He recently served as the chair of the Section on National Security Law of the Association of American Law Schools.

Before joining Wake Forest, Professor Chesney was a litigator at Davis, Polk & Wardwell while in New York City. He attended Texas Christian University and received his law degree from Harvard Law School.

Professor, please go ahead.

STATEMENT OF ROBERT M. CHESNEY, ASSOCIATE PROFESSOR, WAKE FOREST UNIVERSITY SCHOOL OF LAW, WINSTON-SALEM, NC

Professor Chesney. Chairman Leahy, Senator Specter, and distinguished members of the Committee, thank you very much for allowing me to be here today to talk to you about the State Secrets Protection Act, which I'll refer to as the SSPA.

I'd like to make just a few points in my remarks, all of which are derived from my written testimony and explained in more detail there.

First of all, I think it's important for us all to acknowledge that there's a great deal in this bill that should not be controversial and that we should all be able to get behind. The vast majority of the provisions here represent codifications of existing practice, or at least practices that are tolerable and sometimes used under existing doctrine, and therefore there's not much reason to be too concerned about them.

Consider, for example, the proposition that it's the judge and not the executive branch official who shall make the ultimate determination as to whether the privilege attaches. As Judge Wald said, that's current doctrine and there's no harm at all—in fact, there is some benefit—in codifying that.

Similarly, as Carl mentioned, the executive branch does in fact provide—even in cases where there's no specific item of evidence in issue—classified and unclassified declarations for ex parte review. There's certainly no harm—and a lot of good when you take into account what happened in Reynolds—in clarifying that judges can and should review these items of information before making their determination. There are other examples.

Of course, there's some stuff in the bill that's not just codifying what we do under the state secrets privilege. Most of it, also, I think, is unobjectionable—in fact, laudable. There are a few points that I think are likely to be controversial, however, and on a few of these I think there are compromise positions that are worth at least considering. I'd like to use my remaining time to identify these.

First of all, I think the SSPA may go too far in its effort to add adversariality into the stage of the case when the judge is deciding whether the privilege attaches. Now, I want to be clear that I very much appreciate and applaud the spirit of adding adversariality. As you know, under current practice some of the most important elements of deciding whether the privilege attaches involves the ex parte presentation of the explanation from the government.

That's ideal from a security point of view, but not from an accuracy point of view. We all understand that adversariality, as the Chairman mentioned, is the touchstone of accuracy, and the more adversariality you can have, the more accurate your process will be.

For that very reason, I endorse the idea of a guardian ad litem mechanism, and in particular I think it's a terrific idea to break with current practice with respect to the ex parte information, appointing an attorney to stand in for the interests of the litigants to provide that adversariality.

My personal preference however, is that this be done using a roster of pre-selected and pre-screened attorneys—a list that could be created and maintained by the Chief Justice of the United States, for example.

The problem I have with the current legislation is that, while it has a guardian ad litem mechanism, it allows the judge to appoint literally anyone the judge might care to appoint for that role. Beyond that, it empowers the judge to skip the guardian mechanism altogether and permit the litigants' attorneys to directly participate in the review and the arguments relating to the otherwise ex parte information.

I would note that even the more limited approach I'm endorsing is a significant break from current practice. It is also a departure from what goes on in CIPA in the Section 4 context, which I think is the CIPA scenario most analogous to what we're talking about here.

My next point is a related one. It concerns what the SSPA has to say about the scenario in which the government seeks the dismissal of a case on privilege grounds. Again, there's a great deal to applaud, not least of which the very notion that we should try to minimize the circumstances where cases are dismissed.

One of the most useful things done here, one of the best parts of the bill, is that it provides a clear ground for the government not to admit or deny an allegation, but instead to plead the state secrets privilege, and thus move beyond the pleading stage without being confronted with the obligation to admit classified or otherwise protected information.

That said, there are concerns here as well. The SSPA addresses the scenario in which the government or a party has a defense that it can't present without privileged information. I think it's laudable to codify those procedures, but I am concerned about the way it's done here in that it seems to call for a mini-trial on the evidentiary merits of the defense that apparently could include the litigants' own attorneys, notwithstanding the conceded applicability of the privilege to the information necessary for that mini-trial.

At a minimum, I think this section should be amended: first, to make it clear that such proceedings shall be in camera in all instances; second, that if there is a need for adversariality in that context, and there may well be, that we use the guardian ad litem mechanism that I just described; finally, I think we should also consider whether that particular process should not be an evidentiary mini-trial, but rather should be a legal sufficiency test akin to Rule 12(b)(6) adjudication.

Finally, let me speak to perhaps the hardest issue, the scenario in which state secrets are the very subject matter of the litigation. In that scenario, the SSPA, as I read it, would not allow dismissal. I think that's a scenario where we're most likely going to see objections from the executive branch, that the SSP in that application would be unconstitutional.

Let's assume that Congress can, in fact, override the existing doctrine on this point, which perhaps it can. The question is, should it? In fact, more specifically, the question is, should Congress create a one-size-fits-all rule? We have a one-size-fits-all rule right now that favors the government winning in all such cases. It's not clear to me that the best solution is to switch to a one-size-fits-all rule in which the government loses in all such cases or, rather, is put to the choice of losing or proceeding with the information being disclosed.

I do think it's important to remember that the impact of this legislation will be to concentrate the minds of judges, leading them to apply the privilege more rigorously. And I would emphasize in particular the notice provision in section 4058, which I think is very useful. It will put this Committee and others—and the Congress as a whole—in a position to know whether application of the privilege

in a given case has resulted in injustice, in which case the remedies of a private bill might be in order.

I look forward to your questions.

Chairman LEAHY. Well, thank you. Thank you very much.

[The prepared statement of Professor Chesney appears as a submission for the record.]

Chairman LEAHY. Our last witness is Michael Vatis. Did I pronounce that correctly?

Mr. VATIS. Yes, sir.

Chairman LEAHY. Thank you. He's a partner with Steptoe & Johnson in New York City. His practice is focused on Internet e-commerce and technology matters.

Prior to joining Steptoe & Johnson, he had a distinguished career in government. One of the things I followed at the time, is he was the founding director for the National Infrastructure Protection Center at the FBI, the first government organization responsible for detecting, warning, and responding to cyber attacks, including cyber terrorism, something we wish we didn't need, but unfortunately we need more every day.

Before that, he served as Associate Deputy Attorney General, Deputy Director of the Executive Office for National Security at the Department of Justice, where he worked on counterterrorism issues. He attended Princeton, and received his law degree from Harvard Law School.

Please go ahead. I would indicate, if we have a roll call vote—you'll have plenty of time to finish your testimony. If we do, we will just break briefly while we go to vote and then come back.

Mr. Vatis, go ahead, please.

STATEMENT OF MICHAEL VATIS, PARTNER, STEPTOE & JOHNSON LLP, NEW YORK, NY

Mr. VATIS. Thank you, Mr. Chairman.

Chairman Leahy, members of the Committee, I appreciate the opportunity to testify before you today about the state secrets privilege, and S. 2533 in particular. I will be very brief, but I do think it's important to recognize that there are two significant trends that inform the discussion and understanding of the issue of the state secrets privilege.

The first is one that you, Mr. Chairman, mentioned and that Senator Specter mentioned, and that is the recent aggressive assertions of executive power in many different areas, including the assertion of the authority to either disregard the law where it is perceived as infringing on the President's Commander-in-Chief power, or the authority to reinterpret the law in the form of signing statements or by other methods.

That, I think, is one important trend to keep in mind. The other trend that has gotten less focus in recent years is the fact of continuing over-classification of information by government officials. A decade ago, Senator Daniel Patrick Moynihan from New York chaired the so-called Moynihan Commission, which studied this problem and concluded that there was a great degree of over-classification at the time.

I think real efforts were made in the late 1990s to address this problem, but if anything, over-classification has increased since

then. The problem stems from the fact that there really is no meaningful internal check within the executive branch to prevent classifying authorities from over-classifying information.

So when you combine those two trends, what you end up with is a situation where there are more secrets and there is a more aggressive use of those secrets in many different contexts, including the context of asserting the state secrets privilege to thwart the vindication of people's rights in civil litigation. It also, I think, results in the deterioration of effective checks and balances—including oversight by Congress and oversight by the judicial branch—which of course are such a fundamental aspect of our constitutional system.

When considering the state secrets privileges, it is important to require meaningful judicial review of assertions of the privilege by the executive branch. I think the bill that has been introduced by Chairman Leahy, Senator Kennedy and Senator Specter does just that. But I also think—and here I think I disagree with a few of my colleagues on this panel—that it is important to recognize the executive branch's constitutional responsibility for protecting our national defense and engaging as the principal organ of our foreign policy, and also to recognize the executive branch's superior expertise in these fields.

For that reason, I do think it is important that the bill specify that there should be deference to the executive branch's assertions that disclosure of information would result in significant harm, or is reasonably likely to result in significant harm. I do not think that de novo review by a court of that determination would be appropriate. I think if the bill specifically called for de novo review, there would actually be more significant litigation and potential determination by the courts that the bill has constitutional flaws.

Now, I would not let an executive assertion easily lead to the dismissal of litigation, and I think the bill has careful safeguards to prevent that from happening. I would also require that an executive assertion of the privilege be detailed and specific as to which information officials think cannot be disclosed without harming national security.

But given all of those safeguards, I think it is important that the bill specify a particular standard of deference, and perhaps we can talk during the question period about what such standards of deference might be. There are many different options, but I do think that would be the one principal amendment that I would make to the bill.

The last part that I will just mention, which I think should not go without touching on, is the importance of congressional oversight of this whole issue. I think the bill does that by providing for meaningful reports to Congress, to the Intelligence Committees, as well as to the Chairman and Ranking Member of this Committee and its counterpart on the House side.

I think that is vitally important, because if you do have assertions of privilege resulting in some cases getting dismissed, congressional oversight will ensure that at least we don't have systemic abuse of the privilege. There may be cases where a particular civil litigant is unable to vindicate his or her rights, but at least congressional oversight will ensure that we don't have systematic

abuse of the privilege to hide government misconduct. I think that is vitally important.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Vatis appears as a submission for the record.]

Chairman LEAHY. Thank you.

The vote has begun, so I am going to stand in recess, subject to the call of the Chair. It will probably take 5, 10 minutes to get over there and vote and come back, and we will start the questions. Some of our hearings are done because we have to do them and some are doing because they're interesting. This follows both categories. It's what we should do, and it's also interesting. I thank you for the time you've spent.

We'll stand in recess, subject to the call of the Chair.

[Whereupon, at 11:09 a.m. the hearing was recessed.]

AFTER RECESS [11:42 a.m.]

Chairman LEAHY. Thank you.

Let me ask a couple questions. I was thinking. This is first to Judge Wald, but I was thinking, Mr. Nichols, of what you said earlier. I had mentioned the al-Masri case, Khalid al-Masri. Just put that back in perspective. German citizen, Lebanese descent, claimed he was kidnapped and transported against his will from Macedonia to Afghanistan under the Bush administration's extraordinary rendition program. He claims it detained and tortured. The judge dismissed the entire lawsuit at the—I believe this was in a Virginia court. Is that correct?

Judge WALD. Yes.

Chairman LEAHY. The entire lawsuit, at the pleading stage, based on an affidavit from the CIA Director, the Court of Appeals affirmed. The Supreme Court declined to review the case. Now, this wasn't on an argument or anything else. No evidence was taken, simply from the pleadings. At either the trial level or the appellate level, there was no review of actual evidence.

The judge said in his decision that "al-Masri's private interest must give way to the national interest in preserving state secrets." I find that troubling because there was never any determination made whether there really were state secrets or whether it was a carton of milk on the helicopter.

So, Judge Wald, do you agree with the judge's calculation that it is only the litigant—in that case, Mr. al-Masri—who suffers when a court politely refuses to entertain a lawsuit that alleges serious government wrongdoing, or are there other interests at stake?

Judge WALD. I think you can predict my answer, Senator Leahy. I think it is not, in that particular instance and in similar instances, only the claimant who is suffering. I think it is the appearance of justice. I think it is the perceived status of the judiciary as an ultimate protector of individual civil and constitutional rights.

It's been several months since I read the al-Masri case, but it does seem to me that many of the techniques and steps that you have outlined in this bill were ones that could have been followed. Whether they would have eventuated in a state secret privilege that must be recognized and could not allow the litigation to continue with other evidence, I don't know. But we certainly knew at

the time that the fact that renditions were going on was something that was covered in every newspaper in the country.

Chairman LEAHY. Isn't it possible, without going into this case, to assume there might be cases if, if it's in camera or otherwise, you had a hearing and determined some of the evidence is protected by state secrets, the case could go on on other evidence. Is that not correct?

Judge WALD. Yes.

Chairman LEAHY. Don't courts do this all the time: this is going to be excluded, however, you can continue your case if you feel you still have one on what's remaining.

Judge WALD. That's definitely a possibility in some of the cases, even some that I have actual knowledge of, that if the judge knows—and he would know if you passed the bill—that he should go through certain motions, that mentally he would go through certain loops, as it were, one of them being, if there is a state secret privilege somewhere here, first let me make sure that the litigant has exhausted his rights in discovery of any non-secret information.

At that point, one could make a determination in some cases whether or not there's enough evidence, non-secret evidence, to go ahead and make a prima facie case for the claimant, and then require the government to put on its defense of the case, or whether he should move into the state secrets privilege, look at it, and decide whether or not the government could produce a non-classified affidavit which had enough information in it which would help the claimant to go ahead with his right. So I think there are many steps that the judge should follow, and will follow, and will be glad to have some guidance in following before dismissing.

Chairman LEAHY. If I might—and I apologize, Senator Specter. I've gone a little bit over here. But as I mentioned Mr. Nichols at the beginning, I wanted to be fair to him.

You said, Mr. Nichols—my notes are that before asserting state secrets by the executive branch, 1) the privilege has to be invoked formally by the government; 2) the head of the department or agency has to invoke the privilege and not a lower-level official; 3) a senior official must personally consider the assertion and review of the materials; and 4) the Department of Justice must approve the assertion. But that is still assumes it could be done ex parte, in camera.

A judge could make the determination based simply on the affidavit—assuming all these other steps, but it could still be the affidavit of the administration. In this case, it was something that was known in the press anyway—and agree to it. Is that fair?

Mr. NICHOLS. Senator Leahy, if I could make a few points.

Chairman LEAHY. Sure.

Mr. NICHOLS. First, the courts have long recognized that ex parte adjudications are proper in national security cases. There's a long pedigree of courts saying, we need to adjudicate issues ex parte because the alternative is disclosing to private litigants, who have no security clearances, necessarily, and certainly no independent need to know classified information—

Chairman LEAHY. Well, even conceding that, doesn't the court have an obligation if they're going to do that to at least look beyond the four corners of the affidavit?

Mr. NICHOLS. Well, I think, Senator Leahy, that there's a bit of an assumption built into your question, and that is that the declarations or the affidavits that are provided to the courts in the classified setting are basic, simple, and don't contain details.

Chairman LEAHY. I've seen some of these affidavits. I know they can be detailed.

Mr. NICHOLS. And I think that the al Masri case is actually a very good example of the kind of steps we go through. If you look at the Fourth Circuit opinion—and I think it's important to note that both the judge in the Eastern District of Virginia and all three judges on the Fourth Circuit agreed with us that we had properly asserted the privilege there, and the court said the following: the reason for the state secrets privilege and the Motion to Dismiss "were explained largely in a classified declaration which sets forth in detail the nature of the information that the executive seeks to protect and explains why its disclosure would be detrimental to national security. We have reviewed the classified declaration and the extensive information it contains is crucial to our decision in the matter." Then the court went on to say it then assessed whether the case could proceed.

The court said the plaintiff would have to come forward and make his prima facie case, but that showing could be made only with evidence that exposes how the CIA organizes, staffs, and supervises its most sensitive intelligence operations, which seems to me a very reasonable thing that we don't want to be disclosing publicly, how the CIA organizes, staffs, and supervises its most sensitive intelligence operations.

Then even if the plaintiff could come forward with a prima facie case, the defense side would have to prove, potentially, whether al-Masri was or was not subject to the treatment, whether or not the defendants were involved, and the nature of their involvement. As the court says, any of those three showings on the defense side would require disclosure of information regarding the means and methods by which the CIA gathers intelligence. So I think the al-Masri case is a perfect example of the steps that the executive branch goes to in providing very robust classified submissions—

Chairman LEAHY. You understand that some would think that the al-Masri case provides a great example of why the procedures are stacked in favor of the government.

Mr. NICHOLS. I understand people say that, but I think that a review of the Fourth Circuit's opinion, which is an extremely careful analysis, makes clear that there is a significant difference. I think this is very important. There is a significant difference between being able to talk about an issue, like whether there's a program that the CIA might have, and actually litigating a particular plaintiffs claims under that program, which requires very specific facts and details about what happened, who did it, where, when, and why. Those are the kind of details that the court looked at and said, we believe the state secrets assertion is properly asserted here.

Chairman LEAHY. I'll re-read the case. I remain somewhat skeptical.

Judge WALD. Could I just add one sentence?

Chairman LEAHY. One sentence.

Judge WALD. One sentence.

Chairman LEAHY. One sentence. I am really way over my time. Go ahead.

Judge WALD. The one sentence is that everything Mr. Nichols recounted I'm sure is true, but it was essentially a dialogue between the executive and the court. In other words, the plaintiff had no participation.

Mr. FISHER. The problem with al-Masri is, the balancing test that you gave is al-Masri against the national interest. No individual would have a chance unless you stopped to say that it is not in the national interest to take an innocent person and put him away for 5 months. So, that's a test that's not useful.

Chairman LEAHY. Thank you.

Senator Specter.

Senator SPECTER. Judge Wald, you have referred to a standard of review, talking about de novo substantial weight to the government. Consideration had been given to a balancing test and this proposal does not have a balancing test. It would grant the government's claim on the determination by defining "state secret" as any information that, if publicly disclosed, would be reasonably likely to cause significant harm to the national defense or foreign relations of the United States.

Do you think that there ought to be consideration for the person seeking the information which would import a balancing test? Is that what you're thinking about as a standard of review?

Judge WALD. Not necessarily. If I might make two quick points. One, several of the courts have pointed out—I think it may actually be in one of the Supreme Court cases, though I can't cite you—that once you find that the state secrets privilege applies, there is no balancing of that against the need of the—

Senator SPECTER. Do you agree with that?

Judge WALD. Well, I guess I do, if it's genuinely a state secret that is going to cause, by your definition, significant harm to the national defense or the military or diplomatic relations.

Senator SPECTER. Mr. Vatis, do you think there ought to be a balancing test?

Mr. VATIS. I don't. I think a balancing test makes no sense. I think the plaintiff or civil litigants' interests should be examined and weighed in determining what summaries or what substitute evidence should be made available in lieu of state secrets. But I think at the end of the day if the court agrees with the executive branch's determination that disclosure would be reasonably likely to cause significant harm, I don't think it should matter how much the civil litigant needs the information, it should not be disclosed.

Senator SPECTER. Professor Chesney, how do you evaluate the contention that it really isn't any business of the court to make a judgment on what is national security, that that's an executive branch decision and the court ought to accept the executive branch determination?

Professor CHESNEY. I don't think that judges should have to accept the executive branch's determination. It's clearly appropriate, and is required in current doctrine, that the judge ultimately has to make the decision whether the substantive test in this bill or in current doctrine has been satisfied. That said, I do think that some

degree of non-binding deference needs to be shown to, for example, the Director of National Intelligence when, in his judgment, there would be such a harm from the disclosure. That official's judgment can't be entirely binding, but it should be given great weight.

Senator SPECTER. Mr. Nichols, what's your view on whether the courts should second-guess the executive branch on what is a state secret, or second evaluate?

Mr. NICHOLS. Senator Specter, the courts have recognized, and I think they're right to do so, that the executive branch is in far better institutional position to determine whether the disclosure of a particular piece of information is going to harm national security. Courts have recognized for many years that the executive branch has the full panoply of intelligence information, foreign relations information, and the like to know whether, and where, a particular piece of information sits and whether it makes sense or not to allow that piece of information to be disclosed. That's not to say that when the executive branch has made that determination, that the courts have no role. But the courts have said, I think—

Senator SPECTER. Well, what is, then, the court's role?

Mr. NICHOLS. The Supreme Court has made clear that the courts must review both the procedural components, i.e., that all of the steps are set up to ensure, and I think—

Senator SPECTER. When you come to grips with the evaluation of whether it's a legitimate, genuine state secret, what's the court's role?

Mr. NICHOLS. It should defer, but it should not abdicate its responsibility to review. In other words, implausible—

Senator SPECTER. Those words are all right. I've got 26 seconds left.

Mr. Fisher—

Chairman LEAHY. I took extra time. You take extra time.

Senator SPECTER. No. I like to observe—well, okay.

Mr. FISHER. Of course, I have a problem with the two words "national security". They can be so broad to swallow everything. You probably remember the first compulsory flag salute case in 1940 was decided on national security grounds. So if the court ever said, in national security we have a subordinate role, it would be very destructive to an independent court.

Senator SPECTER. Mr. Fisher, how would you define the role of the courts vis-a-vis the executive branch determination of what is a state secret?

Mr. FISHER. I don't think they should rely on affidavits and declarations, even if classified. I think they have to look at the evidence and come to a determination that has respect for the government's position and the private party's position, because that's the one place we're supposed to have some opportunity for justice, and you can't do it if you have advance deference.

Senator SPECTER. Well, my time has expired. I yield, Mr. Chairman.

Chairman LEAHY. Are you sure you don't have any more?

Senator SPECTER. That's fine. No.

Chairman LEAHY. Senator Feingold.

STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator FEINGOLD. Thank you, Mr. Chairman. I want to salute you, Mr. Chairman, the Ranking Member, and Senator Kennedy for taking the initiative on this issue. A rigorous examination of the state secrets privilege is long overdue, and I think this hearing will provide critical support for legislative efforts to fix the problem.

In a democracy, the public should have the right to know what its government is doing. That should be the rule. Secrecy should be the rare exception, reserved for the few cases in which the national security is truly at stake.

Unfortunately, this administration has stood that presumption on its head. It cloaks its actions in secrecy whenever possible and grudgingly submits to public scrutiny only when it can't be avoided. And the state secrets privilege is a favorite weapon in the administration's arsenal of secrecy.

None of us disputes that information may properly be withheld as a state secret when disclosing the information would cause grave damage to national security. The problem arises when the privilege is abused and invoked to shield government wrongdoing. Indeed, that is exactly what happened the first time the Supreme Court recognized the privilege in 1953, in the case of *United States* v. *Reynolds*. The government had been sued after a military aircraft crash killed nine people, and it invoked the state secrets privilege to shield an internal investigative report. Decades later, when the report was declassified, it revealed nothing that could fairly be characterized as a state secret—but it did reveal faulty maintenance of the aircraft.

Abuses like these can be prevented, but only if the courts fulfill their responsibility to carefully review claims of privilege. In the Reynolds case, no court actually looked at the privileged report. The government must be required to submit allegedly privileged information to the courts for *in camera* review. Courts handle highly classified information on a regular basis. There is no legitimate justification for skipping this crucial step.

Furthermore, a determination that certain information is privileged should be the beginning of the analysis rather than the end. As Congress recognized when it passed the Classified Information Procedures Act, courts have many tools at their disposal to move litigation forward, even when some of the evidence cannot be disclosed. For example, courts can require the government to submit non-privileged substitutes for the privileged evidence, or fashion a variety of other remedies to serve the interests of justice.

The need for these common-sense measures is greater than it has ever been. This administration has invoked the state secrets privilege to block judicial scrutiny in cases ranging from warrantless wire tapping, to extraordinary rendition, to employment discrimination. A country where the government need not answer to allegations of wrongdoing is not a democracy. We must ensure that the state secrets privilege does not become a license for the government to evade the laws that we pass. I commend the Chairman, the Ranking Member, and Senator Kennedy for making sure this is being considered.

Judge Wald, in your written testimony, you discussed a Freedom of Information Act case in which the government claimed the right to withhold a large amount of classified information. With the help of a special master, the court reviewed the information and determined that 64 percent of the material could be released. How common is it, in your experience as a judge, for the government to assert a privilege that ultimately turns out to be inapplicable?

Judge WALD. My direct experience, Senator, is limited to a few cases. That's probably the outstanding one where that happened. However, I am aware of not a great many, but several cases—let me put it that way, several cases—where indeed, when the evidence was looked at, it was determined by a court to have been, how shall I say, vastly over-classified.

I think the problem of over-classification that Mr. Vatis referred to, everybody knows that that's true. Peter Goss, who is the head of CIA, says so. Rumsfeld has issued statements when he was at the Defense Department, saying he knows it's too easy to over-classify material. So there are instances.

In fact, if there's been any criticism under the FOIA Exemption 1, it's been that the courts have been too reluctant to use the power which was given them by Congress which says they can look behind a classification and see if it's been reasonably classified to actually do that. I can't say I've encountered many, many, many cases. I can say I've encountered, either myself or through my colleagues, several cases where material should not have been subject to state secrets or classified that was.

Senator FEINGOLD. Have you ever experienced or observed a situation in which the government submitted affidavits asserting the state secrets privilege and then either withdrew the privilege claim or publicly disclosed the same information in some other venue?

Judge WALD. I am aware of some Freedom of Information cases where the initial classification—the initial exemption was raised for many documents, and after negotiation, et cetera, and sometimes the court remanding for additional affidavits, et cetera, some of that was subsequently disclosed. I think every Freedom of Information Act lawyer that I know that deals with Exemption 1 has had some experiences where the initial invocation of privilege after negotiation or a remand has been cut down, cut back, and more evidence has been disclosed.

Senator FEINGOLD. I thank the panel.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you very much, Senator.

Mr. Vatis, I spent a lot of time looking at some of the areas that you worked in at the FBI and Department of Justice. You say, and I agree, the protection of sensitive sources, methods, and details of weapons systems, for example, is absolutely essential.

I don't think you'll find anybody on this panel, Democratic or Republican, who would disagree with you. But then you say—and this is a quote that jumped out at me—"there are secrets and then there are secrets", the point being that the executive branch often over-classifies or claims the need for secrecy and it's too absolute because there's no check on those claims.

I mean, we've seen things marked "Top Secret" that were on a government Web site for 6 months, or they've been in the National

Archives for years. We are now spending several billion dollars a year to classify stuff, classify things that—we've actually had people testify in open session, and then all of a sudden say, oh, that's got to be classified, so we can't use it in debate. Do the courts need to make more of an independent judgment on this, and can we trust courts to make sound judgments?

Mr. VATIS. I think we can trust courts, Mr. Chairman, to make sound judgments. The problem is, the windows of opportunity for courts to get involved are relatively few and far between. Assertions of the state secrets privilege, even if you believe that this administration is asserting it more, are still relatively rare.

FOIA cases are more frequent, so they present an opportunity for courts to assess classification. But there is still so much more classifying going on that I don't think that the courts alone provide a meaningful enough check. They're still looking at discrete bits of information, and their review often is so long after the fact that it's not as helpful as it might be.

So I think there's actually a greater role for Congress in trying to stem the over-regulation of information—which secrecy is really all about. I think one of the great insights of the Moynihan Commission is the idea that secrecy, or classification of information, is a form of regulation, and that this is one area in which the government, I think everybody would agree, is over-regulating. Congress needs to step in.

Chairman LEAHY. It's interesting when you mentioned the Moynihan Commission. Senator Moynihan's office was just down the hall from mine, and we used to have some long discussions about this. You also just mentioned FOIA. We have passed a FOIA bill which, after opposition from the administration—it was a very bipartisan bill that got heavy, heavy support from both sides of the aisle, our argument being, we're passing it now when we don't know who's going to be the next President so nobody is saying it's aimed at a particular person.

But when the President signed it around New Year's Eve, they also then quietly put a thing into the President's budget to basically repeal part of the act he signed. The act, without going into all the technicalities of it, allows disputes of what should be looked at in FOIA that will be handled by the U.S. Archivist, who has always been a non-political figure. They want to move that back into the Justice Department, the same department which, of course, was directed by the memo from former Attorney General Ashcroft saying, basically, resist all FOIA requests, or almost all.

So I think real secrets, nobody questions. But I think too often secrets become secrets for convenience or to cover up mistakes or embarrassment. That's just a long way around of saying, I agree with your line, "there are secrets, and then there are secrets."

Senator Kennedy is here. I am going to another hearing that I'm late for, so I'm going to turn it over to Senator Kennedy, and if you could wrap up when you finish.

Senator KENNEDY. Thank you. All right.

Chairman LEAHY. Thank you.

Thank you all very much. We've actually had—and Senator Kennedy is here, but both have had two very interesting panels, entirely different, this one, the other one on the presidential papers

where we had the foremost historians of this country testify, sitting where you are, just a week ago.

Senator KENNEDY. That's it.

Chairman LEAHY. Thank you.

Senator KENNEDY. Thank you, Senator Leahy, again, for having this hearing and for your strong commitment to this issue and your willingness to move this whole process forward, which gives us a good sense of hope that we could make some progress.

And to our witnesses, thank you for remaining here. I would like to, just very quickly, go into two areas, but they are important. One, is the constitutionality of our bill. We have to be clear about this issue, I think, to the extent that we can, that the actions that we're talking about here are justified in view of any constitutional considerations.

I'll ask Judge Wald.

Judge WALD. Senator, I don't see anything in this bill which, to my mind, raises any serious constitutional objection in the sense that ultimately, even when all of the techniques are used and all of the procedures are used, the bottom line is that if the judge does find that there is a state secret, nothing in here requires him to reveal it, and in fact tells him he should not reveal it. So, in that sense, something that is a genuine state secret will not get revealed as a result of this bill.

The only constitutional problem I could even conceptualize would be a kind of shared power. I think Mr. Nichols may have alluded to the fact that some courts have suggested that the state secrets may be derivative, at least in part, from the executive's constitutional obligation to protect the national security.

But this is the same kind of shared power problem that you have had to meet in FISA and in several of the other things, and which Justice Jackson in the Steel Seizure case met in which he set out his famous triumvirate, that the executive's power is at its lowest ebb when Congress has actually legislated in the area. So in its present form, I don't see any constitutional objections.

Senator KENNEDY. Mr. Fisher.

Mr. FISHER. I would like to add that if the executive branch invokes Article II, Congress can invoke Article I. So the fact that the President has certain Article II powers doesn't stop Congress from legislating. In fact, I think Congress is the only legitimate branch here that can tackle the state secrets privilege. The courts could do it, but the courts have not done it. You can't ask the executive branch to police it, they're one of the litigants. So I think Congress has all the legitimacy in the world to provide the guidelines in the future.

Senator KENNEDY. Good.

Any others? Yes.

Professor Chesney. Senator, may I?

Senator KENNEDY. Mr. Chesney.

Professor Chesney. There are two different ways Congress can legislate here: it can regulate and it can abrogate. The power to regulate, I think, is clearly within the constitutional power of Congress, enabling it to create rules that will govern the process of adjudicating the privilege. That covers the bulk of what's in this bill. The tougher question is whether, if there's anything in this bill

that actually overrides or abrogates the privilege, Congress can do that. In that case, you get into the question of whether you're in Justice Jackson's third category, the lowest ebb, uncertainty as of who wins.

The two areas that even arguably go near that question are, first, the language that permits the government to raise a defense as a ground for dismissal but otherwise bars dismissal on privileged grounds. That has the effect of preventing the government from seeking dismissal based merely on the fact that the suit concerns privileged information, at least where there is no particular defense to raise. So the net effect of that language is to create a crime-or-illegality exception to current doctrine.

I don't think we really know for sure what result is most likely were that approach to be challenged on constitutional grounds. I assume the executive branch would argue that constitutionally dismissal still is required in that scenario. I don't think they necessarily would win on that argument, but that's one area where constitutional objections would come up.

Second, insofar as the process of adjudicating privilege as sertions would involve adversariality in the form of actually disclosing the information to the litigants on the other side before the privilege is resolved, I can see the executive branch objecting on constitutional grounds there as well.

Senator KENNEDY. Okay.

Mr. VATIS. Senator Kennedy, I don't think there's a serious constitutional objection to Congress' getting involved in this area and passing a statute that regulates the process for assessing the executive branch's assertion of the privilege. The one place that I think there would at least be a constitutional issue, though, is if the bill either expressly called for, or was interpreted as calling for, de novo determination by a judge of whether disclosure would result in harm to national security.

Because that sort of determination of harm implicates the President's Article II power, I think there would be a colorable argument that de novo review would impinge on the executive's authority. So that's one of the reasons I think it's important to specify a standard of review in the bill and to make it clear that some level of deference should be accorded to the executive branch's determination of the likelihood of harm to national security.

I would couple that standard of review, though, with some specific language requiring that the assertion of harm be made in a very specific and detailed way, so that you don't just have blanket assertions of the privilege, with the executive saying that disclosure will harm national security, period, or disclosure will harm our diplomatic relations, period. There needs to be specificity. If there is such specificity, I think the procedures that are in the bill will do a great deal to prevent abuse of the privilege.

Senator KENNEDY. Now, let me follow up on that, Mr. Vatis. In your testimony, you expressed strong support for the legislation but you suggested we codify the standard for judicial review, something that the bill, like virtually all bills—does not do.

So how do you respond to the experts like Judge Wald, Judge Webster, and Mr. Fisher, who have argued that judges ought to be

respectful of the government's claims of privilege, but that no special deference is appropriate?

Mr. VATIS. I think it's important to specify and codify the standard of review, for two reasons. First, if you don't, there will be differing opinions among judges about what the level of deference should be. They will argue about this until it's ultimately resolved by the Supreme Court. I think it's fully appropriate for Congress to make the determination of what the standard of review should be and not let this just be litigated with inconsistent results.

The second reason is the constitutional one. I think there would be a serious argument of at least constitutional problems, if not outright, unconstitutionality, if there was no deference called for at all. So I think Congress should provide for deference, but, again, make sure that the bill doesn't allow for the executive to use that deference to abuse the privilege.

Senator KENNEDY. Let me throw out some possible standards. Should the courts give substantial weight to the executive? Some weight? Something else? Who wants to take a crack at it?

Mr. FISHER. Let me just point to your problem with the word "deference." You can look it up in the dictionary, and there's no agreement even on what "deference" means. It could be "lean in your favor", it could be "respects." So I don't think the word "deference" helps. It clouds.

I think Judge Wald and others have worked with standards like what weight should be given, but I don't like litigation where, in advance, you know that the judge is giving substantial weight or deference to one side before the case begins.

Senator KENNEDY. Yes?

Professor CHESNEY. I'll join in and add—I'm sorry, Judge. Please.

Judge WALD. Okay. I was just going to say that I think Mr. Vatis is worried about specifying de novo review because it might have some constitutional problems, but I believe that Congress already did that in the 1974 amendment, which you led the fight on, in FOIA 1. I think it's de novo review, and it's the report that says, but of course they should give "substantial weight" to the affidavits of the government. There are many judicial formulations of de novo review, which then say, of course you should give different weights to some testimony others. Deference is a funny word. It means two things.

It means in some instances, as Mr. Fisher showed in it double usage in the Ninth Circuit case, we're going to defer, we're going to go in there with the notion that if they show themselves to be reasonable, that's enough.

The other lesser meaning is just, we take account of the fact that these people know what they're doing and they've got a lot of experience, the same way we would do for a patent expert if the judge had a patent case and didn't know anything about it. So, actually I think I'd prefer the weight kind of thing, because judges do that all the time. They give whatever due weight should be accorded to the expertise of the individual testifying.

Professor CHESNEY. I agree with Judge Wald on that. Choosing among a bunch of not very good options, the best terminology is "weight" terminology.

Judge WALD. I agree.

Professor CHESNEY. Something along the lines of "substantial weight" or "great weight." The reality is that the way it's calibrated, in terms of adjectives, won't actually affect much how the judges ultimately apply it. This exact same issue arises in the context of executive branch interpretations of treaties and the question of how much weight judges should give to such interpretations, and the formulations of deference in that context have varied over the years without really changing substantive outcomes.

Mr. NICHOLS. Senator Kennedy, if I might.

Senator KENNEDY. Sure.

Mr. NICHOLS. I think there are a couple of components to the question, and I'd like to break them apart. There's a constitutional issue lurking here about whether Congress can require—notwithstanding decades-long precedent that says that in a assessing state secrets privilege assertion, that the courts must give utmost deference to the executive branch, and they often say that in constitutional terms.

So there's a question, and it's not just an Article 1, Article 2 issue, but it's actually whether Congress could constitutionally give to Article 3 courts the ability to second-guess the executive branch on questions of national security. That's a constitutional issue. I think the courts have long made clear that deference is appropriate in this area, both for constitutional concerns, but there's a policy reason.

That is, as I mentioned to Senator Specter before, the executive branch has before it all of the information relating to national security, intelligence programs, foreign relations. The Director of National Intelligence, as an example. When he asserts the state secrets privilege, he knows the full panoply of information and he can tell, he is the best situated to know whether the disclosure of a particular piece of information, given all that he knows, will harm national security.

With all respect, that is simply not something that courts are institutionally as capable of assessing, and any standard of review that would have a court substituting its judgment for the considered judgment of someone like the Director of National Intelligence strikes me as, (A) potentially unconstitutional, but (B) more important, not very good policy.

Senator KENNEDY. Let me sort of go to a related issue. Judge Wald, why are judges well-prepared to review sensitive national security claims?

Judge WALD. Well, judges handle classified information in a variety of sources and they handle them every day. Just last week, Judge Burkima, who presided over the Moussaoui trial, gave a talk at American U, in which she said she felt that as a Federal judge she'd be glad to take another Moussaoui trial the next day. She felt she had the equipment she needed, the techniques she needed, and that judges are handling classified information in a variety of sources and are used to doing it.

Now, judges often have to deal with complex matters about which they don't instinctively know anything. I mean, some of the patent cases, some of the industrial contract cases, I know in many instances national security may have even higher stakes. But in terms of the complexity and the ability to look at all the material,

and to weigh it, and to give due regard to the sources which should be given due regard is something that they do, and they have to do. The Constitution ultimately says that it is the courts who shall declare what the law is. That goes back to *Marbury* v. *Madison*. Even when you have conflicts between executive branch and Congress, it is the courts who are supposed to ultimately decide.

Admittedly they don't like to do that very much and they steer away through doctrines like political question, et cetera, but basically that's where the decision-making power lies. And certainly that is where the common law privilege, state secrets privilege, originated in the courts, the recognition of it.

So I think it is something which courts take seriously and that they can master, and their temperament is such that they are not going to leap in and just put their own immediate view ahead of all of the expert testimony that comes before them.

Mr. FISHER. Let me just add, on war power issues the Supreme Court, starting in 1800 and going up at least to the Korean War, took all the war power cases. They never said, oh, this is a sensitive matter, we don't have competence. They took them all except for two cases I know of during the post-Civil War period.

So I think we were thrown off guard in the Vietnam period where courts, as you remember, ducked those cases by the dozens on political question, mootness, ripeness, prudential considerations, you name it. So a lot of people, including judges today, were educated during the time where courts were ducking. But if you look at our history, courts have handled national security, war power issues, foreign affairs issues from the start and they've never ducked them, never felt that they were inadequate to handle such cases.

Senator KENNEDY. Okay. Well, this has been an enormously helpful hearing. I've learned a lot from it, and I know our colleagues valued it very highly as well, so we want to thank all of you. It's been very constructive and useful, and I'm sure we're going to have additional questions as we move this whole process along. But I want to thank you all again for coming here today.

The Committee stands in recess.

[Whereupon, at 12:26 p.m. the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

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QUESTIONS AND ANSWERS

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WAKE FOREST
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Dear Senator Leahy, March 5, 2008

I write in response to the written questions from Committee Members sent to me on February 29, 2008, following the February 13, 2008 hearing regarding "Examining the State Secrets Privilege: Protecting National Security While Preserving Accountability."

Responses to Questions from Senator Kennedy

Question 1

Your study of the state secrets privilege, published last year in the George Washington University Law Review, has become controversial. You found that the Bush administration has invoked the privilege somewhat more frequently than previous administrations, but you did not find this result to be statistically significant. Others believe that this administration's use of the privilege has been more sweeping. But it appears you agree Congress ought to act on this issue. As you wrote in your article, "the quantitative inquiry is a pointless one in light of the significant obstacles to drawing meaningful conclusions from the limited data available." Even if "the current administration does not depart from past practice in its use of the privilege," you wrote, that does not mean the status quo is "desirable." Can you explain why you believe the quantitative inquiry is "pointless" and why the status quo is not desirable?

Answer 1

Quantitative inquiries are problematic for two reasons. First, one cannot calculate the precise number of privilege invocations in a given year with confidence; not all privilege invocations result in published judicial opinions, after all, and so far as I know the Justice Department does not maintain a comprehensive list indicating how often the privilege is asserted. Thus we do not really know how often the government may have used the privilege in, say, 1965, 1975, or 2005. But let's assume, counterfactually, that we do have a precise count for two different years, and that there is a jump from one year to the next. Does it follow that the executive branch in the latter year has changed its understanding of the privilege, adopting a more aggressive posture? Not at all. The frequency with which the privilege is invoked by definition is a function *both* of executive branch attitudes *and* the number of lawsuits filed in a given year that may happen to warrant invocation of the privilege. Without controlling the latter variable, one cannot simply attribute the change from one year to the next to the former. This is why I contend in my article that the quantitative debate is a red herring.

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It does not follow from this conclusion that the status quo is or is not desirable. The point I make in the article is that the status quo should be assessed on its own merits in light of the various security and accountability concerns associated with the privilege, regardless of whether the status quo is a recently-created regime attributable to the current administration or instead is a long-standing regime with a bipartisan pedigree. So that leaves two questions: do I agree that Congress ought to act, and if so, what should Congress do? My view is that there are things Congress should do in terms of codifying the procedures to be used by judges in responding to privilege invocations, many of which appear in S. 2253. But I also take the view that the bill as currently drafted should be amended at a few points to strike a better balance between the security and accountability concerns at stake. My written testimony spells out these concerns.

Question 2

How do you respond to the argument of Deputy Assistant Attorney General Carl Nichols that various procedural and substantive requirements within the executive branch "ensure that the privilege is invoked and accepted only in the most appropriate cases"? The implication of this argument, as I understand it, is that Congress should remain silent on the state secrets privilege because the status quo is working well. Do you agree that the internal checks identified by Mr. Nichols really do ensure that the privilege is properly applied?

Answer 2

The internal checks truly are significant, and should not be discounted as mere formalities. No such system is foolproof, of course. This helps explain why the status quo under *Reynolds* does not allow the final decision to rest with an executive branch official, but instead vests the final determination in the judge. The real question, then, is whether the combination of internal screening and external judicial review suffices, or if instead some combination of legislative changes should be made to the status quo. As discussed in my written testimony, I believe that S.2253 makes a number of useful changes, though it also contains a few elements that warrant closer scrutiny.

Question 3

Mr. Nichols also suggested that courts should give "utmost deference" to all executive claims of the state secrets privilege. I agree that courts should give due regard to the executive's national security expertise, but I believe utmost deference would be inappropriate—it would undermine the role of the courts and make them a rubber stamp, when we need real checks and balances. What are your views on the appropriate standard for judicial review of state secrets assertions and on whether Congress should address this issue in legislation?

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Answer 3

The question is whether and to what extent a judge should give weight to the executive's factual claim that disclosure of an item of information will result in harm to national security. The argument in favor of requiring at least some degree of deference to that factual claim rests ultimately on a theory of relative expertise (judges may not be particularly likely to make factual mistakes in assessing the consequences of disclosures, but the argument is that officials such as the Director of National Intelligence are *less* likely to make such a mistake because of their concentrated expertise and experience and their access to analytical systems dedicated to making such judgments). This is indeed a powerful argument for affording a significant degree of deference to the executive's factual judgment. It does not follow, however, that deference should be strong to the point of being entirely binding. Offsetting the functional advantage of the executive official, of course, is the risk of self-interested assessments. One polices against this by having an external check—in the form of the judge—on the process of assessing the executive's claim. This requires that the judge have the freedom, in the final analysis, to reject the executive's factual claim. The judge should not exercise that freedom, however, absent a strong foundation for rejecting the executive's conclusion.

What calibration of "deference" does that mean in practical terms, and does the answer to that question differ from the status quo? One can call this "substantial deference", "great weight," or any number of other formulations. Judge Wald and I agreed during the hearing that "weight" formulations speak more clearly than "deference' formulations. This is, I think, consistent with the status quo, and I see no harm in codifying that approach (there are occasional bits of language in state secrets rulings that imply that a given judge may not be sure that he or she can in fact reject the executive's claim under any circumstances, which is not in my view an accurate assessment of the status quo). I do see harm in Congress purporting to direct judges to give no particular weight, or merely some kind of *de minimis* acknowledgment, to the executive's factual conclusion. That strikes me as unwise from a policy perspective for the functional reasons discussed above, and likely to generate vigorous arguments from the executive branch questioning whether Congress can compel that result.

Question 4

On the day of our state secrets hearing, a federal judge in San Jose dismissed on state secrets grounds a lawsuit that accused a flight-planning company of helping the CIA transport prisoners to overseas dungeons for interrogation and torture. The case was Mohamed v. Jeppesen Dataplan, Inc. It appears that the judge never looked at any actual evidence, only at government affidavits, before he dismissed the case at the pleadings stage. Do you agree that cases such as this should not be dismissed solely on the basis of affidavits submitted by defendants, without the judge ever looking at any of the allegedly privileged evidence?

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Answer 4

It depends on what one means by "actual evidence" or "the allegedly privileged evidence." In the context of that particular case, for example, the privilege issue arose independent of any specific item of evidence; the government's argument instead was based on the privileged nature of the abstract information alleged as facts in the plaintiffs' complaint. Insofar as the privilege is to be considered at all outside the context of discovery requests seeking access to specific items of evidence, the government necessarily must proceed via declarations setting forth the explanation for the privilege claim. In my view, then, there is nothing inherently wrong about using classified declarations in this context, so long as the classified declaration actually conveys the information necessary for the judge to assess the validity of the privilege assertion.

Responses to Questions from Senator Cornyn

Question A

You have written that Congress should not replace the "reasonable danger" standard established in the case law with a less deferential standard. And, in your testimony, you said that the Kennedy-Specter Bill presents no significant change in this substantive test for the privilege. The "reasonable danger" standard of the Reynolds line of cases is that the privilege applies when "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.***" *(emphasis added). The Kennedy-Specter Bill defines "state secret" as "information that, if disclosed publicly, would be* ***reasonably likely*** *to cause* ***significant harm*** *to the national defense or foreign relations of the United States." (emphasis added). This appears to be a meaningful departure from the Reynolds language. Do you disagree? If so, why?*

Answer A

It seems to me that there are two variables at issue here. First there is the question of how likely it is that public disclosure of information will cause harm, period. Second, there is the question of the magnitude of that harm. The language in the bill calibrates the first variable using a reasonable-risk test that is, I think, consistent with existing law (as reflected in the "reasonable danger" language quoted above). The language in the bill calibrates the second variable using a "significant harm" standard. How does that compare to the status quo? I do not think there is a clear answer to that question. *Reynolds* and its progeny do not clearly specify whether the harm threshold is *de minimis*, significant, grave, or any other particular calibration. That said, it seems to me that "significant" fairly captures the understanding implicit in current law, given that there is no affirmative support in current law for the proposition that the privilege only kicks in when the harm to national security would be especially grave, and given that there is little sense in protecting information the disclosure of which concededly would cause only *de minimis* or insignificant harms.

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For all of those reasons, therefore, I think that the bill does not actually work a change with respect to either variable.

Question B

Consider Sec. 4054(c)'s provision that "[a] Federal court shall conduct a hearing to review . . . all evidence the United States asserts is protected from disclosure by the state secrets privilege." Does this language give a district judge discretion to decline to review a document that the district judge believes he ought not review for important national security reasons? For example, if a party requests production of the nuclear launch codes for a given day, and the government asserts that those codes are protected from disclosure by the state secrets privilege, may the district judge decline to review those launch codes? Please explain why or why not.

Answer B

The use of the word "shall" of course implies a lack of discretion. On the other hand, it is conceivable that in a fact pattern such as described above a judge might attempt to construe the statute not to require personal examination of the evidence itself (possibly citing the canon of constitutional avoidance, given that in this circumstance the executive branch would surely invoke constitutional objections).

Responses to Questions from Senator Feingold

Question 1

In your written testimony, you asserted that appointing a guardian ad litem from "a previously-generated list of attorneys who have high-level clearances and who have agreed to serve in this capacity" would be preferable to permitting "the appointment of any person as guardian so long as the individual has the requisite security clearance."

a. Any individual who has obtained the requisite security clearance to examine state secrets has been extensively vetted by the government and deemed trustworthy to handle materials that could harm the national security if disclosed. Why, in your view, would it be preferable to draw guardians ad litem only from a pre-established list?

Answer 1.a.

The most important point, in my view, is to avoid the problems that might arise should a party's *existing* attorney be made privy to information that the judge later determines is privileged and therefore cannot be shared with the client. This would place such an attorney in a particularly difficult position, as vividly asserted in appellate and amicus briefs filed recently in the Fourth Circuit in

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Moussaoui v. United States.[1] That case is, to be sure, a criminal one in which issues arise that have no direct parallel in the civil litigation context. Still, the depictions in those briefs of the ethical and practical dilemmas faced by counsel in this scenario constitute a warning as to comparable problems that could arise in the state secrets context.

Setting that issue aside, why should the list be generated in advance? It seems to me that this is the efficient way to proceed, both because it will minimize the potentially significant delay that might otherwise occur as the court searches for appropriate counsel or awaits the granting of clearances to counsel, and because it makes it possible to have potential guardians receive advance training in the handling of classified information and related security issues. This is, it seems, why the Canadians proceed precisely in that way when using an appointed guardian system in certain national security contexts.

Question 1.b.

Under your proposal, who would select the attorneys to be included on the pre-established list, and what would be the criteria for selection?

Answer 1.b.

It seems to me that the Chief Justice of the United States would be a logical person in whom this responsibility could be vested. I do not have specific views regarding the criteria for selection, though of course any selected attorney must be eligible to obtain (or must already have) the requisite clearances.

Question 2

In Part 11-d of your written testimony, you expressed concern that the State Secrets Protection Act (SSPA) might not prevent lawsuits from going forward in cases where the plaintiff can proceed without the benefit of discovery (for example, where the plaintiff has first-hand knowledge of the sensitive information) and where the government does not have a "valid defense" it would raise but for the privilege. In such cases, however, the government could move to prevent the introduction of the plaintiff's evidence pursuant to section 4054(a) of the SSPA. If the court found that the plaintiff's evidence was privileged, disclosure or admission of the evidence would be prohibited by section

[1] Moussaoui's appellate brief is available online here: http://www.esnips.com/doc/b3f029de-a54f-4ba7-98d7-a604c2949e23/MoussaouiOpeningBrief17Jan08. The supporting amicus brief filed by the National Association of Criminal Defense Lawyers is posted here: http://www.nacdl.org/public.nsf/newsissues/amicus_attachments/$FILE/Moussaoui.pdf.

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4054(e)(2). Doesn't the protection afforded by these provisions address the concern you raised in this part of your testimony?

Answer 2

The ability of the government to move to suppress evidence under § 4054(a) is an important tool, one that does speak to this issue and one to which I had not paid sufficient attention in my initial assessment of the bill. **Section 4054(a) should be amended in a few respects, however, in order to address my concern.**

First: If it is appropriate for the government in the midst of trial to invoke the privilege to suppress evidence already in the hands of a party, the question arises as to why the government cannot raise the same objection in advance of the trial. This would enable the claim to be resolved via a subsequent or contemporaneous Rule 56 summary judgment motion, which is more desirable than forcing the parties and the court through the needless expense of a trial that terminates abruptly through a § 4054(a) motion followed by a Rule 50(a) motion for judgment as a matter of law upon the conclusion of the claimant's case in chief. **Accordingly, § 4054(a) should be amended to make clear that such a suppression motion may be brought at any time, and not just during trial.**

Second: Just as is done under CIPA in the criminal context, the government is entitled to advance notice that a party may make use of information in its possession that arguably falls within the scope of the privilege. This enables fair and efficient resolution of the government's consequent effort to suppress that information, avoiding the risk that the information will be blurted out into the public sphere before a judge can assess the government's privilege claim. **Accordingly, S. 2253 should be amended to incorporate a notice requirement comparable to that found in CIPA § 5.**

Thank you again for considering my views on these matters. I would be happy to address any other concerns or questions you may have.

Very truly yours,

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Senator Edward M. Kennedy Questions for the Record, Senate Judiciary Committee Hearing on "Examining the State Secrets Privilege: Protecting National Security While Preserving Accountability"

Questions for Louis Fisher

1. In its written testimony, the Justice Department stated that it is "incorrect" to claim that the executive's state secrets assertions in the 1953 *Reynolds* case were "improper." The Department said that the charge of improper conduct has been rejected by two federal courts. As the world's leading expert on *Reynolds*, do you agree?

I do not agree with the Department's characterization. The judicial record contains clear evidence of improper conduct by the administration. However, as interpreted by the district court and the Third Circuit in 2004 and 2005, the improper conduct was insufficiently gross or egregious to justify reopening the case.

In *Reynolds*, the Supreme Court relied on the administration's arguments and documents to conclude that the official accident report sought by the three widows contained state secrets and they could not have access to it. The Court recommended that they return to district court and depose the three surviving crew members. In looking at the accident report, declassified in the 1990s, no state secrets are present. As a consequence, the three widows initiated a *coram nobis* lawsuit, claiming that the administration had practiced fraud on the court. On September 10, 2004, the district court dismissed their case but never squarely ruled on whether the accident report did or did not have state secrets. It correctly described the Supreme Court's impression that the report contained secrets: "In *Reynolds*, the Court recognized the military secrets privilege that, upon adequate showing, allows the government to withhold evidence the disclosure of which would compromise national security." Herring v. United States, Civil Action No. 03-CV-5500-LDD (E.D. Pa. Sept. 10, 2004), memo op., at 1.

The task of the district court was complicated because the Third Circuit had not "expressly addressed the standard for fraud upon the court." Id. at 5. Looking to other circuits for guidance, it concluded that a finding of fraud upon the court "is justified only by the most egregious misconduct directed to the court itself such as bribery of a judge or jury or fabrication of evidence by counsel." Id. at 6. Under this standard, the administration could mislead the Supreme Court in 1953 about the presence of state secrets in the accident report and yet not commit fraud on the court. The question to the district court was not whether the administration misled the Supreme Court, but whether "the Air Force intended to deliberately misrepresent the truth or commit a fraud on the court." Id. at 7. Moreover, it was proper for a court "to defer on some level to governmental claims of privilege even for 'information that standing alone may seem harmless . . .'" Id. at 8.

The district court maintained that "the apparent dearth of sensitive information in the accident investigation report" did not by itself discredit judicial deference to

executive claims about secrecy. Id. at 9. Additionally, it pointed to information in the report that "[t]he projects which the 3150th Electronics Squadron were conducting require aircraft capable of dropping bombs and operating at altitudes of 20,000 feet and above." Id. at 10. If those facts were somehow sensitive, they could have been redacted and the balance of the report (showing government negligence) submitted to the widows and their attorneys. Besides, newspaper readers the day after the crash knew that the plane had been flying at 20,000 feet. As for the capacity for dropping bombs, that is what the B-29 was designed to do. The district court concluded that details of "flight mechanics, B-29 glitches, and technical remedies in the hands of the wrong party could surely compromise national security." Id. at 11. If that argument were accepted, an administration could nullify the congressional objective in passing the Federal Tort Claims Act, allowing individuals to sue government, simply by withholding information about government negligence.

In the end, the district court decided the case by adopting a lenient standard for fraud against the court. It was not enough that the administration might have committed an injustice on the court. "Plaintiffs fail to set forth allegations in the complaint amounting to gross injustice to warrant relief." Id. at 18. Another factor was judicial finality. The case had been decided a half-century before and should not be disturbed. "The Government correctly argues that the Plaintiffs cannot undo the careful and prudent decision to settle their claims and relitigate issues they voluntarily put to rest more than fifty years ago." Id. at 19.

Those arguments reappeared in the decision by the Third Circuit on September 22, 2005. The administration in *Reynolds* might have misled the Supreme Court, practiced improper conduct, and committed an injustice on the courts, but not of sufficient gravity to merit reopening the case. The second paragraph flags the value of judicial finality: "The concept of fraud upon the court challenges the very principle upon which our judicial system is based: the finality of a judgment." Herring v. United States, 424 F.3d 384, 386 (3d Cir. 2005). However, there is another value. The judicial system should not allow litigants to present false or misleading information to the courts, particularly the executive branch which is in court more than any other litigant. However, that value was never mentioned by the Fourth Circuit. Instead, someone who wants to reopen a case should encounter "not just a high hurdle to climb but a steep cliff-face to scale." Id. To argue fraud against the court, a private plaintiff must show "(1) an intentional fraud; (2) by an officer of the court; (3) which is directed at the court itself; and (4) in fact deceives the court." Id. Fraud on the court requires "the most egregious misconduct directed to the court itself." Id. at 387 (citing In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 538 F.2d 180, 195 (8th Cir. 1976)).

Therefore, the Third Circuit decided that misconduct by itself is not considered fraud on the court. There must be egregious misconduct, such as "bribery of a judge or jury or fabrication of evidence by counsel." 424 F.3d at 390. The Third Circuit agreed with other courts that "perjury by a witness is not enough to constitute fraud upon the court." Id. According to this standard, even if the administration in 1953 had lied to the Supreme Court, that kind of misconduct would be insufficient to constitute fraud on the

court. Like the district court, the Third Circuit pointed to possibly "sensitive information" in the accident report: the mission was carried out by the 3150th Electronics Squadron, it required an aircraft capable of dropping bombs, and the aircraft had to fly at altitudes of 20,000 feet and above. Id. at 391 n.3. Most of that information was already publicly available in 1948, when newspapers reported on the crash, and could have been easily redacted with the balance of the report shared with the plaintiffs.

2. What lessons does *Reynolds* offer Congress in writing legislation on the state secrets privilege?

Courts must look at the evidence and original documents and not be satisfied by affidavits and declarations prepared by executive officers. Court should not adopt the standard of "deference" or "utmost deference" to claims made by the executive branch. Such assertions are entitled to respect, but respect needs to be shown also to the private parties in a lawsuit. Otherwise, the judiciary appears to function as an arm or agency of the executive branch and loses its reputation for independence and integrity.

3. The Justice Department's statement explained that the state secrets privilege "can be invoked only by the United States (that is, it cannot be invoked by a private litigant)." Do you agree? I ask because in oral argument for the *Hepting* case in the Ninth Circuit, I understand that AT&T tried to invoke the privilege for itself.

It is true that private parties, such as the telecoms in the NSA surveillance cases, are at least indirectly invoking the state secrets privilege as a reason why they cannot adequately defend themselves in court. During oral argument in the *Hepting* case, in August 2007 before the Ninth Circuit, Michael Kellogg for AT&T raised the state secrets privilege as a defense. He argued that the SSP extends "far beyond the scope of individual espionage relationships" (as with the *Totten* and *Tenet* cases) "into any discovery into methods, modes and operations of clandestine government programs, which are alleged to be at issue here" (oral argument, at 21). He repeated that position as a defense for AT&T on pages 23-26. On page 26 he asserted: "we cannot litigate those questions, we can't provide any defense on them . . ." On the same page: "our hands are completely tied here by the government's invocation." Of course this issue appears in Section 4055 of S. 2533.

4. How do you respond to the argument of Deputy Assistant Attorney General Carl Nichols that various procedural and substantive requirements *within the executive branch* "ensure that the privilege is invoked and accepted only in the most appropriate cases"? The implication of this argument, as I understand it, is that Congress should remain silent on the state secrets privilege because the status quo is working well. Do you agree that the internal checks identified by Mr. Nichols really do ensure that the privilege is properly applied?

In *Reynolds*, the Supreme Court identified a number of procedural checks to assure that the state secrets privilege is "not to be lightly invoked." United States v. Reynolds, 345 U.S. 1, 7 (1953). Mr. Nichols summarized those steps in his testimony: the privilege

must be invoked only by the United States, the decision must be asserted by the agency head that has control over the matter, etc. The Court said the department head must give "actual personal consideration" before invoking the privilege. Id. at 8.

No matter how carefully those procedures are followed, they are done by a party with self-interest. The self-interest could include concealing agency embarrassments or illegalities. My statement for the committee includes a number of examples where the executive branch presented false information to the courts, including to the Supreme Court. Courts must exercise independence to assure that assertions of state secrets are valid and that all steps are taken to assure that private litigants have an opportunity to make their case.

5. Mr. Nichols stated that the privilege may not be invoked by "a low-level government official" but must be "lodged by the head of the department which has control over the matter." That official "must give 'actual personal consideration.'" Are you satisfied with those procedural safeguards?

I think the procedural safeguards are reasonable, but it is similarly reasonable that an agency head is unlikely to give "actual personal consideration." Agency heads are extremely busy and cannot be expected to review hundreds and thousands of documents that might be involved in a state secrets case. There is no reason to believe that Secretary of the Air Force Finletter, in the *Reynolds* case, took the time to personally read the lengthy and detailed accident report to determine if state secrets were present. It is more likely that agency personnel draft an affidavit or declaration and then brief the agency head. Mr. Nichols said in his prepared statement: "An important part of that process is the agency head's personal review of various materials." Given the heavy and demanding duties assigned to a CIA Director, Attorney General, department head, etc., it is not credible that they routinely conduct a personal review of the relevant documents.

6. Mr. Nichols cited language from the Ninth Circuit's decision in the 2007 *Al-Haramain* case that federal courts have an obligation to review executive documents with "a skeptical eye" and not take "at face value" the government's assertions. Does that accurately capture the position of the Ninth Circuit in this case?

No, it does not. The statement by Mr. Nichols suggests close, vigorous scrutiny by federal courts when executive officials assert the presence of state secrets. However, after the passage cited by Mr. Nichols above, eight lines later the Ninth Circuit states: "That said, we acknowledge the need to defer to the Executive on matters of foreign policy and national security and surely cannot legitimately find ourselves second guessing the Executive in this arena." Al-Haramain Islamic Foundation, Inc. v. Bush, 507 F.3d 1190, 1203 (9th Cir. 2007). With that attitude, judicial skepticism and independent analysis are not possible.

7. Mr. Nichols suggested that courts should give "utmost deference" to all executive claims of the state secrets privilege. I agree that courts should give due regard to

the executive's national security expertise, but I believe utmost deference would be inappropriate – it would undermine the role of the courts and make them a rubber stamp, when we need real checks and balances. What are your views on the appropriate standard for judicial review of state secrets assertions and on whether Congress should address this issue in legislation?

I do not agree that courts should adopt the standard of "utmost deference" or even "deference," because either test places the judiciary in an inferior position to the executive branch, eliminates crucial checks and balances, undermines the opportunity for private litigants to pursue their claims, and invites executive abuse. Those dangers are particularly grave today when executive officials claim authority to invoke "inherent" presidential power even when such activities violate statutes, treaties, and constitutional provisions. Those executive arguments are advanced in such disputes as NSA surveillance and extraordinary rendition.

8. On the day of our state secrets hearing, a federal judge in San Jose dismissed on state secrets grounds a lawsuit that accused a flight-planning company of helping the CIA transport prisoners to overseas dungeons for interrogation and torture. The case was *Mohamed* v. *Jeppesen Dataplan, Inc.* It appears that the judge never looked at any actual evidence, only at government affidavits, before he dismissed the case at the pleadings stage. Do you agree that cases such as this should not be dismissed solely on the basis of affidavits submitted by defendants, without the judge ever looking at any of the allegedly privileged evidence?

I agree that judges should not limit their review role to looking at affidavits, even when the documents are classified and supposedly contain privileged information. To accept affidavits is to risk losing the independence and credibility of federal courts. This type of judicial shortcut creates the impression that judges are complicit in a wrongful act or at least in a cover-up. Initially, the administration denied the existence of the extraordinary rendition program, even when evidence of the flights was well known and flight plans could be tracked with accuracy. After investigations by such outside groups as the Council of Europe provided further details on the program, the administration admitted that it existed. The cycle of denial-admission damaged U.S. credibility and prestige around the world. An effective judicial check, even if it resulted in the release of embarrassing information, would assure citizens in this country and abroad that the United States respects checks and balances, the rule of law, and procedural safeguards.

Questions from Sen. John Cornyn

Questions for Mr. Fisher

A. Do you believe that S. 2533 raises the substantive standard for invoking the state secrets privilege? Why or why not?

For reasons given in my written statement and in my remarks at the hearings, I have problems with the way the state secrets privilege is defined in the bill. Granted, federal

courts have done little to clarify the meaning of the privilege, which is probably inevitable when we are dealing with such nebulous concepts as "national interest," "national defense," "national security," and "foreign relations." For the most part, federal judges have interpreted the inconsistent standards of *Reynolds* to justify either "deference" or "utmost deference" to executive claims. Either standard poses unacceptable risks to the integrity of the judiciary and the health of our constitutional system of checks and balances. I think claims by the executive branch merit respect by the courts, but the same standard of respect should be extended to private litigants. Courts should not tip their hand in advance lest they become entangled or complicit in executive branch wrongdoing. To underscore basic constitutional values, I would add to the bill's definition two sentences: "The assertion of a state secret by the executive branch is to be tested by independent judicial review. The 'state secrets privilege' may not shield illegal or unconstitutional activities."

B. Do you disagree with the following statement: The executive branch is better situated than the judicial branch to weigh the possible national security implications of disclosing state secrets.

The executive branch has great expertise in matters of national security and in determining the risks of disclosing state secrets. At the same time, the executive branch has a track record of presenting false and unreliable national security claims to Congress, the courts, and the public. It has a track record of overclassifying documents, of attaching "secret" and "top secret" to documents that should never have been classified in the first place. It has a track record of exaggerating grave damage to national security if documents are made public. My prepared statement gives many specific examples of executive branch miscalculations and erroneous predictions. For that reason, assertions of state secrets need to be subject to independent scrutiny by another branch. Otherwise, the executive branch can claim the existence of state secrets to hide embarrassments and illegality.

Question Submitted by U.S. Senator Russell D. Feingold to Louis Fisher

1. In your written testimony, you pointed out that "there is no reason to regard in camera inspection by the judge as a 'disclosure.'" If a court wishes to view an item of evidence in camera and ex parte, may the government assert the "state secrets" privilege as a ground for withholding that evidence from the court? If so, should the government be required to demonstrate that presenting the evidence to the court would be reasonably likely to cause significant harm to national security or foreign relations?

If a court asked to see a document *in camera* and *ex parte*, and the government refused by citing the state secrets privilege, one option is for the court to rule in favor of the private party. That is what the district court and the Third Circuit did in *Reynolds*. If the government felt strongly that information should not be given to the court, how could it demonstrate to the court that it would be "reasonably likely" to cause "significant harm" to national security or foreign relations if shared with the court? If the court

doesn't see the document and has to rely on an affidavit or declaration prepared by the executive branch, the court would be at arm's length from the document. It would be difficult for the court to determine either "reasonableness" or the risk of significant harm. Unless the story came out somewhere else, the court would not know if it had been misled by executive representations.

All of us can imagine scenarios where withholding evidence from the court might be justified on its face, such as sharing battle plans of a pending military action. But these hypotheticals rarely get into court, if ever. I think if the executive branch refuses to release evidence to a court, to be examined *in camera* and *ex parte*, there has to be some kind of penalty. In the *Reynolds* case, Congress had established legislative policy in the Federal Tort Claims Act that individuals were entitled to sue the government for alleged wrongs or negligence. In such cases, the government was to be treated as any private litigant. Individuals suing the government had an opportunity to present interrogatories to the government and use the tools of discovery to gain access to relevant documents. If the government could withhold those documents not only from the private party but also from the court, possibly to prevent the release of evidence of government wrongdoing, the tort claims statute would be emptied of meaning. It was on those grounds that the district court and the Third Circuit, after they were denied the accident report by the government, ruled in favor of the three widows.

Questions Submitted by U.S. Senator Russell D. Feingold to Carl Nichols

1. You've testified that the "state secrets" privilege is constitutionally based. Do you take the position that the government has a constitutional right, not only to withhold from private litigants documents that a court has found to be privileged, but to withhold documents from the court when the court is in the process of deciding whether they are privileged?

2. If you answered Question #1 in the affirmative, please answer the following questions.

   a. The security procedures that courts employ when handling highly classified information are just as rigorous as the procedures employed when executive branch employees handle "state secrets," and there's no reason to believe that federal judges are more likely than executive branch employees to mishandle privileged information. That being the case, what is the justification for withholding privileged information from the courts?

   b. In *United States v. Reynolds*, the U.S. Supreme Court indicated that *in camera* court review of allegedly privileged documents may be dispensed with in cases where it is possible "to satisfy the court" that the privilege attaches without such review. Do you agree that this language indicates that it is up to the court, and not to the executive branch, to determine whether *in camera* review of the allegedly privileged documents is necessary?

3. Do you take the position that the executive branch has a constitutional right to withhold documents or information that it alleges to be "state secrets" from Congress? If so, what is the basis for concluding that it could harm the national security to disclose information to members of Congress in a classified setting?

4. In your reading of the law, is the government entitled to assert the state secrets privilege over information that indicates illegal conduct or constitutional violations on the part of the government?

5. If you gave an affirmative answer to Question #4, please explain the means that would be available to hold the government accountable for illegal or unconstitutional conduct in cases where the evidence of that misconduct is subject to the "state secrets" privilege and is not disclosed to private litigants, the public, or Congress.

Questions from Sen. John Cornyn

Question for Mr. Nichols:

Mr. Nichols, do you believe that the definition of "state secret" contained in Section 4051 of the S.2533 is less deferential to the executive than the "reasonable danger" test currently used by courts? Why or why not?

Senator Edward M. Kennedy Questions for the Record
Senate Judiciary Committee Hearing on "Examining the State Secrets Privilege: Protecting National Security While Preserving Accountability"

Questions for Michael Vatis

1. In your written testimony, you stated that in your experience, "there are secrets, and then there are *secrets*." Can you explain what you meant by this distinction, and how it's relevant to the legislation we are considering?

Answer: What I meant by this distinction is that are things the Executive Branch may *call* a secret one day, but then the next day leak to the media or declassify for political or other reasons. On the other hand, there are true "secrets" that the Executive Branch goes to great pains to protect from disclosure -- information that, if disclosed, really would hurt national security. My underlying point is that the mere fact that the Executive calls something a secret should not end the analysis, since the Executive Branch itself can quickly change its view on the need for secrecy. When it comes to the state secrets privilege, this means that it is necessary and appropriate for courts to examine the evidence itself and independently evaluate the rationale offered by the Executive Branch for asserting the privilege.

2. Your testimony also said "the modern administrative state tends to overregulate, rather than underregulate, information." Why is this? Does it suggest the executive branch will tend to overuse the state secrets privilege and other tools for secrecy?

Answer: The modern administrative state tends to "overregulate" information for at least two reasons. First, it does so because of the lack of transparency in the classification process. Since Congress, the courts, the media, and the public have little insight into the classification process, there is little "check" on the officials who act as classifying authorities (*i.e.*, the persons who decide whether to classify something as Confidential, Secret, or Top Secret). Compounding the problem is the fact that a classifying official will err on the side of secrecy, in order to "play it safe." That is, when it doubt, the official will normally tend to decide in favor of classifying information in order to protect against possible harm to national security.

Second, overregulation occurs because "information is power." In other words, by restricting access to information, bureaucrats can increase their own power or leverage within the bureaucracy. Secrecy also increases the power of the Executive Branch as a whole vis a vis the Legislative and Judicial Branches, since it gives the Executive the power to determine what information the other branches may see.

Both of these reasons suggest that the Executive Branch, if left unchecked by legislation or by common law constraints, will tend to overuse the state secrets privilege and other tools for secrecy.

3. How do you respond to the argument of Deputy Assistant Attorney General Carl Nichols that various procedural and substantive requirements *within the executive branch* "ensure that the privilege is invoked and accepted only in the most appropriate cases"? The implication of this argument, as I understand it, is that Congress should remain silent on the states secrets privilege because the status quo is working well. Do you agree that the internal checks identified by Mr. Nichols really do ensure that the privilege is properly applied?

Answer: I have no doubt that the Executive Branch's procedural and substantive requirements described by Mr. Nichols serve to reduce abuse of the privilege, and to limit the number of cases in which the privilege is asserted. But I do not think such internal Executive Branch requirements are sufficient. As noted above and in my written testimony, the Executive Branch, left alone, will tend to overclassify information and to assert the state secrets privilege in litigation too frequently, *even with* the internal requirements described by Mr. Nichols. This is why judicial review of Executive assertions of the privilege is essential. As I noted in my written testimony, I also believe it is entirely appropriate under the Constitution, and salutary for our democracy, for Congress to pass legislation regulating assertions of the privilege and setting the terms for judicial review of such assertions.

The procedures for obtaining a search or surveillance order under the Foreign Intelligence Surveillance Act (FISA) provide a useful analogy. The Executive Branch has extensive internal procedures and requirements that must be met before the Attorney General approves a FISA application to the Foreign Intelligence Surveillance Court (FISC). But FISA nevertheless requires independent review by the FISC.

4. Mr. Nichols also suggested that courts should give "utmost deference" to all executive claims of the state secrets privilege. I agree that courts should give due regard to the executive's national security expertise, but I believe utmost deference would be inappropriate—it would undermine the role of the courts and make them a rubber stamp, when we need real checks and balances. What are your views on the appropriate standard for judicial review of state secrets assertions and on whether Congress should address this issue in legislation?

Answer: As I stated in my testimony, I also believe that we need real checks and balances. I also believe that Congress should address the issue of the standard of judicial review in the legislation, and that it would be a mistake if the legislation remains silent on this issue. In my view, though, the standard of review should include some amount of deference to the Executive Branch's determination that disclosure of information would be "reasonably likely to cause significant harm to the national defense or foreign relations of the United States." I think requiring "utmost deference" would go too far, and would undermine independent judicial review of assertions of the privilege. On the other hand, if the Executive Branch explains, for example, how revelation of the details of a sensitive negotiation with a foreign official would damage the nation's diplomatic relations, or how revelation of a specific signals intelligence method would harm our national defense,

the court should be required at least to accord that judgment substantial weight if it is reasonable in light of the evidence presented.

5. On the day of our state secrets hearing, a federal judge in San Jose dismissed on state secrets grounds a lawsuit that accused a flight-planning company of helping the CIA transport prisoners to overseas dungeons for interrogation and torture. The case was *Mohamed v. Jeppesen Dataplan, Inc.* It appears that the judge never looked at any actual evidence, only at the government affidavits, before he dismissed the case at the pleadings stage. Do you agree that cases such as this should not be dismissed solely on the basis of affidavits submitted by defendants, without the judge ever looking at any of the allegedly privileged evidence?

I agree as a general matter that no case should be dismissed solely on the basis of affidavits submitted by defendants, without the judge's ever looking at any of the allegedly privileged evidence. I therefore applaud the requirement in S. 2533 that courts review the evidence itself.

In *Mohamed v. Jeppesen Dataplan, Inc.*, the district court decided that the case should be dismissed because "the very subject matter of the case is a state secret." *Jeppesen* involves the CIA's alleged detention, interrogation, and "extraordinary rendition" of suspected terrorists to other countries. The difficult issue in such cases is whether a case should be permitted to proceed if it would inevitably require disclosure of facts concerning, or the government's official acknowledgment of, a sensitive intelligence activity. That issue is further complicated when government officials have made general public statements about such intelligence activity. These issues cannot meaningfully be addressed in the abstract, but only on a case-by-case basis. It can be said, however, that the state secrets privilege originated as an *evidentiary* privilege, and not as a rule of *justiciability*. Accordingly, as S. 2533 contemplates, courts should only rarely dismiss a claim or an entire suit on the ground of the state secrets privilege, and should strive to allow the case to proceed on the basis of non-privileged evidence.

Questions from Sen. John Cornyn

A. Do you believe that S. 2533 raises the substantive standard for invoking the state secrets privilege? Why or why not?

Answer: S. 2533 defines "state secret" as "any information that, if disclosed publicly, would be *reasonably likely* to cause *significant harm* to the national defense or foreign relations of the United States." (Emphases added.) *United States v. Reynolds*, 345 U.S. 1, 10 (1953), set forth a similar risk threshold, stating that "[t]he state secrets privilege...permits the government to bar the disclosure of information if there is a '*reasonable danger*' that disclosure will 'expose military matters which, in the interest of national security, should not be divulged.'" *Id.* at 10 (emphasis added). S. 2533 does differ in that it requires a reasonable likelihood that disclosure would cause "significant harm," whereas *Reynolds* and subsequent cases do not clearly define the extent of harm that would need to be caused by disclosure in order for the information to be considered a state secret. Indeed, *Reynolds* leaves the issue rather obscure, speaking only of "military matters which, in the interest of national security, should not be disclosed."

B. Do you disagree with the following statement: The executive branch is better situated than the judicial branch to weigh the possible national security implications of disclosing state secrets.

Answer: I agree that the Executive Branch is better situated than the Judicial Branch to assess the harm to national security that may be caused by disclosure of specific information that the Executive Branch asserts is privileged. For that reason, I believe that courts should accord some level of deference to the Executive's assessment of likely harm, at least giving substantial to weight to that assessment. However, I believe courts should nevertheless exercise their independent judgment in evaluating assertions of the privilege, look at the actual evidence for which the privilege is asserted, and not simply accept the Executive's "say so" in ruling on assertions of the privilege.

Answers to Questions Propounded to Judge Wald by Senate Judiciary Committee
March 5,2008

Senator Kennedy

(1) No I do not

(2) The consensus for Congressional action on state secrets to which I referred is reflected in the October 4,2007 letter sent by 18 scholars of constitutional law and public policy who urged that "Congress has an important role to play in providing guidance to federal courts" on state secrets and went on to say that "When the state secrets privilege was first recognized in United States v Reynolds(1953) the Supreme Court tilted far too much in the direction of executive power and seriously undercut the legitimate interests of private plaintiffs. That bias has continued with the current state secrets cases involving such areas as NSA surveillance and extraordinary rendition" The same letter recounts examples of post-Reynolds misuse of the privilege that "create() an all-too tempting invitation to executive abuse" including the recent El-Masri case which was dismissed before any discovery at all. The scholars' letter concludes "There is a need for new rules designed to protect the system of checks and balances, individual rights, national security, fairness in the courtroom and the adversary process". William Webster, former Director of the FBI and CIA also referred in his letter to "much-needed reforms" in the application of the privilege. The American Bar Association has submitted testimony that the government has asserted the privilege in a "growing number of cases, including those involving fundamental rights and serious allegations of government misconduct, and has sought dismissal at the pleadings stage...Courts have been required to evaluate these claims of privilege without the benefit of statutory guidance or clear precedent. This has resulted in the application of inconsistent standards and procedures in determinations regarding the applicability of the privilege" (citing cases). I agree with these conclusions leading to a consensus among legal authorities that there is an urgent need for Congressional action to make the recognition of the privilege more uniformand more fair.

(3) Although internal checks by Executive officials on the invocation of the privilege are vitally important, they will never be sufficient to guarantee that the right balance will be drawn between the interests of the government in insuring against all risks they perceive disclosure may hold for security and the very important interests of fairness for civil litigants and the perception of impartial justice administered by the courts that are essential to our constitutional form of government . The fact that currently the legal community as well as public commentators are aroused about the possible unfairness to private citizens with valid claims against the government being unnecessarily thrown out of court before they are allowed to try and make a case with unprivileged material , and a disturbing worry that all such privilege claims are not founded on the careful consideration Mr. Nichols recounts but rather or even additionally by desires to keep secret misdeeds by the government suggest strongly that the status quo is not working well. The perception as well as the reality of justice will be better served by judicial

determinations based on known protocols which judges will follow and which employ a series of alternative techniques designed to save the case if possible without endan gering national security.

(4) I would reject "utmost deference" to the government as a standard for judicial review. I would prefer "due deference" or even "due weight". These standards allow for sufficient judicial flexibility to take into account the expertise and the credibility of the government affiants and they are standards similar to those which have been used in other contexts involving claims of security (e.g. FOIA Exemption 1-"substantial weight" to government affidavits but still retaining a de novo review by the court) I do think Congress ought to put some standard either in text or in reports-otherwise the government well argue and some courts may accede to the former too deferen tial standards now employed.

(5) Reynolds did not require the judge to actually look at the report in question which turned out to be a costly mistake for the plaintiffs since it actually contained no material requiring secrecy. I believe that the judge should always be allowed to look at the material if he believes it necessary and furthermore that this should be the practice in all but the most unusual cases (see answer to Senator Cornyn's question below) . He should especially not be allowed to dismiss a case wholesale without assuring himself that the material really does deserve privileged treatment. This presumption that he will look at it except in the most unusual cases is important because the experience under FOIA Exemption 1 is that the judge may but does not have to decide if a classification is reasonavble and the result has been that too many judges bypass this authority.

Senator Feingold

(1) Clearly the government should not be able to assert the privilege in order to conceal wrongdoing and to avoid that situation it is necessary to have the court as the final arbiter of whether the privilege applies. The harder question is what to do if the material really does deserve privileged status but at the same time it would also reveal government wrongdoing. The Senate bill does provide specifically for segregation of non privileged from privileged material and the judge should in any such case make a stringent effort to see if there is material that does not need to be kept secret that will allow the misdeeds to be revealed. It has also been suggested that where that is not possible the court might send some notice to the appropriate authority that it is aware of the incriminating material and urges that the government itself investigate ior hold accountable the miscreants. And if possible provide some administrative relief to the injured claimants.

Senator Cornyn

(A) I do not believe there has been only one uniform articulation of the substantive standard for the privilege used by all courts up to now. Indeed I believe that would be one of the great benefits of legislation, to provide a uniform definition. Thus I do not think that the current definition in the Senate bill would raise the standard in all or even most of

the cases but there have been instances in which courts have pretty much deferred to executive allegations even as to the amount of risk involved. Given the interests at stake, I think the Bill 's definition strikes the right balance and if I may be candid, it still allows any judge who thinks after reviewing the evidence that a real risk of national security is involved to invoke it.

(B)The example you raise as to the nuclear launch codes is certainly at the outer limits of what any claimant would be likely to request as a basis for civil relief. I believe that in that extreme case the judge after obtaining a sworn assurance from the government that it was such codes that were involved, i.e. a Vaugn index description of what they were could decline e to have them produced. But in virtually every other case the judge should look at the material before dismissing a case. This can and is done every day in the federal courts which have been accommodated to storing such material safely or even having the government transport it over for the judge to look at and stand outside his chamber while he does so, returning it promptly thereafter.

SUBMISSIONS FOR THE RECORD

WASHINGTON
LEGISLATIVE OFFICE

American Civil Liberties Union
Statement for the Record to the United States Senate
Committee on the Judiciary

Submitted by
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Chairman Leahy, Ranking Member Specter, and Members of the Committee:

We are pleased to submit this statement for the record on behalf of the American Civil Liberties Union, its 53 affiliates and more than 500,000 members nationwide, to explain the ACLU's concern about an issue of critical importance to us, and to all Americans concerned about the unchecked abuse of executive power: reform of the state secrets privilege.

Over the years we have seen the state secrets privilege mutate from a common-law evidentiary rule that permits the government "to block discovery in a lawsuit of any information that, if disclosed, would adversely affect national security,"[1] into an alternative form of immunity that is increasingly being used to shield the government and its agents from accountability for systemic violations of the Constitution. Since September 11, 2001, the Bush administration has fundamentally altered the manner in which the state secrets privileged is used, to the detriment of the rights of private litigants harmed by egregious government misconduct, and at the sacrifice of the American people's trust and confidence in our judicial system.

ACLU litigators challenging the Bush administration's illegal policies of warrantless surveillance, extraordinary rendition, and torture have increasingly faced government assertions of the state secrets privilege at the initial phase of litigation, even before any evidence is produced or requested. Too often in these cases, courts accept government claims of risk to national security as absolute, without independently scrutinizing the evidence or seeking alternative methods to give our plaintiffs an opportunity to discover non-privileged information with which to prove their cases.

The untimely dismissal of these important lawsuits has undermined our constitutional system of checks and balances and weakened our national interest in having a government that is accountable to the people. The misuse of the privilege by the executive branch, coupled with the failure of the courts to exercise independent scrutiny over privilege claims, has allowed serious, ongoing abuses of executive power to go unchecked. Congress has the power and the duty to restore these checks and balances and the ACLU commends Senator Kennedy

and Senator Specter for recently introducing legislation to clarify judicial authority over civil litigation involving alleged state secrets.

HISTORY OF THE PRIVILEGE

It has been more than half a century since the Supreme Court formally recognized the common-law state secrets privilege in *United States v. Reynolds*, a case that both established the legal framework for accepting a state secrets claim and serves as cautionary tale for those judges inclined to accept the government's assertions as valid on their face.[2] In *Reynolds*, the family members of three civilians who died in the crash of a military plane in Georgia sued for damages. In response to a discovery request for the accident report, the government asserted the state secrets privilege, arguing that the report contained information about secret military equipment that was being tested aboard the aircraft during the fatal flight.

Although the Supreme Court had not previously articulated rules governing the invocation of the privilege, it emphasized the privilege was "well established in the law of evidence,"[3] and cited treatises, including John Henry Wigmore's *Evidence in Trials at Common Law*, as authority. Wigmore acknowledged that there "must be a privilege for *secrets of state, i.e.* matters whose disclosure would endanger the Nation's governmental requirements or its relations of friendship and profit with other nations."[4] Yet he cautioned that the privilege "has been so often improperly invoked and so loosely misapplied that a strict definition of its legitimate limits must be made."[5] Such limits included, at a minimum, requiring the trial judge to scrutinize closely the evidence over which the government claimed the privilege:

> Shall every subordinate in the department have access to the secret, and not the presiding officer of justice? Cannot the constitutionally coordinate body of government share the confidence? The truth cannot be escaped that a Court which abdicates its inherent function of determining the facts upon which the admissibility of evidence depends will furnish to bureaucratic officials too ample opportunities for abusing the privilege.[6]

Noting that the government's privilege to resist discovery of "military and state secrets" was "not to be lightly invoked," the *Reynolds* Court required "a formal claim of privilege, lodged by the head of the department which had control over the matter, after actual personal consideration by that officer."[7] Further, the Court suggested a balancing of interests, in which the greater the necessity for the allegedly privileged information in presenting the case, the more "a court should probe in satisfying itself that the occasion for invoking the privilege is appropriate."[8] Like Wigmore, the *Reynolds* Court cautioned against ceding too much authority in the face of a claim of privilege: "judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers."[9]

Yet despite these cautions the *Reynolds* Court produced an ambiguous standard for making a judicial determination of whether the disclosure of the evidence in question poses a reasonable danger to national security,[10] and it sustained the government's claim of privilege over the accident report without ever looking at it. While the Court allowed the suit to proceed using alternative

non-classified information (testimony from the crash survivors) as a substitute for the accident report, the declassification of the report many decades later proved the folly in the Court's unverified trust in the government's claim. The accident report contained no national security or military secrets, but rather compelling evidence of the government's negligence.[11]

The Supreme Court has not directly addressed the scope or application of the privilege since *Reynolds*. In the intervening years, the privilege has become unmoored from its evidentiary origins. No longer is the privilege invoked solely with respect to discrete and allegedly secret evidence; rather, the government now routinely invokes the privilege at the pleading stage, before any evidentiary disputes have arisen.[12] Indeed, Reynolds' instruction that courts are to weigh a plaintiff's showing of need for particular evidence in determining how deeply to probe the government's claim of privilege is rendered wholly meaningless when the privilege is invoked before any request for evidence has been made. Moreover, the government has invoked the privilege with greater frequency[13]; in cases of greater national significance[14]; and in a manner that seeks effectively to transform it from an evidentiary privilege into an immunity doctrine, thereby "neutraliz[ing] constitutional constraints on executive powers."[15]

In particular, since September 11, 2001, the government has invoked the privilege frequently in cases that present serious and plausible allegations of grave executive misconduct. It has sought to foreclose judicial review of the National Security Agency's warrantless surveillance of United States citizens in contravention of the Foreign Intelligence Surveillance Act, to foreclose review of the NSA's warrantless data mining of calls and e-mails, and to foreclose review of various telecommunication companies' participation in the NSA's surveillance activities.[16] It has invoked the privilege to terminate a whistleblower suit brought by a former FBI translator who was fired after reporting serious security breaches and possible espionage within the Bureau.[17] And, of course, it has invoked the privilege to seek dismissal of suits challenging the government's seizure, transfer, and torture of innocent foreign citizens.[18]

The proliferation of cases in which the government has invoked the state secrets privilege, and the lack of guidance from the Court since its 1953 decision in *Reynolds,* have produced conflict and confusion among the lower courts regarding the proper scope and application of the privilege. In *Tenet v. Doe*, the Supreme Court clarified the distinction between the evidentiary state secrets privilege, which may be invoked to prevent disclosure of specific evidence during discovery, and the so-called *Totten* rule, which requires outright dismissal at the pleading stage of cases involving unacknowledged espionage agreements.[19] As the Court explained, *Totten* is a "unique and categorical . . . bar – a rule designed not merely to defeat the asserted claims, but to preclude judicial inquiry."[20] By contrast, the Court noted, the state secrets privilege deals with evidence, not justiciability.[21] Nevertheless, some courts have permitted the government to invoke the evidentiary state secrets privilege to terminate litigation even before there is any evidence at issue.

There is substantial confusion in the lower courts regarding both *when* the privilege properly may be invoked, and *what* precisely the privilege may be invoked to protect. The *Reynolds* Court considered whether the privilege had been properly invoked during discovery, at a stage of the litigation when *actual*

evidence was at issue.[22] Consistent with *Reynolds,* some lower courts have properly rejected pre-discovery, categorical assertions of the privilege, holding that the privilege must be asserted on an item-by-item basis with respect to particular disputed evidence.[23] Other courts, however, have permitted the government to invoke the privilege at the pleading stage, with respect to entire *categories* of information – or even the entire subject matter of the action – before evidentiary disputes arose.[24]

There is also a wide divergence among the lower courts regarding how deeply a court must probe the government's claim of privilege, and what, exactly, the court must examine in assessing a privilege claim and its consequences. Notwithstanding *Reynolds'* clear instruction that the judge has a critical and authoritative role to play in the privilege determination, many courts have held that the government's state secrets claim must be afforded the most extreme form of deference.[25] Other courts properly have scrutinized the government's privilege claim with more rigor – adopting a common-sense approach to assessing the reasonable risk of harm to national security should purported state secrets be disclosed.[26]

This confusion as to the proper judicial role plays out with particularly dire consequences when a successful claim of privilege results in dismissal of the entire lawsuit. Some courts correctly have held that where dismissal might result from a successful invocation of the privilege, the court must examine the *actual* evidence as to which the government has invoked the privilege before making any determination about the applicability of the privilege or dismissal.[27] Other courts have refused or declined to examine the allegedly privileged evidence, relying solely on secret affidavits submitted by the government.[28]

Legislative action to narrow the scope of the state secrets privilege and standardize the judicial process for evaluating privilege claims is needed to clear up the confusion in the courts and to bring uniformity to a too often flawed process that is increasingly denying justice to private litigants in cases of significant national interest.

ACLU LEADERSHIP IN REFORMING THE STATE SECRETS PRIVILEGE

The ACLU has brought several cases designed to challenge controversial government intelligence programs that have come to light through press leaks, through inadvertent disclosure, and through intentional admissions of high government officials. These cases serve more than just the narrow personal interests of the litigants; they serve the national interest in that they often seek declaratory relief and/or a judicial determination that the challenged government conduct is illegal and unconstitutional, and therefore must end. The misuse of the privilege to dismiss these cases at the pleading stage does damage to the body politic as a whole, and not just to the rights of the litigants.

EXTRAORDINARY RENDITION, TORTURE

Khaled El-Masri, a German citizen of Lebanese descent, was forcibly abducted while on holiday in Macedonia in late 2003. After being detained

incommunicado by Macedonian authorities for 23 days, he was handed over to United States agents, then beaten, drugged, and transported to a secret CIA-run prison in Afghanistan. While in Afghanistan he was subjected to inhumane conditions and coercive interrogation and was detained without charge or public disclosure for several months. Five months after his abduction, Mr. El-Masri was deposited at night, without explanation, on a hill in Albania. El-Masri suffered this abuse and imprisonment at the hands of U.S. government agents due to a simple case of mistaken identity.

Mr. El-Masri's ordeal received prominent coverage throughout the world and was reported on the front pages of the United States' leading newspapers and on its leading news programs. In addition to widely disseminating Mr. El-Masri's allegations of kidnapping, detention, and abuse, these news reports revealed a vast amount of information about the CIA's behind-the-scenes machinations during Mr. El-Masri's ordeal, and even about the actual aircraft employed to transport Mr. El-Masri to detention in Afghanistan. German and European authorities began official investigations of El-Masri's allegations. Moreover, on numerous occasions and in varied settings, U.S. government officials have publicly confirmed the existence of the rendition program and described its parameters.

The government has acknowledged that the CIA is the lead agency in conducting renditions for the United States in public testimony before the 9/11 Commission of Inquiry. Christopher Kojm, who from 1998 until February, 2003 served as Deputy Assistant Secretary for Intelligence Policy and Coordination in the State Department's Bureau of Intelligence and Research, described the CIA's role in coordinating with foreign government intelligence agencies to effect renditions, stating that the agency "plays an active role, sometimes calling upon the support of other agencies for logistical or transportation assistance" but remaining the "main player" in the process.[29] Similarly, former CIA Director George Tenet, in his own written testimony to the 9/11 Joint Inquiry Committee, described the CIA's role in some seventy pre-9/11 renditions and elaborated on a number of specific examples of CIA involvement in renditions.[30] Even President Bush has publicly confirmed the widely known fact that the CIA has operated detention and interrogation facilities in other nations, as well as the identities of fourteen specific individuals who have been held in CIA custody.[31]

On December 6, 2005, Mr. El-Masri filed suit against former Director of Central Intelligence George Tenet, three private aviation companies, and several unnamed defendants, seeking compensatory and punitive damages for his unlawful abduction, arbitrary detention, and torture by agents of the United States.[32] Mr. El-Masri alleged violations of the Fifth Amendment to the U.S. Constitution as well as customary international law prohibiting prolonged arbitrary detention; cruel, inhuman, or degrading treatment; and torture, which are enforceable in U.S. courts pursuant to the Alien Tort Statute.[33] Although not named as a defendant, the United States government intervened before the named defendants had answered the complaint, and before discovery had commenced, for the purpose of seeking dismissal of the suit pursuant to the evidentiary state secrets privilege. In a public affidavit submitted with the motion, then-CIA director Porter Goss maintained that "[w]hen there are allegations that the CIA is involved in clandestine activities, the United States can neither confirm nor deny those allegations," and accordingly Mr. El-Masri's suit must be dismissed.[34]

The district court held oral argument on the United States' motion on May 12, 2006, and despite the wealth of evidence already in the public record, the United States' motion to dismiss was granted that same day.[35] Mr. El-Masri thereafter appealed to the Court of the Appeals for the Fourth Circuit. On March 2, 2007, the court of appeals upheld the dismissal of Mr. El-Masri's suit, holding that state secrets were "central" both to Mr. El-Masri's claims and to the defendants' likely defenses, and thus that the case could not be litigated without disclosure of state secrets.[36]

The district court held that "El-Masri's private interests must give way to the national interest in preserving state secrets." But no meaningful national interest was served by this decision. There is no national security interest served in having U.S. government agents kidnap, render, torture, abuse, and illegally detain the wrong person. To the contrary, the allegations questioned our government's commitment to core values of American criminal law and international humanitarian law. In an amicus brief filed in support of El-Masri's appeal to the Forth Circuit, ten former U.S. diplomats warned that denial of a forum for El-Masri would undermine U.S. standing in the world community and the ability to obtain foreign government cooperation essential to combating terrorism, and thereby undermine our national security.[37] Perhaps it should have been no surprise that on January 31, 2007 a German court issued arrest warrants for 13 unnamed CIA agents believed to have participated in the El-Masri abduction and rendition.[38] In cases that touch fundamental values and constitutional principles, courts must be empowered to look to the long-term national interests in devising a solution that protects both our national interests and the interests of justice for all.

The ACLU recently filed another federal lawsuit on behalf of five victims of the U.S. government's unlawful extraordinary rendition program. The lawsuit charges that Jeppesen Dataplan, Inc., a subsidiary of the Boeing Company, knowingly provided direct flight services to the CIA that enabled the clandestine transportation of Binyam Mohamed, Abou Elkassim Britel, Ahmed Agiza, Mohamed Farag Ahmad Bashmilah, and Bisher al-Rawi to secret overseas locations where they were subjected to torture and other forms of cruel, inhuman and degrading treatment.[39] On October 19, 2007 the government moved to intervene and filed a motion to dismiss based on CIA Director Michael Hayden's formal invocation of the state secrets privilege as grounds for dismissal. The matter is currently pending in the district court.

NATIONAL SECURITY AGENCY WARRANTLESS SURVEILLANCE

In December of 2005 the *New York Times* revealed that shortly after the 9/11 attacks the NSA began conducting warrantless domestic eavesdropping in violation of the Foreign Intelligence Surveillance Act (FISA).[40] The Bush administration acknowledged approving this surveillance as part of a program it called the Terrorist Surveillance Program (TSP). Subsequent articles in the *Times* and *USAToday* alleged that major telecommunications companies "working under contract to the NSA" were also providing the domestic call data of millions of Americans to the government for "social network analysis."[41]

The ACLU sued the NSA on behalf of a group of journalists, academics, attorneys and nonprofit organizations, alleging that their routine communication with individuals in the Middle East made them likely victims of the NSA's warrantless wiretapping program.[42] The plaintiffs alleged the NSA program violated the Fourth Amendment, FISA and other federal laws. They also allege that they suffered real injury as a result of the NSA's warrantless surveillance program because the program forced them to make other, more costly arrangements to communicate with clients, sources, and colleagues in order to maintain confidentiality. The government filed a motion to dismiss prior to discovery, arguing the matter could not be explored in litigation because evidence supporting the NSA program qualifies for the state secrets privilege. U.S. District Judge Anna Diggs Taylor correctly found that the ACLU's challenge to the program could be made based solely on the government's public acknowledgement of the warrantless wiretapping program and ruled the NSA program unconstitutional.

In July 2007, the Sixth Circuit Court of Appeals dismissed the case, ruling the plaintiffs in the case had no standing to sue because they did not, and because of the state secrets doctrine could not state with certainty that they had been wiretapped by the NSA.[43] Once again the interests of justice were not properly served by dismissal of this case because Americans were denied the chance to contest the warrantless surveillance of their telephone calls and e-mails when the appeals court refused to rule on the legality of the program. Indeed, if this decision stands no person could ever challenge a secret domestic surveillance program because evidence necessary to demonstrate standing falls under the protection of the privilege. This unfettered executive authority is untenable under our constitutional system of competing powers among the separate branches of government. In October 2007, the ACLU asked the Supreme Court of the United States to review the Sixth Circuit decision and we are awaiting a decision regarding whether it will accept the case.

NATIONAL SECURITY WHISTLEBLOWER

Sibel Edmonds, a 32-year-old Turkish-American, was hired as a translator by the FBI shortly after the terrorist attacks of September 11, 2001 because of her knowledge of Middle Eastern languages. She was fired less than a year later in March 2002 in retaliation for reporting shoddy work and security breaches that could have had serious implications on our national security to her supervisors. Edmonds sued to contest her firing in July 2002. Rather than deny the truth of Edmonds' assertions, the government invoked the state secrets privilege in arguing that her case raised such sensitive issues that the court was required to dismiss it without even considering whether the claims had merit. On July 6, 2004, Judge Reggie Walton in the U.S. District Court for the District of Columbia dismissed Edmonds' case, citing the government's state secrets privilege. The ACLU represented Edmonds in her appeal of that ruling.[44]

A few days before the appeals court heard Edmonds' case, the Inspector General published an unclassified summary of its investigation of her claims.[45] The summary vindicated Edmonds. It stated that "many of [Edmonds'] allegations were supported, that the FBI did not take them seriously enough, and that her allegations were, in fact, the most significant factor in the FBI's decision to terminate her services."[46] The Inspector General urged the FBI to conduct a

thorough investigation of Edmonds' allegations. It stated that "the FBI did not, and still has not, conducted such an investigation."[47] It is truly difficult to see how ignoring and suppressing a whistleblower's complaint about security breaches within the FBI protects the national security.

In the appeals court, the government continued to argue that the state secrets privilege deprived the judiciary of the right to hear Edmonds' claims. In fact, the appeals court closed the arguments for the case to the press and general public.[48] Even Edmonds and her attorneys were forbidden from hearing the government present part of its argument. In a one-line opinion containing no explanation for its decision, the appeals court agreed with the government and dismissed Edmonds' case. Edmonds asked the Supreme Court to review her case, but it declined.[49]

CONCLUSION

In each of these instances, the government has sought dismissal at the pleading stage, and the privilege as asserted by the government and as construed by the courts has often permitted dismissal of these suits on the basis of a government affidavit alone – without any judicial examination of the purportedly privileged evidence and sometimes only after ex parte hearings. Accordingly, a broad range of executive misconduct has been shielded from judicial review after the *perpetrators themselves* have invoked the privilege to avoid adjudication. Employed as it has been in these cases, the privilege permits the executive to declare a case nonjusticiable – without producing specific privileged evidence, without having to justify its claims by reference to those specific facts that will be necessary and relevant to adjudicate the case, and without having to submit its claims to even modified adversarial testing. These qualitative and quantitative shifts in the government's use – and the courts' acceptance – of the state secrets privilege warrant legislative action to correct this imbalance of power and rein in unconstitutional executive practices that are injurious to the health of a democratic society.

THE STATE SECRETS PROTECTION ACT (S. 2533)

The ACLU commends Senator Kennedy and Senator Specter for introducing the State Secrets Protection Act (S. 2533), a bill that takes great strides toward restoring essential constitutional checks on executive power. S. 2533 restores the states secrets privilege to its common law origin as an evidentiary privilege, by prohibiting the dismissal of cases prior to discovery. S. 2533 ensures independent judicial review of government state secrets claims by requiring courts to examine *in camera* the evidence for which the privilege is claimed and make their own assessments of whether disclosure of the information would reasonably pose a significant risk to national security.

Courts have long experience responsibly handling national security information in criminal cases involving terrorism and espionage, and there is no reason to suggest courts will not be just as reasonable in fulfilling their obligations in civil cases. S. 2533 uses the Classified Information Procedures Act as a model, and appropriately so, because CIPA has both protected the national security and the rights of individuals in adversarial proceedings against the government for more than twenty years.[50] CIPA not only establishes procedures,

now tested, for handling classified information in an adversarial process, it also correctly shifts the burden that results from the government's withholding of evidence to the government where it belongs. The balancing test under CIPA holds that our collective national interest in protecting the rights of an individual the government seeks to deprive of his liberty outweighs the government's interest in pursuing its criminal justice mission or protecting its secrets. This is the appropriate balance because the government is in the best position to weigh the competing risks and come to a determination whether protecting its secret is more or less important than prosecuting the individual, and placing the burden on the government is the only way to compel it to make that choice. While not every tort case implicates issues of collective national interest, courts should be allowed to consider broader interests of justice in those cases that do involve torture in addition to torts.

S. 2533 brings this balance to civil litigation. S. 2533 would allow courts to protect evidence from disclosure that would legitimately harm national security, yet would allow the litigation to proceed if possible with non-privileged evidence. Like CIPA, S. 2533 would allow courts to compel the government to produce non-privileged substitutes for privileged evidence and, if the government refuses to produce substitutes, would allow the court to resolve the issue in favor of the non-government party. These procedures would ensure the litigation can proceed to a just result unless the court determines the government is unable to present specific privileged evidence that establishes a valid defense.

Notwithstanding the clear improvements the bill offers, the ACLU has two concerns with S. 2533 as written and would like to work with the sponsors throughout the markup process to address them. First, S. 2533 authorizes ex parte hearings and would allow courts to limit participation in hearings to attorneys with appropriate security clearances. The authorization for a cleared guardian ad litem to represent the interests of the adverse party is an appropriate half-measure where the party's attorney cannot be cleared. But Congress should recognize that centuries of American jurisprudence have demonstrated the strength of the adversarial process in reaching decisions on matters of law and fact, and to the extent possible the full adversarial process should be maintained. Congress should empower the courts to ensure that security clearances are not inappropriately withheld from particular attorneys, or a particular class of attorneys, simply because the government wants to select its adversaries.

Second, S. 2533 would require *in camera* hearings except when the hearing relates only to matters of law. While *in camera* hearings should of course be allowed where privileged material is discussed, transparency is a fundamental principle of our judicial system and the courts should be encouraged to hold open hearings to the greatest extent possible so the American public can maintain confidence in our courts.

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[1] Ellsberg v. Mitchell, 709 F.2d 51, 56 (D.C. Cir. 1983); *See also*, United States v. Reynolds, 345 U.S. 1, 10 (1953); Tenenbaum v. Simonini, 372 F.3d 776, 777 (6th Cir. 2004).
[2] Reynolds, 345 U.S. 1 (1953).
[3] *Id*, at 6-7.
[4] 8 John Henry Wigmore, EVIDENCE IN TRIALS AT COMMON LAW §2212a (3d e. 1940)(emphasis in original).

[5] *Id.*
[6] Id, at § 2379.
[7] Reynolds, 345 U.S. 1, 7-8.
[8] *Id*, at 11.
[9] *Id*, at 9-10.
[10] Id, at 8 ("The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect.").
[11] *See*, Herring v. United States, Civil Action No. 03-5500 (LDD) (E.D. Pa. Sept. 10, 2004).
[12] *See Hepting v. AT&T, Corp.*, 439 F. Supp. 2d 974 (N.D. Cal. 2006), *appeal docketed*, No. 06-17137 (9th Cir. Nov. 9, 2006); *Al-Haramain Islamic Found., Inc. v. Bush*, 451 F. Supp. 2d 1215 (D. Or. 2006); *ACLU v. NSA*, 438 F. Supp. 2d 754 (E.D. Mich. 2006); *Terkel v. AT&T Corp.*, 441 F. Supp. 2d 899 (N.D. Ill. 2006); *Edmonds v. U.S. Dep't of Justice*, 323 F. Supp. 2d 65 (D.D.C. 2004), *cert. denied*, 74 USLW 3108 (U.S. Nov. 28, 2005) (No. 05-190); *El-Masri 437 F. Supp. 2d 530 (E.D. Va. 2006); Arar v. Ashcroft*, 414 F. Supp. 2d 250 (E.D.N.Y. 2006) (dismissed on other grounds).
[13] Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 FORDHAM L. REV. 1931, 1939 (2007) ("The Bush Administration has raised the privilege in twenty-eight percent more cases per year than in the previous decade, and has sought dismissal in ninety-two percent more cases per year than in the previous decade.")
[14] Editorial, Too Many Secrets, N.Y. Times, Mar. 10, 2007, at A12, available at: http://www.nytimes.com/2007/03/10/opinion/10sat2.html?ex=1331182800&en=023b94ae28666f34&ei=5090&partner=rssuserland&emc=rss ("It is a challenge to keep track of all the ways the Bush administration is eroding constitutional protections, but one that should get more attention is its abuse of the state secrets doctrine.").
[15] Note, *The Military and State Secrets Privilege: Protection for the National Security or Immunity for the Executive?*, 91 YALE L.J. 570, 581 (1982).
[16] *See*, Hepting v. AT&T Corp., 439 F.Supp. 2d 974 (N.D. Cal. 2006), *appeal docketed*, No. 06-17137 (9th Cir. Nov. 9, 2006); Al-Haramain Islamic Found., Inc. v. Bush, 451 F. Supp. 2d 1215 (D. Or. 2006); ACLU v. NSA, 438 F. Supp. 2d 754 (E.D. Mich. 2006); Terkel v. AT&T Corp., 441 F. Supp. 2d 899 (N.D. Ill. 2006).
[17] Edmonds v. U.S. Dep't of Justice, 323 F. Supp. 2d 65 (D.D.C. 2004), *cert. denied*, 74 USLW 3108 (U.S. Nov. 28, 2005) (No. 05-190).
[18] *See*, El-Masri, *437 F. Supp. 2d 530 (E.D. Va. 2006)* ; Arar v. Ashcroft, 414 F. Supp. 2d 250 (E.D.N.Y. 2006) (dismissed on other grounds).
[19] Tenet v. Doe, 544 U.S. 1 (2005).
[20] *Id.* at 6.
[21] *Id.* at 9, 10.
[22] Reynolds, 345 U.S. at 3.
[23] *See, e.g.*, In re United States, 872 F.2d 472, 478 (D.C. Cir. 1989) (rejecting categorical, prediscovery privilege claim because "an item-by-item determination of privilege [would] amply accommodate the Government's concerns"); Hepting, 439 F. Supp. 2d at 994 (N.D. Cal. 2006) (refusing to assess effect of pleading stage, categorical assertion of the privilege in suit challenging phone company's involvement in warrantless surveillance, preferring to assess the privilege "in light of the facts."); Nat'l Lawyers Guild v. Att'y General, 96 F.R.D. 390, 403 (S.D.N.Y. 1982) (holding privilege must be asserted on document-by-document basis).
[24] *See, e.g.*,Zuckerbraun v. General Dynamics Corp., 935 F.2d 544, 546 (2d Cir. 1991) (finding privilege properly asserted at pleading stage over all information pertaining to ship's defense system and rules of engagement); Sterling v. Tenet, 416 F.3d 338, 345-46 (4th Cir. 2005) (upholding pre-answer invocation of privilege over categories of information related to plaintiff's employment as well as alleged discrimination by CIA); Black v. United States, 62 F.3d 1115, 1117, 1119 (8th Cir. 1995); Terkel, 441 F. Supp. 2d at 918.
[25] *See, e.g.*, Zuckerbraun, 935 F.2d at 547; Sterling, 416 F.3d at 349 (accepting government's pleading-stage claim that state secrets would be revealed if plaintiff's suit were allowed to proceed, holding that court was "neither authorized nor qualified to inquire further"); Kasza, 133 F.3d at 1166 (holding that government's privilege claim is owed "utmost deference").
[26] *See, e.g.*, In re United States, 872 F.2d at 475 ("[A] court must not merely unthinkingly ratify the Executive's assertion of absolute privilege, lest it inappropriately abandon its important judicial role."); Ellsberg, 709 F.2d at 60 (rejecting claim of privilege over name of Attorney General who authorized unlawful wiretapping, explaining that no "disruption of diplomatic relations or undesirable education of hostile intelligence analysts would result from naming the responsible officials"); Hepting, 439 F. Supp. 2d at 995 (holding that "to defer to a blanket

assertion of secrecy" would be "to abdicate" judicial duty, where "the very subject matter of [the] litigation ha[d] been so publicly aired"); Al-Haramain, 451 F. Supp. 2d at 1224 (rejecting government's overbroad secrecy argument, stating that "no harm to the national security would occur if plaintiffs are able to prove the general point that they were subject to surveillance . . . without publicly disclosing any other information").

[27] *See, e.g.*, Ellsberg, 709 F.2d at 59 n.37 (when litigant must lose if privilege claim is upheld, "careful *in camera* examination of the material is not only appropriate . . . but obligatory"); ACLU v. Brown, 619 F.2d 1170, 1173 (7th Cir. 1980).

[28] *See, e.g.*, Sterling, 416 F.3d at 344 (finding "affidavits or declarations" from government were sufficient to assess privilege claim even where asserted to sustain dismissal, and holding that in camera review of allegedly privileged evidence not required); Black, 62 F.3d at 1119 (examining only government declarations); Kasza, 133 F.3d at 1170 (same).

[29] *Intelligence Policy and National Policy Coordination: Hearing of the National Commission on Terrorist Attacks Upon the United States*, Mar. 24, 2004, *available at* http://govinfo.library.unt.edu/911/archive/hearing8/9-11Commission_Hearing_2004-03-24.htm

[30] *Written Statement for the Record of the Director of Central Intelligence Before the Joint Inquiry Committee*, Oct. 17, 2002, *available at* http://www.intelcenter.com/resource/2002/tenet-17-Oct-02.pdf

[31] Statement of President George W. Bush, President Discusses Creation of Military Commissions to Try Suspected Terrorists, Office of the White House Press Secretary, (Sept. 6, 2006) at: http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html

[32] El-Masri v. Tenet, 437 F.Supp.2d 530 (E.D.Va. May 12, 2006).

[33] 28 U.S.C. § 1350.

[34] See Petition for a Writ of Certiorari at 9, 2007 WL 1624819, (Appellate Petition, Motion and Filing), El-Masri v. U.S., 128 S. Ct. 373 (U.S. 2007) (No. 06-1613), *available at* http://www.fas.org/sgp/jud/statesec/elmasri-cert.pdf

[35] El-Masri v. Tenet, 437 F.Supp.2d 530, 532-34 (E.D.Va. May 12, 2006).

[36] El-Masri v. U.S., 479 F.3d 296, 313 (4th Cir. 2007) *cert. denied*, 128 S. Ct. 373 (U.S. 2007).

[37] Brief Amicus Curiae of Former United States Diplomats Supporting Plaintiff-Appellant and Reversal, El-Masri v. Tenet, 437 F.Supp.2d 530, 532-34 (E.D.Va. May 12, 2006), (No. 06-1667) *available at*: http://www.aclu.org/safefree/rendition/asset_upload_file638_26287.pdf

[38] Mark Landler, *German Court Seeks Arrests of 13 CIA Agents*, N.Y. TIMES, Jan. 31, 2007, *available at*: http://www.nytimes.com/2007/01/31/world/europe/31cnd-germany.html?ref=europe

[39] Mohamed et al, v. Jeppesen Dataplan, Inc., Civil Action No. 5:07-cv-02798-JW, (United States District Court for the Northern District of California), (May 30, 2007).

[40] James Risen and Eric Lichtblau, *Bush lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1, *available at* http://www.nytimes.com/2005/12/16/politics/16program.html?ei=5090&en=e32072d786623ac1&ex=1292389200.

[41] Leslie Cauley, *NSA has Massive Database of Americans' Phone Calls*, USATODAY, May 11, 2006, at 1A, *available at* http://www.usatoday.com/news/washington/2006-05-10-nsa_x.htm. See also, James Risen and Eric Lichtblau, *Spy Agency Mined Vast Data Trove, Officials Report*, N.Y. Times, Dec. 24, 2005.

[42] ACLU v. NSA, 438 F. Supp. 2d 754 (E.D. Mich. 2006).

[43] ACLU v. NSA, 467 F.3d 590, 591 (6th Cir. 2006).

[44] *See* Edmonds v. U.S. Dept. of Justice, 323 F.Supp.2d 65, (D.D.C. Jul 06, 2004), *aff'd* 161 Fed.Appx. 6, (D.C.Cir. May 06, 2005) (NO. 04-5286); Reply Brief for the Plaintiff-Appellant, 2005 WL 622960, (Appellate Brief), (C.A.D.C. Mar. 10, 2005) (NO. 04-5286).

[45] U.S. DEPARTMENT OF JUSTICE OFFICE OF INSPECTOR GENERAL, A REVIEW OF THE FBI'S ACTIONS IN CONNECTION WITH THE ALLEGATIONS RAISED BY CONTRACT LINGUIST SIBEL EDMONDS, (Unclassified Summary, January 2005).

[46] *Id*, at 31.

[47] *Id*, at 34.

[48] Petition for a Writ of Certiorari, 2005 WL 1902125, (Appellate Petition, Motion and Filing), Edmonds v. U.S. Dept. of Justice, 546 U.S. 1031, 126 S.Ct. 734, (U.S. Nov 28, 2005) (NO. 05-190), *available at* http://www.justacitizen.com/articles_documents/edmonds%20cert[1].%20petition.pdf

[49] Edmonds v. U.S. Dept. of Justice, 546 U.S. 1031, 126 S.Ct. 734, (U.S. Nov 28, 2005) (NO. 05-190) .

[50] Pub. Law 96-456 (1980).

Prepared Statement by Richard M. Barlow

Former Intelligence Officer and Plaintiff in Senate Reference Court Proceeding Where State Secrets Privilege Was Invoked

Before the

U.S. Senate Committee on the Judiciary

"Examining the State Secrets Privilege: Protecting National Security While Preserving Accountability"

February 13, 2008

Chairman Leahy, Ranking Member Specter, and Members of the Committee,

I am offering the Committee my views on the State Secrets Protection Act. I applaud your Committee's decision to begin to address this issue after over 50 years. I view this as part of a much larger question of justice, checks, balances and accountability that is essential to the functioning of our democracy. I offer my particular insights from the standpoint of one of those very rare plaintiffs who, unfortunately, has practical experience in a fairly recent court proceeding where the State Secrets Privilege (SSP) was invoked over all the classified evidence, yet nevertheless went all the way to trial over a four year-long proceeding. Barlow v. the U.S. was a Congressional Reference by the Senate; your committee in particular initiated this. In a Reference, the Court of Federal Claims, by law, is supposed to serve as a fact finding advisory body for the Senate, the ultimate deciding and appellate body. So this was actually the Senate's inquiry. The case raises issues not dissimilar to those Senator Specter raised with Attorney General Gonzalez last year when he asked: *"Do you think that Constitutional government can survive if the President has unilateral authority to reject Congressional inquiries on the grounds of Executive Privilege and the President then acts to bar the Congress from getting a judicial determination as to whether that privilege was properly invoked?"*

The Reference case centered about my concerns that Congress, in the late 1980's, had been willfully misled by the Executive Branch about Pakistan's nuclear weapons program and related activities in violation of certain Congressional laws. In 1989, I was retaliated against by my employer, the Office of the Secretary of Defense, under Dick Cheney, because I objected to people lying to Congress. The chain of events began in 1987, with my truthful, fully approved classified testimony before Congress following my efforts as a CIA officer that resulted in the arrests of some of Dr. A.Q. Khan's agents here in the U.S., during what people are calling "Charlie Wilson's War" these days.

I am a former CIA intelligence officer. I have spent my entire adult life, some twenty seven years, working on sensitive WMD intelligence and counter proliferation matters, in both operational and analytical capacities, for CIA, FBI, the Office of the Secretary of Defense, the Department of Energy and others. I have a history with this Committee going back to 1998. My representatives, including my former attorney, Joseph Ostoyich, former Ambassador Robert Gallucci, and Danielle Brian, Director of the Project on Government Oversight and others expert in the relevant areas, recently met with Senator Leahy and Senator Specter after a few Senators on this committee placed anonymous holds on an amendment to the DOD Authorization bill intended to provide relief for me in the form of my pension, after 19 years of extensive Congressional involvement in my case. I spent considerable time reviewing some of the issues in the court case with the Minority Counsel. The SSP aspects of the court case were of particular interest to the Senators in these meetings.

As Senator Specter recently suggested, I believe you should avail yourselves of an excellent, if not unprecedented opportunity to examine an actual full SSP court proceeding in detail, including reviewing the full un-redacted court record and all the classified documents/evidence that I requested in discovery that were denied to me, the court and the Senate via the invocation of SSP. I think this is entirely appropriate since this was the Senate's case. Your Committee will then be able to draw from that practical knowledge in crafting truly effective and meaningful legislation to regulate the rules of procedure and evidence for the federal courts in cases where the government seeks to invoke SSP, while also protecting national security but assuring Executive Branch (EB) accountability.

Recognizing that the new bill (S.2533, the State Secrets Protection Act) is still in its infancy, such a review will, I respectfully submit, reveal that the bill, while well intended and containing some potentially useful provisions, exhibits an understandable lack of insight into the practical applications and effects of SSP in cases that might proceed through discovery and depositions to trial under circumstances similar to those proposed in the bill. If intended to provide plaintiffs with their fair "day in court," the bill must address the scope of assertions of SSP that indeed arise throughout an entire proceeding, and not only in the initial invocation of SSP. For example, in our proceeding, SSP was asserted not only over actual classified documents or information, but over virtually anything the Government unilaterally decided was "protected" in depositions, filings and trial testimony, to include unclassified documents and statements. As I will explain in some greater detail, the defendant, not the court, effectively controls the proceeding in truly extraordinary and inequitable ways.

The bill also fails to effectively remedy one of the most basic issues in recent SSP cases: The issue in these cases, as in the initial invocation of SSP in Barlow, is not that the evidence in question was improperly classified, as was eventually discovered in the Reynolds case. These cases, such as those involving the Terrorist Surveillance Program, and others, actually appear to involve evidence which is indeed properly classified under Executive Order, such as NSA and CIA operations and intelligence, the unauthorized public disclosure of which, would indeed compromise sources and methods. As in Barlow, this type of classified information may nevertheless also provide clear evidence of illegal activity by the Executive agency invoking the SSP, which may be central to the claim of the plaintiff. Reynolds, in this sense and other respects, is not representative of cases cited in the floor statements and many other recent SSP cases. The bill must somehow address the fact that documents containing properly classified secrets in these proceedings may also provide relevant evidence of illegal activity by the Executive Branch. As far as I can see, it does not.

I offer the following more detailed views on the bill:

1. Addressing Properly Classified Evidence Revealing Criminal or Illegal Activity in SSP Proceedings: Of great concern to me is the idea expressed in Senator Kennedy's floor statement: *"At the same time, the State Secrets Protection Act will prevent the executive branch from using the privilege to deny parties their day in court or shield illegal activity*

that is not actually sensitive". I interpret this statement and the bill language to infer that illegal activity that is properly classified should be shielded by SSP. This would appear to constitute an abdication of Congressional power and a virtual Congressional approval of cover-ups of classified crimes by EB officials in court, effectively placing the President and his subordinates above the criminal laws of the land. I cannot imagine this is Constitutional. I do not see how today's Supreme Court, if asked to look at this, could agree with any law that puts anyone above the criminal laws, classified or not. Regardless of the SSP decisions of lower courts, there was, to my knowledge, no issue of EB criminality or illegality in the original Reynolds case and I do not believe the Supreme Court has ever addressed an issue of SSP being used to willfully conceal criminal activity from the courts by EB officials in that case, as is indeed evident in more recent cases.

To avoid any misimpressions: I am a big fan of Executive power, since I have had the privilege of assisting in wielding it in relevant classified areas, and it is a "good thing." But in my view, it must remain within the law. In a May 22, 2002 Justice Department memo to my attorney in Barlow, Justice stated: *"We of course agree with your general assertion that SSP is not designed to protect the government from embarrassment nor to cover up potential illegalities."* While I recognize this a very complex issue, and certainly beyond my capability address in all its dimensions, it strikes me--having lived through exactly such a proceeding where potential or actual classified crimes against the Congress itself were the central issue--that the Congress needs to take the position in drafting this new law that at least in the class of civil cases that involve credible issues of illegal or criminal activity by any EB officer, the courts, after an in camera review, should NOT be procedurally allowed to accept invocations of SSP over classified evidence by those who may have violated the law. The same might apply to cases involving incompetence or mismanagement, as Justice implies.

In such cases, you might consider a provision that the Courts, having viewed such evidence in camera, be required to notify the appropriate committees of Congress in a secure manner that the classified evidence it has reviewed *in camera* reveals the potential for illegal activity. The court should not be bound to reach a final conclusion on criminality. It then falls appropriately on Congress to ask for the appointment of an independent or quasi-independent prosecutor of some sort. Assuming the classified evidence supports the plaintiff's claim the case should be decided in the plaintiff's favor, and Congress should provide direct relief, or both.

2. Unclassified Evidence Summaries or "Non-Privileged Substitutes": This is one of the most problematic ideas in the bill in a practical sense. While seemingly helpful, in practice, the approach of unclassified evidence summaries in classified cases does not serve justice in SSP cases since these will effectively be used to deny plaintiffs their day in court as things proceed. The same applies to unclassified depositions, trial testimony or even many filings in such cases. In reality, the "unclassified" approach effectively allows the defendant (as opposed to the court) to arbitrarily and capriciously control the entire proceeding, to manipulate the evidence, testimony and the scope or focus of the proceeding in its favor. Questions and answers by plaintiffs and witnesses are blocked at will. Documents are selectively redacted. This unclassified approach also

introduces ambiguities that may not exist at all in the actual classified evidence which can then be exploited by the defendant. For example, who determines what goes into an unclassified evidence summary, especially if these are done *ex parte*? What is the point of even an unclassified admission by the government where this cannot be explored further in any detail in depositions or trial? In Barlow v. U.S. not only did all of the aforementioned occur, but SSP was used to shield willfully false material testimony by a few government witnesses about their misleading of Congress that could not--as the defendant and the witnesses were well aware--be challenged by the plaintiff as a result of denial under SSP of all the relevant classified documents, or the ability to even subject these witnesses to cross examination on these "SSP" issues for the same reason. In proceeding at the unclassified level, SSP becomes both a sword and a shield for the defendant. Keep in mind that unlike most prospective plaintiffs, I knew the contents of the classified evidence denied under SSP. I recognize that the bill seeks to elevate the role of the court in reviewing the classified evidence, but—as noted below—there is reason to believe that courts will continue to be highly deferential to the government's position.

3. Risk of Unauthorized Disclosure or "Compromise"of Classified Information: This related issue goes to the heart of SSP, since it is ostensibly the underlying concern of the Executive Branch in invoking it. Judges are not interested in acting as arbiters of what is classified or not, as the bill essentially proposes. The Courts have stated repeatedly that they will not "second guess" the EB on such matters. Judges are understandably concerned about compromising intelligence sources or methods and are therefore utterly deferential to the EB in such matters and will remain so. After witnessing an untrained judge attempting to deal with even very basic intelligence matters in an overly deferential manner, I fully sympathize and agree with the Judicial Branch view on this issue. I feel that the inclusion of a court appointed special master is a necessary and excellent provision in this bill, which may mitigate some of these concerns, providing the courts with expert assistance and guidance on frequently complex intelligence matters, including whether evidence over which the government is attempting to invoke SSP is properly classified.

Unfortunately, as I mentioned, much of the evidence in many of these cases may be properly classified. In such circumstances, the only effective solution is a fully classified proceeding to relieve the Courts of this burden. I see no valid reason for precluding such an approach, if handled properly. Congress needs to ensure that justice is truly served in significant claims against the government--especially those involving illegal activity by the Executive Branch--while maintaining the security of the nation's legitimate secrets and assuring checks, balances and accountability. In most cases under consideration, these should not be conflicting goals in a nation of laws if handled with great care. The 1953 Reynolds decision was the child of a bygone McCarthy atmosphere and never really addressed the issue of SSP and illegal activity.

As in CIPA, private attorneys can be fully cleared to the Top Secret/SCI or above level if need be. Given proper facilities, controls, and procedures, the proceeding then should pose no greater risk of unauthorized disclosure, compromise or other security violations

than posed by those with such clearances and accessed within the EB itself. A clearance is a clearance. If someone is deemed trustworthy via the security clearance process, it makes no difference if they are an actual federal employee or not. Thousands of private contractors have the highest level clearances and accesses, some for relatively mundane work, and the government assumes that "risk" of compromise every day in matters far less important than justice being served in some of these cases. If a given attorney is not clearable (and clearly not all will be) the plaintiff would have to find one that is. Attorneys should face disbarment if they violate their security agreements in such cases, making such actions very unlikely.

The issue of clearing plaintiffs is cloudier. Obviously, not all plaintiffs would be clearable, but this does not mean that a proceeding would be impossible. This is where carefully cleared unclassified summaries might suffice for attorney client communications with unclearable plaintiffs.

In this matter of risk of unauthorized disclosure or "compromise" in a proceeding, Barlow v. U.S. provides a practical illustration of how irrational the invocation of SSP can become in this regard. As DCI George Tenet accurately states in his SSP declaration, I had prior official clearance and access to all the documents requested, described by me, and diligently located[1] by CIA in discovery. Due to my work as a consultant to intelligence agencies, I held Top Secret/SCI and other compartmented clearances before, during, and after the pendency of the proceeding, as did my lead attorney, the Honorable Paul Warnke (who died partway through the proceeding) the former Assistant Secretary of Defense and Director of the Arms Control and Disarmament Agency who was on advisory panels to the Cabinet level at the time of the proceeding.

During the proceeding, I actually engaged in classified business at CIA HQ, where I was fully cleared and trusted to roam unescorted. During the proceeding my primary work was helping to lead one of the FBI's most sensitive and highly classified operational programs, a matter of considerable trust and responsibility. Yet, these intelligence documents critical to my case were all denied to me, the Court, and ultimately the deciding body, the Senate, by DCI Tenet due to the risk of "*unauthorized disclosure*". As he stated in his SSP declaration: "*Providing Plaintiff and his Counsel access to the requested information would expose fragile intelligence sources and methods to serious risk of compromise without furthering the intelligence mission for which the sources and methods were utilized.*" In my view, DCI Tenet's, NSA Director Hayden's and Deputy Secretary of Defense Hamre's assertions in this regard were truly hollow in this situation. The risk of unauthorized disclosure by Mr. Warnke or me was no greater than anyone in the EB with access to this information. Indeed, in this case, the risk of disclosure was nil, assuming the provision of proper classified facilities and procedures in the proceeding. A similar situation might exist in other cases involving intelligence personnel with claims.

Had the court not taken what I think is the unsubstantiated position that the invocation of SSP over "virtually all the relevant evidence" was "absolute" and instead forced that

[1] The same cannot be said for the Office of the Secretary of Defense which announced it had shredded everything.

evidence to be admitted in a case centering on potential crimes against the Congress itself in the Senate's own Reference, the practical effect in this case would not have been any compromise, but only the introduction of material evidence of such illegalities, thereby revealing the motives for the actions taken against me that formed a basis for my claim. I would hardly call proceeding in the absence of the central evidence or testimony having "my day in court." Once it granted the SSP, the court should have sent the case back where it belonged and from where this case never should have left: the Senate. It did not follow the Senate's instructions, but instead failed to obtain the only facts the Senate did not have and speculated its way to erroneous conclusions.

4. *In Camera* Reviews: The problems with this provision are all the issues I have already identified regarding the next steps following such a review. If it becomes clear to the Court that the evidence over which the Government is attempting to invoke SSP is not properly classified under Executive Order, this bill effectively remedies that situation. Unfortunately, as I mentioned, in many of the current cases of concern to the committee, the evidence appears to be properly classified. With the court having viewed the evidence, this *in camera* provision might at least preclude what occurred in Barlow v. U.S. where the Court, having allowed itself to be denied every single classified document (literally thousands of pages) under SSP, then decided erroneously that it knew enough without them, proceeded for over four years, and then wrote a largely factually incorrect opinion based on erroneous speculation about evidence it never viewed and a dead witness it never met. If *in camera* reviews are desired, you might consider that the bill require that lawyers for the plaintiff should be present to explain somewhat complex evidence. Otherwise, the Court would have to rely on the government to incriminate itself, a rather unlikely prospect for any defendant, in my experience. The special master might mitigate this problem as well, however, assuming he has the substantive expertise.

5. Addressing the Actual Scope of SSP in Full Proceedings: This appears to be one of the greatest inadequacies of the current bill. The bill does not appear to address the basic applications of SSP by the government in practice in an actual court proceeding through discovery and depositions to trial. If you read the record in Barlow, SSP was invoked not only over the actual classified documents requested in discovery, per se, but over whatever the government deemed "protected information" as things proceeded on a daily basis. These "protected" things may be totally unclassified documents (magazine articles as I recall) and statements squarely in the public domain. To this day, neither my attorneys, nor I, or even the judge, quite understand exactly what criteria was being employed.

SSP is used at will to block even the most generalized questions or answers in depositions, trial testimony, as well as in selective redactions of documents, including deposition transcripts, affidavits and filings, to support the defense and weaken the plaintiff's case. The Executive Order classification authority being used is not even marked on the redacted or excluded documents, as is the normal practice. To cite but one of hundreds of examples in Barlow, the former Deputy Director of Central Intelligence, Richard Kerr and two of his highest level CIA subordinates all came voluntarily to Mr. Warnke's office and drafted what they considered to be very general unclassified sworn

affidavits supporting my allegations that Congress had been misled about what we knew about Pakistan's nuclear weapons activities. CIA and Justice then showed up at his office and seized these as Top Secret "SSP" documents calling for an emergency conference with the judge who viewed the documents and then upheld the assertion of SSP by the defendant and the selective redaction of the sworn affidavits by same defendant. I think that my former supervisors, DDCI Kerr and the other officials involved, having about ninety years of CIA experience between them, know at least as much as Mr. Tenet about what is classified, what is not and what compromises sources and methods.

We heard about the SSP "mosaic theory" in which the Government explained that all these unclassified little bits could allegedly be put together to make something classified. You can imagine that this approach provides carte blanche control to assert SSP over just about anything the Government chooses. And they do. Keep in mind, that during depositions, the judge is not even present, so the defendant always unilaterally prevails, deciding what answers can be provided or what questions can be asked. In effect, the court does not control the proceeding; the defendant does. As anyone familiar with litigation knows, much of the case is decided before it ever gets to actual trial.

In my particular case, it should be evident that my daily Top Secret professional life and the central issues being explored in court were, by definition, dealing with some of the more highly classified matters in our nation, as Mr. Tenet properly states in his SSP declaration. Yet, I and other similar witnesses were forced to try to answer specific questions about central issues at an unclassified level in depositions and at trial. I could not do so effectively and I made this clear as I was deposed for days. It was highly frustrating. The resultant ambiguities in my testimony that only existed due to the assertion of SSP to preclude my complete answers were later exploited by both the defendant and the Court in its opinion to reach erroneous "factual" and other conclusions that would have otherwise been both impossible and ridiculous had the evidence denied under SSP been before the court and part of the proceeding.

The trial itself was conducted in a CIA-swept courtroom under an arrangement where I was to speak slowly in my testimony providing an opportunity for the lead Justice attorney to jump up if the CIA and NSA people whispered in his ear that my answers were sounding "SSPish" and I was to stop speaking instantly when this occurred. He must have stood at least 60 times in one day as my attorney was attempting his direct. He had to rephrase his questions. I had to try to constantly rephrase my already generalized answers to please the Government. Some witnesses simply unilaterally refused to answer generalized key questions on SSP grounds in both depositions and at trial, or were directed not to by the Government.

I hope you can now have at least some sense that all of this becomes hopeless for the plaintiff in any such court proceeding and cannot by any stretch of the imagination fall into the category of fair litigation. If you want plaintiffs to have "their day in court" you need to ensure that you address the practical issues I have raised in your SSP bill to create a level playing field. Unclassified proceedings about classified matters and evidence will not generally accomplish this goal. An examination of the actual un-redacted record and

documents denied under SSP in Barlow will illustrate this is far more vividly than I can in this statement.

6. Congressional Relief for Some Plaintiffs: Senator Kennedy in his floor statement has also quite justifiably raised the issue of providing "relief" for plaintiffs who have been denied their day in court since the evidence they need has been denied them by invocations of SSP. I am most gratified to hear this and I think this should be a central issue in your consideration of this SSP legislation, if not embodied in the legislation, since if you cannot address many of the practical issues I have broached, either the status quo will continue, or additional plaintiffs will be sent on incredibly expensive, unfair proceedings and will likely lose. The only remedy left then is Congressional relief.

Relief involves Congressional action. Congressional action can either be bi-partisan, equitable and timely, or it can disintegrate into politics, even to the point of Senators blocking relief seeking to protect EB officials. This will result in inaction at the cost of a plaintiff who may have already experienced profound damage. In this sense, after nineteen years of Congressional deliberations, I think I can safely say that Barlow v. US can also serve as a prime example of how not to handle matters of relief.

Senators, having said all that I have about SSP proceedings, I must note for the record that in my particular situation, I did not request that this Committee give me my "day in court." Under the circumstances, that was entirely unnecessary and this was obvious from the beginning of such considerations as Mr. Warnke told your committee at the time. I think the only reason I was sent to court was the desire by one Senator to block relief for me for highly dubious political reasons. The Senate had all the facts it needed, many more facts than the court ever uncovered.

The committees with primary jurisdiction over the offending agency had concluded after seven years of truly extensive investigation and consideration that I was due relief. They still believe this. Sending this case to the court of federal claims as a Congressional Reference served no practical purpose other than to deny me relief and to launch me on a unfair, four year-long million dollar wild goose chase, the outcome of which, especially when SSP was invoked, was predictable.

Let me briefly review the nineteen year history of this matter with the Congress. Beginning in 1989, my life had been irreparably harmed, professionally and personally by the Office of the Secretary of Defense, via some of the most vicious retaliations anyone in the Congress had ever seen, over something I had never actually done: "intending" or threatening to tell Congress directly that the EB was willfully misleading lawmakers about Pakistan's classified nuclear activities, something that later spawned serious threats to our national security; threats that could have been prevented. Beginning in 1990, I then cooperated in seven years of investigation by the committees with primary jurisdiction over the agencies involved. I endured seemingly endless streams of IG investigators from three IG's, followed by an eighteen month-long GAO investigation into the IG's.

The driving force during this seven year period was the Senate Armed Services, Intelligence, and Governmental Affairs Committees along with the participation of six or seven other Senate and House Committees including the HPSCI. These inquiries and efforts were led by a fairly impressive bipartisan group, notably Senators Thurmond, Nunn, Levin, Boren, Murkowski, Glenn, Grassley and Bingaman, most of whom were Committee Chairmen or Ranking Members. By 1997, these committees had concluded, on a bi-partisan basis, that I had been unjustifiably harmed, was due Congressional relief, and that the case raised a series of critical issues about the interests of the Congress itself to know the classified truth in the execution of its Constitutional duties, as well as issues relating to WMD intelligence, the lack of protections for intelligence officers from political retaliation, and the effectiveness of our counter proliferation operations and policies as well as separation of powers issues that arose over something I had never done. This is memorialized in legislative history. In reaching their decisions, these committees and Senators were well aware not only of the detailed facts of the case, but based on truly extensive correspondence, of DOD's legal and other views and the players involved in OSD and CIA. They were also well aware of the highly classified nature of the central issues involved, and with substantially more access to the relevant classified information and evidence than this committee (and certainly the Court). I had extensive face to face personal contacts for a period of years with senior staff on both sides of the aisle on all these committees, who were thus in a position to assess my credibility and character.

One of the major considerations by the involved committees and Senators in deciding I was due relief, was a clear recognition, by all involved, that due to rather extraordinary circumstances, I had exhausted all legal and administrative options. I did not ask for a relief bill. This was offered and then promised to me by Chairman Thurmond, Ranking Member Nunn, and Senator Levin on behalf of the committee. The SSCI was also deeply involved and supported this matter of relief including Chairman Boren, and later Chairman Shelby, Vice Chairman Murkowski and Senator Glenn. Even President Clinton was briefed on the case in late 1997, and he also supported relief and expressed this to the Chairman Thurmond, expecting a relief bill to arrive at his desk shortly.

In early 1998, a private relief bill was offered with the full bipartisan backing of the aforementioned committees. The intent was to act swiftly, pass the bill through both houses and send it up to the President who was ready to sign it, providing me with at least some compensation for the irreparable damages I had suffered, and allowing me to resume some semblance of a normal life, a concern of all the involved Senators. The bill was referred to Judiciary since your committee has jurisdiction over private relief. It is my understanding that it initially had the full backing of this committee as well.

Thus, the bill was ready to pass, but suddenly, in a fateful turn of events, a single Senator reportedly placed a hold on the bill for no valid reason. Rather than abiding by democratic procedures and overcoming the questionable unilateral actions of a single Senator, as an apparent "compromise," this committee instead decided to refer this bill to the Court of Federal claims causing further unnecessary harm to my life. To this day, the

constructive intent of this committee in making this Reference evades me, as it does my attorneys and perhaps even the Article I judge who was stuck with it. You are capable of reaching your own conclusions and making decisions in the Congress as part of your oversight responsibilities. You do not need a court to find the facts for you, especially after seven years of Congressional inquiries involving Top Secret/SCI matters.

Immediately following the invocation of SSP over all the relevant classified evidence, in 2000, I asked the Senate for permission to withdraw from the case, predicting that I would almost certainly lose in the absence of all the material evidence. Mr. Warnke and I were told by the Senate that it was recognized that once SSP had been asserted, we would probably lose, but to proceed anyway. We were told that losing in the court under these circumstances would not preclude Congressional relief

Over two years later, in 2002--during which time I was forced to spend thousands of hours essentially fighting for Congress' right to not be misled by the EB about WMD intelligence--we lost. We formally appealed the case, via the court, back to this Committee and the Senate, the deciding and appellate body under the law, but neither my attorney nor I received any response from this committee, despite lengthy letters warning of further major abuses of Executive power if the Senate did not act to address the issues and precedents raised in the court case, especially the use of SSP in this situation and the destruction of WMD intelligence officers just doing their jobs.

The court failed to follow the Senate's instructions in a variety of ways including not finding the facts for the Senate as a result of allowing SSP to be invoked, despite clear testimony indicating potential crimes had been committed against the Congress. To quote Louis Fisher, your expert on separation of powers and SSP at the Library of Congress: *"The executive branch, by asserting the state secrets privilege, essentially told the court that it was not entitled to know the facts, and the court, in accepting that position, essentially told the Senate--and Congress--that it was not entitled to know the facts."* It also blocked any proceeding whatsoever on one of the Senate's primary concerns and instructions in its Reference: to examine the primary form of retaliation by OSD--the "security actions" taken against me as a suspected Congressional spy.

Just to impart some slight sense of the extent of abuse of the SSP in Barlow v. U.S and how unfair this proceeding was, let me quote from DCI Tenet's SSP February 10, 2000 sworn declaration (attached) paragraph 18, where, before what was supposed to be a proceeding on the merits even began, he stated the following: *"In his motion to compel Plaintiff specifically asserts that intelligence community employees provided incomplete and misleading testimony to Congress...because this testimony ignored evidence that the F-16's proposed for sale to Pakistan could deliver nuclear weapons, that Pakistan possessed nuclear weapons, and that Pakistan was engaged in a systematic effort to obtain U.S. technology illegally in support of its nuclear weapons program...As a former staff Director of the Senate Select Committee on Intelligence I was particularly disturbed at Plaintiff's allegation. However, my review of....classified information available to me as DCI has convinced me that plaintiff's allegations are groundless. By July 1989, the Congress had received the Intelligence Community's candid assessment of the status of*

Pakistan's nuclear weapons program...(the) classified information Plaintiff seeks in discovery, refutes rather than supports his assertions..."

In essence, Mr. Tenet told the court, "you can't see the evidence, your Honor, and Mr. Barlow can't have access to it again to show it to you (since he might spill the beans) but it's a slam dunk your Honor, we never misled Congress on Pakistan WMD. Trust me, I'm the head of the CIA and Mr. Barlow doesn't know what he is talking about." I ask you Senators, what is the point of having a court proceeding when the government simultaneously denies the evidence and in the same breath effectively decides the merits? How can a plaintiff effectively challenge this? In this case, the Court relied heavily on these and other unsubstantiated assertions in Tenet's SSP declaration that went to the merits as a central basis for its opinion.

As I recall, not too long after this SSP declaration about Pakistan nuclear intelligence, the Congress also had from DCI Tenet the Intelligence Community's "candid assessment" of the status of WMD's in Iraq, as did the President. Trust me, Senators, as one of the CIA's top experts, on a single good day, we had more hard, reliable, superb intelligence on Pakistan's very real nuclear weapons activities (including Dr. A.Q Khan's nuclear network) than the sum total of everything we had on Iraq's alleged nuclear intentions in 2003, other than suspicions. Yet we have the very odd situation where two presidents in the late 1980's certified to Congress that Pakistan did not possess nuclear weapons, while another told you more recently that Iraq was awfully close to possessing them.

Of even greater concern to me is why we waited thirteen years from the time I was removed from my job--thereby shutting down the operations I was leading against the A.Q. Khan network and sending a chilling message to my colleagues--to bust Dr. Khan, only after Pakistan spread critical nuclear weapons technology Iran, North Korea, Libya and perhaps elsewhere in the interim. We knew enough to shut down that network twenty years ago, Senators. The central issues in Barlow v. U.S. over which SSP was invoked thus have implications far beyond the impact of OSD's actions against me. Had Congress known the truth about these matters and acted ten years ago at the time of this Reference, much less twenty year ago, history may have been very different. Without critical assistance from Pakistan, there would be no meaningful Iranian nuclear weapons program today, in my professional opinion. The same applies to North Korea's uranium enrichment activities recently referred to by DNI McConnell.

After four years of effort, while failing to find the relevant facts, the judge told the Senate what it already knew: that the Whistleblower Protection Act of 1989 did not apply to classified whistleblowing (although I note that this was not the view of the Congress in 1989) adding also that employees could be fired for even threatening to blow the whistle on classified wrongdoing or malfeasance of any sort, including crimes of the most serious nature, or people in the EB ignoring intelligence relating to the attacks on 9/11, for example. That would include me, in the view of the court. Nowhere in this bizarre opinion does it address or even mention the central fact that OSD itself, nine years earlier, had officially concluded that both the *"performance"* and the *"security"* actions taken against me were based on fabrications, or, that in 1990, following extensive

investigation, OSD itself officially overturned all its actions against me, restored my security clearance and made me a permanent member of the civil service. OSD's actions in this regard were upheld by DOD, CIA and State Department IG's as well as the GAO, long before the Reference. Mr. Cheney himself assisted in one aspect of this, although the political appointees beneath him refused to place me back in any job in OSD. The damage was done, as intended. My career as a government employee was over.

I hardly think that in referring this matter to the court, the Senate intended for the judge to fail to obtain the facts on the central issues and instead rewrite the history of my personnel and security files and OSD's official decisions. As I stated, when SSP was granted, he should have sent the case back to the Senate immediately.

This was not the end of my history with this committee, however. In 2005, after the bust of the A.Q. Khan network, the injustice of what both OSD and the Senate had done to the life of the person who had organized government efforts to shut that network down and tried to get the truth about Pakistan's nuclear activities to Congress became the subject of international concern. The handling of Iraq WMD intelligence by some of my former OSD bosses, followed by their retaliations against Joe Wilson and another CIA officer, Valerie Plame, tended to further confirm their *modus operandi* in dealing with WMD intelligence and intelligence officers that get in the way. Ambassador Robert Gallucci, other former senior government WMD officials and POGO approached the Senate, asking for at least the pension I would have earned if not for OSD's actions, especially because I had continued to serve my country as a self-employed consultant to the intelligence community for years.

In July of last year, once again, a bi-partisan coalition headed by the Senate Armed Service Committee introduced an amendment to the DOD Authorization bill for pension relief for me. Once again, when it reached this committee, a few Senators--this time members of the committee--placed anonymous holds on the amendment, effectively killing the amendment. The reason they offered: The court case. Let me mention that this recent relief amendment was for a pension, not a subject of the 1998 Reference and something the court did not consider, nor could it under the law. Of even greater concern to me is that I am now apparently faced with a few senators, whether they realize it or not, siding with the EB, this time effectively supporting an SSP cover-up of potential crimes against the Congress in an apparent attempt to protect certain EB officials who might appear to have made some mistakes in my situation in this matter. Besides being unfair to me, I do not think this is appropriate Congressional behavior, nor does misplaced partisan politics serve as a substitute for justice. No member of Congress, understanding the facts, should view me as an adversary or deny me relief. This case should be as it was before it arrived at this Committee, a matter of bipartisan concern and action.

The broad lesson here is that in SSP cases where potential plaintiffs have no options for meaningful litigation, timely consideration of Congressional relief is warranted and appropriate. In such situations, the Senate and the House are essentially acting as a court. To allow one (or even two or three) Senators to unilaterally block relief for an individual

via the practice of holds or other procedural maneuvers is entirely inappropriate since it violates the principles of our democracy and of justice. There will always be some Member of Congress willing to further EB interests. In passing this new law you should prohibit such practices within your institution in such cases. You may want to establish a Select Committee consisting of Senators drawn from the Intelligence, Judiciary and the committee overseeing the offending agency to address these matters of relief in a timely, efficient and bi-partisan democratic manner. Simple democratic majorities should rule in such cases, both in committee and in the full House and Senate, by law.

UNITED STATES COURT OF FEDERAL CLAIMS

RICHARD M. BARLOW,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Congressional Reference
	)	No. 99-887X
THE UNITED STATES	)	
	)	
Defendant.	)	
	)	

Declaration and Formal Claim of State Secrets Privilege and Statutory Privilege by George J. Tenet Director of Central Intelligence

I, GEORGE J. TENET, do hereby declare and state as follows:

1. I am the Director of Central Intelligence ("DCI"), a position I have held since 11 July 1997. As DCI, I serve as the principal advisor to the President of the United States on intelligence matters related to national security. In addition, I am the executive head of both the Central Intelligence Agency ("CIA" or "Agency") and the United States Intelligence Community (sometimes, "the Community"). In this latter role, I am responsible for coordinating the national intelligence activities of the military and civilian departments, agencies, and other elements that comprise the United States Intelligence Community.

2. The CIA and the position of DCI were established by the National Security Act of 1947, as amended, 50 U.S.C. §§ 401, *et seq.* Under section 103(d) of the National Security Act, 50 U.S.C. § 403-3(d), it is the responsibility

Plaintiff's allegations are unfounded. In order to assist the Court, I will summarize below the CIG's findings as well as portions of the classified transcript of the Agency's July 1989 testimony to HFAC, to the extent I can do so without compromising classified intelligence sources and methods.

17. The CIG report concluded that no one at CIA or the NIC ever deliberately provided false or misleading information to Congress regarding Pakistan's nuclear program. Although there were source protection concerns and coordination issues that limited the level of detail that could be provided to HFAC, the Intelligence Community's overall assessment of the Pakistani program was provided accurately and candidly. As the transcript makes clear, CIA and NIC officers apprised HFAC of those instances when source protection or other sensitivities prevented detailed testimony on certain points. In accordance with long standing practice, when circumstances warranted, the briefing officers offered to coordinate the release of additional information with the appropriate originating entities or, in some cases, to provide additional information to HFAC via the oversight committees in Congress.[8] The OIG report concluded that, on those few occasions when an Agency or NIC officer may have made an

honest misstatement during Congressional testimony, the Agency quickly corrected the record without prompting from any other quarter.

18. In his Motion to Compel, Plaintiff specifically asserts certain Intelligence Community employees "provided incomplete and misleading testimony to Congress ... because this testimony ignored evidence that the F-16's [proposed for sale to Pakistan] could be used to deliver nuclear weapons, that Pakistan possessed nuclear weapons, and that Pakistan was engaged in a systematic effort to obtain US technology illegally in support of its nuclear weapons program." Plaintiff's Motion to Compel at 1. As a former staff director of the Senate Select Committee on Intelligence, I was particularly disturbed by Plaintiff's allegations. However, my review of the 1991 OIG report, the July 1989 transcript, and other classified information available to me as DCI has convinced me without doubt that Plaintiff's allegations are groundless. By July 1989 the Congress had received the Intelligence Community's candid assessment of the status of Pakistan's nuclear program. It is clear to me that the OIG report, the July 1989 transcript, and the other classified intelligence information Plaintiff seeks in discovery refutes rather than supports his assertions that the Intelligence Community

[1] The oversight committees are the House Permanent Select Committee on

provided incomplete or misleading information to Congress with respect to Pakistan's nuclear program.

19. CIA's Office of Inspector General concluded in 1991 that Plaintiff appeared to be equating legitimate source protection and coordination issues with the provision of "incomplete and misleading" testimony. On the basis of my own review of this matter, I see no reason to differ with the OIG's conclusion. In short, the source protection and coordination concerns expressed by Intelligence Community briefing officers during their classified testimony to HPAC were legitimate. Rather than resulting in misleading testimony, these protection and coordination concerns resulted in truthful and complete, yet sometimes delayed responses. The source protection concerns have not been attenuated by the period of time that has elapsed since the briefings occurred. As a result, in order to carry out my duty under the law to protect intelligence sources and methods from unauthorized disclosure, I have determined that, in connection with this litigation, Plaintiff and his counsel may not receive access to any of the classified intelligence information under my statutory control that may be responsive to Plaintiff's discovery requests in this litigation.

Intelligence (HPSCI) and the Senate Select Committee on Intelligence (SSCI).

20. In light of the foregoing, after personal consideration of this matter in my capacity as head of both the CIA and the United States Intelligence Community, I hereby formally assert the privilege of secrets of state and the statutory privilege of the DCI to protect intelligence sources and methods from unauthorized disclosure. I assert these privileges to preclude from disclosure any Intelligence Community documents or information sought in this case that would reveal or tend to reveal the specific, classified intelligence sources and methods the United States Intelligence Community employed to monitor Pakistan's nuclear program between 1 January 1986 and 31 December 1990, or that would reveal the success or failures of such monitoring, as such disclosure reasonably could be expected to harm the national security. I have prepared a more detailed, but classified, declaration for the Court's review *ex parte* and *in camera*, should the Court require additional justification in this matter regarding my reasons for asserting the privilege of secrets of state and the statutory privilege to protect intelligence sources and methods.

21. These claims of privilege are intended to preclude the disclosure of any classified intelligence information under my statutory control during all further proceedings in this matter, regardless of the security clearances or

special access approvals Plaintiff or his counsel may possess or obtain.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

Executed on this 10 day of FEB 2000.

George J. Tenet

Statement of Susan Parker Brauner
for the
Senate Judiciary Committee Hearing on
"Examining the State Secrets Privilege:
Protecting National Security While Preserving Accountability"

Thank you Senators Kennedy, Spector and Leahy for introducing S. 2533. I write as an American citizen deeply concerned about strengthening the accountability and protection of state secret privilege.

This act also honors my parents, William and Phyllis Brauner. William Brauner was one of the three civilian engineers killed in the airplane crash that would eventually become the basis of the *U.S. v. Reynolds* case. Phyllis Brauner was one of the three widows who filed the original lawsuit.

The witness list of legal scholars for the Senate Judiciary Committee Hearing on 13 February 2008 is impressive. What I would like to submit for the record is the recognition that not only was the American jurisprudence system substantially altered by *Reynolds,* but the life of our family was as well. William Brauner fled the Nazis in Austria. He was proud to become a United States citizen, and to serve his new country with his engineering skills. *U.S v. Reynolds* was how our country rewarded him. Phyllis Brauner, pregnant at the time of the airplane accident, was to become the sole provider of two children and both her own and William Brauner's mother. She had a distinguished career in academia. In the last year of her life, however, she was to learn of the duplicity of our government after the daughter of one of the other civilian engineers killed in the airplane accident discovered the now-declassified accident report and shared it with our family. As you know, there was a government cover-up of human error that became a useful case as the often inappropriate application of state secret privilege.

Correcting the flaws currently in state secret privilege will not give back the life a young couple had hopefully planned together all those years ago. It will, however, most certainly provide a measure of justice to all the families whose loved ones were killed on the flight.

Testimony of Robert M. Chesney
Associate Professor of Law
Wake Forest University School of Law

United States Senate Committee on the Judiciary
Wednesday, February 13, 2008
"Examining the State Secrets Privilege:
Preserving National Security While Protecting Accountability"

Senator Leahy, Senator Specter, and distinguished members of the committee, thank you for giving me an opportunity to discuss the state secrets privilege with you.

My name is Robert Chesney. I am an associate professor of law at Wake Forest University School of Law, where I teach constitutional law, evidence, civil procedure, and a variety of specialty courses relating to national security in general and terrorism in particular. I recently completed a term as chair of the Section on National Security Law of the Association of American Law Schools, and currently serve as the editor of the National Security Law Report, published by the Standing Committee on Law and National Security of the American Bar Association.

I have addressed an array of national security law topics in my scholarship, including an article published in the George Washington Law Review called "State Secrets and the Limits of National Security Litigation."[1] In that article I examined the origins and evolution of the state secrets privilege, as well as current controversies surrounding its use in recent years. I reached conclusions that both critics and supporters of the administration might find unsatisfying.

On one hand, I concluded that criticisms directed specifically against use of the privilege during the Bush administration are unwarranted. Quantitative criticisms—that is, claims that the Bush administration has misused the privilege by invoking it with greater frequency than in the past—are misguided primarily because the number of suits potentially implicating the privilege vary from year to year, and thus there is no reason to expect the number of invocations to remain constant, or even relatively so, over time.[2] Qualitative claims—that is, claims that the Bush administration is attempting to use the privilege in unprecedented contexts or in search of unprecedented forms of relief—also

[1] Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 Geo. Wash. L. Rev. 1249 (2007), available at http://ssrn.com/abstract=946676.

[2] We also have no way of knowing with confidence how many privilege invocations actually occurred in any given year, under this administration or its predecessors. Many invocations do ultimately result in published judicial opinions, but not all do so. Numerical claims therefore have to be taken with a rather large grain of salt. I say that advisedly, having provided in my own article a table identifying all of the published opinions adjudicating state secrets claims between 1954 and 2006. *See id.* at 1315-1332.

do not withstand scrutiny. The fact of the matter is that the privilege has had a harsh impact on litigants for decades.

On the other hand, I also recognized that cautious legislative reform might be possible and appropriate in this area, particularly in light of the rule of law and democratic accountability issues bound up in some uses of the privilege. "To say that the privilege has long been with us and has long been harsh is not to say . . . that it is desirable to continue with the status quo."[3] The real question, then, is how to craft reforms that will improve the lot of meritorious litigants while preserving legitimate national security and diplomatic interests.

Today the Committee turns its attention to a bill that seeks to achieve these twin goals: the State Secrets Protection Act ("SSPA"). In my opinion, there is much to be applauded in this bill, though also a few elements that warrant closer scrutiny. In the pages that follow I will explain how the SSPA matches up with or departs from the status quo, offering endorsements, suggestions, and criticisms along the way. Before doing so, however, I think it best to at least touch upon the threshold question of the authority of Congress to undertake such a reform.

I. Common Law Rule of Evidence or Constitutional Command?

Everyone agrees that there is a state secrets privilege, but there is sharp disagreement with respect to its nature. Those who favor reform tend to describe it as a "mere" evidentiary rule adopted by judges through the common law process, a conclusion suggesting plenary legislative power to amend or even eliminate the privilege. Those who resist reform tend to describe it as a constitutionally-required doctrine emanating from Article II, with the consequence that Congress either cannot modify the privilege or at least is significantly constrained in doing so. But the best explanation, arguably, incorporates both perspectives.

As a historical matter, there is little doubt that the privilege emerged as a common law evidentiary rule, very much as did the attorney-client privilege and similar rules that function to exclude from litigation otherwise-relevant information in order to serve a higher public purpose.[4] It does not follow, however, that the privilege has no constitutionally-required aspect. In at least some circumstances, for example, the state secrets privilege conceptually overlaps with executive privilege—a doctrine explicitly derived from constitutional considerations.[5] And even outside the context of communications implicating executive privilege in the traditional sense, one can expect

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[3] *Id.* at 1308.

[4] I describe the emergence of the privilege in my article, highlighting the role that influential treatise writers played in constructing and spreading awareness of the concept in the 1800s. *See id.* at 1270-80.

[5] *See, e.g.*, United States v. Nixon, 418 U.S. 683, 705-13 (1974); Attorney General Janet Reno, Memorandum for the President: Assertion of Executive Privilege for Documents Concerning Conduct of Foreign Affairs with Respect to Haiti (Sep. 20, 1996), available at http://www.usdoj.gov/olc/haitipot.htm; Morton Rosenberg, CRS Report for Congress: Presidential Claims of Executive Privilege: History, Law, Practice and Recent Developments (Sep. 17, 2007), at 1, available at http://fas.org/sgp/crs/secrecy/RL30319.pdf.

arguments to the effect that at least some information relating to foreign and military affairs should be protected as a matter of constitutional requirement.

Let us assume for the sake of argument that these latter arguments are correct, and that the state secrets privilege has constitutional foundations. At a minimum, this would suggest that courts would have an obligation to extend some form of protection to state secrets during litigation even if no common law rule to that effect had ever been adopted. But would Congress be disabled from legislating with respect to the privilege?

Some forms of regulation would seem clearly to remain within the control of Congress, while other forms would raise significant constitutional questions. Congress would have authority at least to regulate the process through which assertions of the privilege are to be adjudicated, even assuming a robust constitutional foundation for the privilege. This would include the power to require judges to conduct *in camera, ex parte* review of the specific items of evidence in the course of determining whether the privilege attaches. But whether Congress can override the privilege once it attaches—for example, by compelling the executive branch to choose between conceding liability in civil litigation and disclosure of privileged information in a public setting—is far less clear. It would be particularly hard to justify compelled disclosure, for example, where military or diplomatic secrets protected by the state secrets privilege happen also to fall within the scope of executive privilege. Though executive privilege ordinarily is qualified rather than absolute, the Supreme Court in *United States v. Nixon* raised the possibility that it might be absolute where the communication at issue concerns military and diplomatic secrets.[6]

None of this is to say that Congress cannot or should not pursue reform of the state secrets privilege. In light of the potential constitutional problems identified above, however, it is advisable to emphasize less-intrusive reform options whenever possible.

II. The SSPA in Comparison to the Status Quo

Perhaps the best way to come to grips with the SSPA is to compare its provisions to the status quo, with an eye towards distinguishing that which is mere codification from that which constitutes a substantial change. It helps to conduct this comparison in a way that corresponds to the sequence of questions a judge must resolve when confronted with an invocation of the privilege. The fruits of this approach appear in the text below, and also in the table attached as an appendix to this testimony.

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[6] 418 U.S. at 706. If we assume for the sake of argument that the state secrets privilege is a mere rule of evidence but that executive privilege is a distinct constitutional rule that is absolute in the context of military and diplomatic secrets, the relationship between the two becomes analogous to that between the rule against hearsay evidence and the 6th Amendment Confrontation Clause. The hearsay and confrontation rules are not coextensive, but do have a significant area of overlap in criminal prosecutions. Congress can and does (through the Rules Enabling Act process) legislate exceptions that ameliorate the impact of the hearsay rule. Congress cannot legislate corresponding exceptions to the Confrontation Clause, however, meaning that there are some circumstances in which evidence withstands a hearsay objection but nonetheless must be excluded because of Constitutional considerations.

1. Has the Privilege Been Invoked by the Proper Executive Official?

No significant change.

The SSPA will not significantly alter the status quo with respect to the formalities of invoking the privilege. Both approaches require personal invocation of the privilege by the head of the executive entity with responsibility for the information at issue, and permit only the United States to raise the issue.[7]

2. What Category of Information Is Protected by the Privilege?

No significant change.

There is no significant change as between the status quo and the SSPA when it comes to defining the category of information eligible for state secrets protection. The SSPA defines a "state secret" with reference to information relating to "national defense or foreign relations."[8] The status quo at least arguably encompasses a similar range of topics.[9]

3. What Risk Threshold Is Embedded in the Substantive Test for the Privilege?

No significant change.

There is no significant change as between the status quo and the SSPA when it comes to calibrating the risk threshold for application of the privilege. Under the SSPA, the test is whether public disclosure "would be **reasonably likely** to cause significant harm" to national defense of foreign relations.[10] The status quo appears to employ a similar risk threshold.[11]

4. Who Ultimately Decides Whether the Substantive Test Is Met with Respect to Allegedly-Protected Information?

No significant change.

There is no significant change as between the status quo and the SSPA with respect to the question of whether courts or the executive branch has the final say with

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[7] Compare SSPA § 4054(a) & (b) with United States v. Reynolds, 345 U.S. 1, 7-8 (1953).
[8] SSPA § 4051.
[9] *See* Chesney, *supra* note 1, at 1315-32 (specifying nature of information at issue in published state secrets adjudications between 1954 and 2006).
[10] SSPA § 4051(emphasis added).
[11] *Reynolds* arguably is vague with respect to the question of how strong the likelihood of harm from disclosure must be, but courts appear to understand it to require a reasonable-risk standard. *See, e.g.*, El – Masri v. United States, 479 F.3d 296, 302 (4th Cir. 2007).

respect to whether the privilege attaches to a given piece of information. Under both, that responsibility lies with the courts.[12]

5. When Determining Whether the Privilege Attaches to a Particular Item of Evidence, May the Judge Review the Item Itself?

Some change.

The SSPA departs from the status quo to a small extent with respect to whether the judge may review a document or record as to which the government has invoked the privilege. Under the SSPA, judges not only can but must review the actual item of evidence.[13] Under the status quo, they are expressly admonished by *Reynolds* to be reluctant to require *in camera* production unless the litigant has shown great need for the document.[14]

The SSPA's requirement of *in camera* disclosure reflects the lesson learned in connection with the original *Reynolds* litigation. Famously, the plaintiffs in *Reynolds* had sought production of an Air Force post-accident investigative report in connection with their tort suit, prompting the government to invoke the state secrets privilege on the ground that the report contained details of classified radar equipment. The Supreme Court concluded such details could not be disclosed publicly, which is a plausible enough conclusion under the substantive test described above. But though it did not follow that the accident report necessarily did contain such details, the court assumed that it did and found the privilege applicable on that basis. Notoriously, it turned out much later that the report had not contained any details about the radar at all; the privilege ought not to have been invoked in the first place.[15]

The outcome in *Reynolds* illustrates rather dramatically the need for judges to ensure that a document or other record in fact contains the sensitive information said to be in it. It is important to appreciate, however, that this type of mistake does not reflect standard practice under the state secret privilege today. Where particular documents are in issue, in fact, courts today routinely do examine them personally en route to determining whether the privilege should attach.[16] The change that would be wrought by the SSPA on this issue, accordingly, is simply to remove any question as to whether this should be done.

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[12] Compare SSPA § 4054(e) (describing the judge's role in determining whether the privilege attaches) with *Reynolds*, 345 U.S. at 9-10 (conceding that "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers", and thus rejecting the government's express argument in that case that the executive's invocation of the privilege should be conclusive).

[13] SSPA § 4054(d)(1) (requiring the United States to submit to the court not only an explanatory affidavit but also all evidence as to which the privilege has been asserted).

[14] *See* 345 U.S. at 10-12.

[15] *See* LOUIS FISHER, IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE *REYNOLDS* CASE 166-68 (2006).

[16] *See, e.g.*, Al-Haramain Islamic Foundation, Inc. v. Bush, 507 F.3d 1190, 1203 (2007) ("We reviewed the Sealed Document *in camera* . . . ").

6. When Determining Whether the Privilege Attaches to Abstract Information (Rather than an Item of Evidence), What Form of Justification Should the Government Provide to the Court?

Some change.

The need to invoke the state secrets privilege does not arise only in connection with specific, tangible items of evidence that can be produced for *in camera* judicial review. In the discovery context, a variety of mechanisms (including deposition questions and interrogatories) may implicate the privilege in the context of abstract information. The same is true at the pleading stage. Where a plaintiff alleges a fact in a complaint, the government's baseline obligation under Federal Rule of Civil Procedure 8(b) is to admit that fact, deny that fact, or state that it lacks sufficient information to do either. Admission establishes that fact as true for purposes of the litigation, of course, and thus the pleading stage can present the government with the same need to invoke the privilege but without a particular item of evidence to be reviewed.

The SSPA requires the government to submit a classified affidavit (as well as an unclassified version for public disclosure) to explain the privilege assertion in this scenario (actually, it requires such affidavits in all privilege-assertion contexts, but the requirement has more significance where there is not other information for the court to review).[17] This is only a technical departure from the status quo, however, as it appears to be the universal practice in recent years to supply such affidavits.

In that sense, the SSPA's adoption of an affidavit requirement is unexceptionable. But there is a problem with respect to the related requirement that the classified affidavit be accompanied by an unclassified version for public release: one might read that provision to preclude the judge from being able to order the unclassified document to be sealed. As a general proposition, it seems unwise to deprive (or to risk depriving) judges of discretion to seal any particular document in this sensitive context.

7. When Determining Whether the Privilege Attaches, Should the Judge Permit Opposing Litigants to See the Classified Documents or Information At Issue?

Significant change.

The status quo permits the government to submit classified documents and affidavits on an *ex parte* basis in the course of asserting the privilege. These submissions are reviewed by the court alone, and are not at any point made available to opposing counsel. As a result, the process of determining whether the privilege attaches is in an important sense non-adversarial.

The SSPA departs from that model by granting the judge a range of options designed to permit greater adversariality during hearings concerning the privilege.

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[17] SSPA § 4054(b).

a. Ex Parte Filings

The question of adversariality arises first with respect to the government's written submissions with respect to the privilege (*i.e.*, the filing of the classified information at issue, as well as explanatory affidavits). Under SSPA § 4052(a)(1), the judge will have discretion to determine whether such filings "shall be submitted ex parte."[18] The only restraint on the judge's authority to exercise this option is § 4052(a)(3)'s requirement that the judge "make decisions under this subsection taking into consideration the interests of justice and national security." No doubt most judges in most cases would exercise this authority wisely,[19] and as I will describe below there is much to be said for injecting greater adversariality into the privilege adjudication process. But creating an option for the judge to prohibit an initial *ex parte* filing probably goes too far.

As an alternative to precluding *ex parte* filings, § 4052(a)(2) permits the judge to order the government to provide the other litigants with a "redacted, unclassified, or summary substitute" of its *ex parte* submissions. This authority in practice may turn out to track status quo procedures in which the government typically provides both a classified affidavit justifying its assertion of the privilege and also an unclassified version that can be made available to opposing parties and to the public.

b. Ex Parte Hearings

It is not clear how often *ex parte* hearings occur under the status quo, as distinct from the filing of *ex parte* submissions. That said, hearings do at least take place against the backdrop of such submissions, meaning that there is no opportunity for adversarial testing of them.

There is considerable wisdom in finding a way to inject some degree of adversariality into the currently *ex parte* portion of the privilege adjudication process. The trick, however, is to manage this without undermining the overriding goal of ensuring that there is no disclosure of the assertedly-protected information unless and until the judge determines that it is not in fact protected. The best way to thread this needle, if it is to be threaded at all, is to permit the judge to appoint a guardian-ad-litem to represent the absent litigant's interests, drawing at random from a previously-generated list of attorneys who have high-level clearances and who have agreed to serve in this

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[18] SSPA § 4052(a)(1).

[19] The comparable provision in the Classified Information Procedures Act ("CIPA") permits but does not on its face require the government to submit its filings *ex parte*. *See* 18 U.S.C. App. 3, § 4. That said, it appears that no court has ever barred the government from making its application *ex parte*. *See* DAVID S. KRIS & J. DOUGLAS WILSON, NATIONAL SECURITY INVESTIGATIONS & PROSECUTIONS § 24.7 (2007) (observing that "[a]lthough this procedure denies the defendant the ability to make a meaningful challenge to the government's argument, no court in a published opinion has prevented the government from filing its Section 4 application *ex parte* and *in camera*."). This suggests that judges can be trusted not to act rashly, but perhaps also that there is little point in providing an option to bar such filings. CIPA § 6 hearings, in contrast, are required to be *in camera* but are not normally *ex parte*. *See* 18 U.S.C. App. 3, § 6(a). Such hearings arise in a distinguishable context, however, insofar as the defendant in that scenario already possesses classified information, information that the government seeks to suppress.

capacity.[20] Such a list might be compiled and maintained by the chief judge of each district, or by the Chief Justice of the United States.

The SSPA makes a laudable effort to inject a degree of adversariality into the privilege adjudication process, including a guardian-ad-litem mechanism in § 4052(c). I endorse the spirit of this approach, though not all of its details. My concern with the bill's guardian-ad-litem mechanism is a limited one: § 4052(c) presumably would permit the appointment of any person as guardian so long as the individual has the requisite security clearance. In my view, it is preferable to establish in advance a specific roster of potential guardians.[21]

But that objection is relatively minor. The bigger concern—and the more dramatic departure from the status quo—is that § 4052(c) also appears to authorize the judge to permit the litigant's own attorneys to have "access to motions or affidavits submitted under this chapter" and to participate in hearings in which otherwise *ex parte* materials may be discussed, so long as the attorneys have the requisite clearances. In short, even if the government's initial filings are permitted to be *ex parte*, § 4052(c) might be read to give the judge discretion to require disclosure of those filings to opposing counsel at some point *before* ruling on whether the privilege actually attaches. This probably strikes the wrong balance between the need to preserve the secrecy of information as to which the privilege has been invoked and the desire to obtain the benefits of adversariality, particularly insofar as a guardian-ad-litem mechanism will be available.[22] Insofar as privilege hearings do not involve discussions of the contents of materials filed on an *ex parte* basis, of course, they certainly should continue to involve full adversariality.

8. When Determining Whether the Privilege Attaches, Should the Judge Use *In Camera* Procedures?

No significant change.

Beyond the question of whether filings and arguments will take place on an ex parte basis is the question of whether and when privilege litigation should take place *in camera*, without public access.[23] Under the status quo, judges typically employ a blend of ordinary and *in camera* procedures when adjudicating an assertion of the privilege.

The impact SSPA § 4052(b)(1) would have on this practice is unclear, but probably will not constitute a significant change. This section establishes a default presumption that hearings concerning the state secrets privilege will be conducted *in*

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[20] *See* Chesney, *supra* note 1, at 1313.

[21] The section also should be amended to clarify that any such appointed counsel may not share with the represented party any information obtained from the government in such proceedings.

[22] Again, it is worth noting the contrast between the proposed procedure and the more protective approach associated with CIPA § 4 motions, in which *ex parte* review is the rule. *See supra* note 22.

[23] An *in camera* procedure is not necessarily *ex parte*, though the two concepts are conflated often.

camera, and permits public access only "if the court determines that the hearing relates only to a question of law and does not present a risk of revealing state secrets."

9. In the Course of Determining Whether Information Is Privileged, May the Judge Employ a Special Master?

No significant change.

One of the core difficulties associated with judicial review of the state secrets privilege involves the question of expertise. Critics of the status quo argue that judges in practice merely rubber-stamp executive invocations of the privilege because the judges do not feel confident that they can evaluate the executive's claims regarding the impact of disclosure on security or diplomacy, while others draw on the same notions to contend that judges should in fact be extremely if not entirely deferential. And certainly it is true that a federal judge is not as well-situated as the Director of National Intelligence or the Secretary of State to assess such impacts.[24] At the same time, *Reynolds* itself acknowledges that the judge has ultimate responsibility for ensuring the validity and propriety of privilege assertions, lest the privilege become a temptation to abuse.[25]

In an effort to reconcile these concerns, scholars have pointed out that judges currently have authority to appoint expert advisers such as special masters under Federal Rule of Civil Procedure 53 and independent experts under Federal Rule of Evidence 706.[26] SSPA § 4052(f) would clarify that such authorities can be used in connection with state secrets litigation.

10. Can the Judge at Least Order the Creation of Substitutes for Privileged Information?

No significant change.

SSPA § 4054(f) provides that where the privilege attaches, courts should consider whether it is "possible to craft a non-privileged substitute" that provides "a substantially equivalent opportunity to litigate the claim or defense." Drawing on the model set forth in CIPA § 6, the SSPA goes on to specify several options that might be used in that context, including an unclassified summary, a redacted version of a particular item of evidence, and a statement of admitted facts.[27] Where the court believes that such an alternative is available, it may order the United States to produce it in lieu of the protected information.[28] The U.S. must comply with such an order if the issue arises in a

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[24] *See, e.g., al-Haramain*, 507 F.3d at 1203 ("we acknowledge the need to defer to the Executive on matters of foreign policy and national security and surely cannot legitimately find ourselves second guessing the Executive in this arena").
[25] 345 U.S. at 9-10.
[26] *See, e.g.*, Meredith Fuchs & G. Gregg Webb, *Greasing the Wheels of Justice: Independent Experts in National Security Cases*, A.B.A. NAT'L SECURITY L. REP., Nov. 2006, at 1, 3-5, available at http://www.abanet.org/nat-security/nslr/2006/NSL_Report_2006_11.pdf.
[27] SSPA § 4054(f).
[28] *See id.*

suit to which the U.S. is a party (or a U.S. official is a party in his or her official capacity), or else "the court shall resolve the disputed issue of fact or law to which the evidence pertains in the non-government party's favor."[29]

It is not clear that any of these provisions depart from what a court might order even in the absence of the SSPA, though I am not aware of specific examples in which such compulsory authority actually was exercised. In any event, it certainly is advisable to codify the judge's obligation to exhaust options that would permit relevant and otherwise-admissible information to be used without actually compelling disclosure of that which is subject to the protection of the privilege.

11. Can a Suit Be Dismissed Based on the State Secrets Privilege?

Significant change.

The most controversial aspect of current doctrine may well be the sometimes fatal impact it has on litigation once the privilege is found to attach to some item of evidence or information. This phenomenon is not new; the government has moved to dismiss (or in the alternative for summary judgment) in these circumstances with some frequency since the 1950s, and such motions have frequently been granted.[30] But the use of this approach in high-profile post-9/11 cases—particularly those relating to NSA surveillance and to rendition—has proven especially controversial, drawing attention to the fact that application of the state secrets privilege can have harsh consequences for litigants even where the litigants allege unlawful government conduct.

Invocation of the privilege under current doctrine can result in dismissal of a suit in at least four ways, some of which the SSPA will change and some of which it won't. A full appreciation of the SSPA's impact requires a brief overview of these distinctions.

a. When Denial of Discovery Precipitates Summary Judgment

The first scenario involves summary judgment in the aftermath of a ruling precluding discovery on state secrets grounds. Let us assume that a judge has denied a discovery request based on the state secrets privilege. If it so happens that the plaintiff has no other admissible evidence sufficient to raise a triable issue of fact with respect to a necessary element of his or her claim, this discovery ruling necessarily exposes that plaintiff to summary judgment under Rule 56. In that setting, the Rule 56 ruling conceptually is subsequent to the state secrets ruling, rather than being based directly on it. The discovery ruling ultimately is no less fatal to the plaintiff's case, however, and if the motions happen to be adjudicated simultaneously it might indeed appear that the court has granted summary judgment "on" state secrets grounds. It does not appear that the SSPA is intended to alter the outcome in this scenario, though it might be wise to clarify that this is so in the text of § 4053(b) (stating that that "the state secrets privilege shall not

[29] *See id.* § 4054(g). No sanction is provided by the SSPA for scenarios in which the U.S. is merely an intervenor.

[30] *See* Chesney, *supra* note 1, at 1306-07, 1315-33.

constitute grounds for dismissal of a case or claim" other than pursuant to the § 4055 mechanism described below).

b. When the Government Must Choose Between Disclosing Protected Information and Presenting a Defense

A second scenario that can be fatal to a claim under current doctrine arises when the government would be obliged to reveal protected information in order to defend a claim. This scenario differs from the first in that the plaintiff may be able to survive summary judgment with the evidence it has assembled. The problem here is not the plaintiff's efforts to acquire evidence, then, but the fact that the government must opt between presenting a defense and maintaining the secrecy of protected information. In that setting, current doctrine provides for dismissal on state secrets grounds.

The SSPA codifies this result, to some extent, in § 4055. Under that section, a judge may dismiss a claim on privilege grounds upon a determination that litigation in the absence of the privileged information "would substantially impair the ability of a party to pursue a valid defense," and that there is no viable option for creating a non-privileged substitute that would provide a "substantially equivalent opportunity to litigate" the issue.[31]

More significantly, however, § 4055 also mandates that the judge first review "all available evidence, privileged and non-privileged" before determining whether the "valid defense" standard has been met. This suggests that the judge is not merely to assess the *legal* sufficiency of the defense (assuming the truth of the government's version of events, in a style akin to adjudication of a Rule 12(b)(6) motion), but instead is to resolve the actual merits of the defense (including resolution of related factual disputes). If that is the correct interpretation, it would seem to follow that § 4055 contemplates a mini-trial on the merits of the defense.

The problem with this approach is that the court may or may not permit the use of *ex parte* and *in camera* procedures in this context, as described above. Denying either protection (but especially the latter) would put the government on the horns of a dilemma, forcing it to choose between waiving a potentially-meritorious defense and revealing privileged information to persons other than the judge. This could have constitutional ramifications. At a minimum, therefore, § 4055 should be amended to provide that the judge's assessment of the merits of a defense must take place on an *in camera* basis. Any move away from *ex parte* procedures in this context, moreover, should be limited to the modified guardian-ad-litem mechanism recommended above. Beyond that, it might be wise to structure the judge's review of the defense as a legal-sufficiency inquiry (in which the government's version of events is presumed to be true, akin to Rule 12(b)(6) litigation) rather than as a mini-trial.

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[31] SSPA § 4055(1) & (3). For what it is worth, § 4055(2) also requires a finding that dismissal of the claim or counterclaim "would not harm national security."

c. When the Government Invokes the Privilege to Avoid an Admission at the Pleading Stage and Then Moves For Dismissal

Perhaps the most obscure scenario in which invocation of the privilege might prove fatal under current doctrine arises out of a defendant's obligation to admit or deny the allegations in a plaintiff's complaint. Assume that a plaintiff alleges a fact concerning protected information, such as the existence and details of a covert action program. Under Federal Rule of Civil Procedure 8(b), a defendant ordinarily must admit alleged facts in its answer if the defendant knows them to be true. Such an admission conclusively establishes the existence of that fact for purposes of the litigation, eliminating the need for the plaintiff subsequently to seek production of evidence that might prove the fact. What happens if, instead of admitting the fact, the defendant objects that it should not have to respond on privilege grounds, and the court agrees?

One possibility is that the plaintiff's allegation will be deemed denied, and the case simply will proceed to discovery. In that case, invocation of the privilege functions merely to spare the government any obligation to admit or deny protected information, putting off until later in the case the question of whether the suit may go forward. But another possibility is that the court will treat the plaintiff's allegation as void. Depending on the circumstances, this might expose the complaint to dismissal under Rule 12(b)(6) for failure to state a claim.

SSPA § 4053(c) would resolve this uncertainty by permitting the United States to "plead the state secrets privilege in response to any allegation in any individual claim or counterclaim if the admission or denial of that allegation . . . would itself divulge a state secret to another party or the public," or to do the same where admissions or denials by another party would have such an effect.[32] The language of § 4053(c) should be amended to clarify that the allegation should then be deemed denied.[33] With that qualification, though, the § 4053(c) mechanism is a very useful step forward in rationalizing the impact of the privilege at the pleading stage.

d. Are Some Claims Simply Not Actionable?

One scenario remains. Under current doctrine, "some matters are so pervaded by state secrets as to be incapable of judicial resolution once the privilege has been invoked."[34] The idea here is not that the government needs to avoid admitting or denying a particular allegation, nor that certain discovery should be denied to the plaintiff, nor that the government has a defense it could present if only it were not necessary to preserve certain secrets. Rather, the notion is that some types of claims are not actionable as a matter of law.

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[32] SSPA § 4053(c).
[33] The text currently provides that "[n]o adverse inference shall be drawn form a pleading of state secrets in an answer to an item in a complaint." *Id.*
[34] *See el-Masri*, 479 F. 3d at 306.

It is important to appreciate just what this line of argument accomplishes. Under this approach, a suit may be dismissed even if the plaintiff can assemble sufficient evidence to create triable issues of fact on all the necessary elements of a claim, and even if the government is not prevented by its secrecy obligation from presenting a defense to that claim. Not surprisingly, then, this is the most controversial dismissal scenario in current doctrine, one that the SSPA appears designed to override. Section 4053(b) plainly states that "the state secrets privilege shall not constitute grounds for dismissal of a case or claim" unless, as described above, the government has a "valid defense" it would present but for privilege concerns.

It is easy to see why this approach is tempting. Plaintiffs who can assemble sufficient evidence on their own (i.e., those who do not require sensitive discovery) may proceed to trial so long as the government is not disabled from pursuing legitimate defenses. This sounds reasonable at first blush, assuming that the privilege is enforced properly during the discovery process and the government remains as free as other litigants to pursue summary judgment.

But there are costs to this approach, and potential constitutional obstacles as well. With respect to costs, consider a suit alleging the existence and details of a classified program such as the *el-Masri* rendition lawsuit. Under the SSPA, the suit may well have proceeded at least against the United States. The government might then face an extremely difficult choice. The government could proceed to trial and put the plaintiff to his proof, conducting a strictly-defensive effort to impeach the credibility of the plaintiff's witnesses and otherwise to cast doubt on the plaintiff's case. To present its own case-in-chief, however, the government presumably would be obliged to opt to reveal information that might otherwise be protected by the privilege.

Would putting the government to that choice be a worthy price to pay in order to permit litigation to proceed in that circumstance? Presumably the answer would vary from case to case depending on the circumstances. Section 4053(b) provides no opportunity for an individualized assessment, however. Instead, it predetermines that the better option in all such settings is to proceed with the litigation. A more nuanced approach is desirable, particularly insofar as the SSPA approach may generate constitutional objections. And a middle course is available. For example, judges could retain the ability to dismiss suits in this setting, subject to a heightened showing of potential harm to national security or diplomacy. Where that showing is made and a case is dismissed as a result, the Justice Department could be required to provide notice and relevant filings to the Judiciary and Intelligence Oversight Committees, which could then begin consideration of whether a private bill providing relief to the plaintiff would be in order.

* * *

Thank you very much for your courtesy in soliciting my views and your patience in considering them. Please do not hesitate to let me know if I may be of further assistance.

Appendix A - Summary of Analysis

The SSPA in large part is a codification of existing doctrine, which is a useful thing in and of itself. Where it does depart from the status quo, the SSPA for the most part constitutes an improvement. There are, however, a handful of points that would benefit from clarification or a more cautious approach. As explained in the text above:

- § 4054(b) should be amended to clarify that a judge may choose to order an unclassified affidavit to be filed under seal;

- § 4052(a)(1) should be amended to clarify that the government as an initial matter may always submit to the court on an *ex parte* basis any items of evidence as to which it is invoking the privilege (as well as explanatory affidavits);

- § 4052(c)(1) should be limited to a guardian-ad-litem system based on a pre-selected roster of eligible attorneys selected either by the Chief Judge of each district or the Chief Justice of the United States;

- § 4053(b) should be amended to make clear that courts remain free to grant Rule 56 motions even if a plaintiff's lack of necessary evidence results from application of the state secrets privilege;

- § 4053(c) should be amended to clarify that pleading the state secrets privilege in lieu of admitting or denying an allegation shall cause the allegation in issue to be deemed denied;

- § 4055 should be amended such that a judge considering dismissal based on a "valid defense" shall conduct proceedings *in camera* and also subject to the modified guardian-ad-litem mechanism described above, and perhaps also pursuant to a legal-sufficiency model akin to Rule 12(b)(6) adjudication; and

- § 4055 also should be amended to address the possibility of an overriding need in some cases to permit dismissal even in the absence of a meritorious defense (subject perhaps to a heightened showing of harm), with Congress receiving notice for purposes of considering a bill for private relief.

Appendix B – The SSPA Compared to the Status Quo

Issue	SSPA Approach	Change from Status Quo?	Comment
1. Formalities of invoking the privilege	Requires invocation by relevant department head	No significant change	No comment
2. Subjects protected by the privilege	National security and foreign relations	No significant change	No comment
3. Risk threshold	"reasonably likely to cause significant harm"	No significant change	No comment
4. Final decision-maker	The judge	No significant change	No comment
5. Judicial access to the protected information	Where particular items of evidence are in issue the judge must examine them.	Some change – such examinations are standard practice today, though *Reynolds* does attempt to discourage this.	A useful change in order to avoid a repeat of the *Reynolds* scenario (in which the document at issue did not actually contain sensitive information).
6. Affidavit requirements where abstract information rather than evidence is in issue	Where abstract information is in issue rather than a particular item, the government must submit both classified and unclassified affidavits.	This is typically done, though technically not required under current doctrine.	There is no harm in codifying this requirement. Section 4054(b) should be amended, however, to ensure the judge has the option of having the unclassified version filed under seal.
7. a. *Ex parte* filing of documents as an initial matter	The judge has authority to bar ex parte filings, or to order the provision of unclassified versions, etc.	This is a change to an extent. Under current doctrine, the government's submissions always are *ex parte*, though typically accompanied by unclassified affidavits as well.	Section 4052(a)(1) should be amended to clarify that the government always may make its initial filing on an *ex parte* basis.
7.b. *Ex parte* hearings	The judge has authority to allow access to *ex parte* filings either to the litigant's attorneys (subject to security clearance requirements) or to guardians-ad-litem, and should not hold any *ex parte* hearing unless the judge finds that those conditions provide insufficient security.	This is a significant change from the status quo, which provides no exceptions regarding access to the *ex parte* filings.	Section 4052(c)(1) should be amended to encompass only the guardian-ad-litem option, and to require selection of the guardian from a pre-selected list to be maintained by the Chief Judge of the district or by the Chief Justice of the United States.
8. *In camera* procedures	The judge must hold hearings on the privilege *in camera*, unless only legal issues posing no disclosure risks are in issue.	No significant change	No comment
9. Special masters	The judge may retain a special master to assist in assessing a privilege claim.	No significant change (though this option has not yet been used to the best of my knowledge).	No comment
10. Creation of	The judge may require	It is not certain that comparable currently exists,	No comment

substitutes	production of substitutes, ala CIPA.	but most likely it does.	
11.a. State secrets rulings precipitating a summary judgment ruling	The SSPA does not specifically address the question of whether summary judgment motions can still be made by the government in the aftermath of using the privilege to deny a party access to evidence that might have been needed to establish a triable issue of fact on a necessary element of a claim.	Presumably the SSPA does not intend to limit such rulings, and thus leaves that aspect of the status quo in place.	Section 4053(b) should be amended to make clear that it does not impact the summary judgment process.
11.b. Dismissing on state secrets grounds where a defense requires use of such information	A suit may be dismissed on privilege grounds only where the government has a "valid defense" that would be significantly impaired without privileged information, a determination that apparently would involve *in camera* adjudication of related factual disputes	This is a significant departure from the status quo, as it partially overrides the current rule that the government may obtain dismissal at the pleading stage where the "very subject matter" of a suit is itself a state secret.	Section 4055 should be amended such that the judge will not conduct a mini-trial in determining whether a defense is valid, but rather should employ a Rule 12(b)(6)-style approach that presumes the truth of the government's version of underlying events and limits the judge's role to testing the legal sufficiency of the defense. In any event, proceedings should be *in camera*, and should employ either *ex parte* methods or the modified guardian-ad-litem mechanism described above.
11.c. Invoking state secrets to avoid a pleading obligation	Where a pleading requires admission or denial of protected information, the government may instead plead the state secrets privilege.	The option to plead state secrets in response to an allegation concerning protected information may be a change to the status quo, though a litigant presumably could have achieved a similar result under current doctrine by lodging an objection in its answer.	Section 4053(c) should be amended to clarify that pleading the state secrets privilege should be deemed a denial.
11.d. Dismissing on state secrets grounds where no valid defense is in issue	Where the government does not have a "valid defense" that it would raise but for the privilege, the suit cannot be dismissed simply because its very subject matter concerns state secrets.	This is a significant departure from the status quo. Currently, courts take the view that suits must be dismissed on privilege grounds where their very subject matter is a state secret, regardless of whether the government actually has a defense to assert.	There may be individual instances where the costs to national security or diplomacy of permitting the litigation to continue outweigh the benefits. Section 4055 should be amended to permit the judge to make an individualized assessment of this, perhaps pursuant to a heightened burden on the government. Congress then should receive notice of the dismissal, prompting consideration of a private bill granting relief to the plaintiff.

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WAKE FOREST
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Dear Senator Kennedy, February 15, 2008

I write in response to the letter that William Weaver and Danielle Escontrias sent to you on February 8, 2008, in connection with the recent hearing concerning the State Secrets Protection Act. That letter purports to call into question my methodology in connection with a recently-published article examining the state secrets privilege,[1] suggesting that the piece is "substantially biased in favor of deference to executive power."[2] I do not think it necessary to address the latter characterization, as my article will speak for itself. But I do wish to respond to the substantive claims that Weaver and Escontrias make relating to methodology.

First, Weaver and Escontrias insist that in the mid-1970s, the government began using the privilege more frequently than it had in the past, and they suggest that my work somehow disputes such a claim. But I have never disputed this. On the contrary, I wrote in the article that "published opinions dealing with the state secrets privilege remained relatively rare" in "the first two decades after *Reynolds*," but from "1973 . . . onward, as documented in the Appendix to [the] Article, decisions touching on the privilege have been far more frequent."[3] Thus there is literally no disagreement between my article and the view advanced by Weaver and Escontrias, and I am rather baffled why they have gone to such lengths to suggest otherwise.

Second, Weaver and Escontrias take issue with the list of cases that I included in the aforementioned appendix, which lists "Published Opinions Adjudicating Assertions of the State Secrets Privilege after *Reynolds* (1951-2006)." In particular, they suggest that I inappropriately included four opinions from the pre-1970s era in my set, while inappropriately excluding many others from the post-1975 era, thereby obscuring the increase in use of the privilege in the mid-1970s. Not content to dispute the merits of my selections, moreover, they suggest that these differences result from a conscious effort to "skew the pre-1975 results"[4]

It is hard to know where to begin in debunking such claims. As noted above, I *agree* that use of the privilege was rare until the 1970s, and argue as much in the article. And in any event, the supposed discrepancies highlighted by Weaver and Escontrias do not withstand close inspection. Consider first the four pre-1975 cases that they contend should not have appeared in my data set. One of them—*Petrowicz v. Holland*—in fact

[1] *See* Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 Geo. Wash. L. Rev. 1249 (2007).
[2] Weaver & Escontrias Letter, at 2.
[3] Chesney, *supra* note 1, at 1291.
[4] Weaver & Escontrias, *supra* note 2, at 3.

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does *not* appear in my data set. As for the other three, I provide a footnote in each instance that expressly states that there is uncertainty with respect to whether the case should be included in my set.[5] I do not blame Weaver and Escontrias for this misunderstanding, however. An earlier working draft of my article did include the *Petrowicz* case and did not include the caveats for the other three cases, and I must assume that in drafting their letter they were referencing the unaltered draft rather than the version that actually was published.[6]

As for the claim that there are many post-1975 opinoins (and especially post-2001 opinions) that I should have included in the set but did not, a close look at these "missing" opinions simply does not support that criticism. First, some of the "missing" opinions arise out of cases in which the privilege may have been asserted, but the opinion itself does not actually concern adjudication of the privilege[7] Second, there also are "missing" opinions in which there is no true assertion of the privilege in the case at all.[8] Third, the "missing" opinions include a number of opinions available through LEXIS but that were not otherwise published (plus one sealed opinion that apparently was leaked and then posted to an unspecified website).[9]

But I have no wish to have further debates with Weaver and Escontrias regarding the "true" number of opinions adjudicating the privilege in any given year. Such quantitative inquiries are largely meaningless beyond the general—and non-controversial—observation that the privilege has been used much more frequently since 1975. The fact of the matter is that the frequency with which the privilege is invoked by definition is a function both of executive branch attitudes *and the number of lawsuits filed in a given year that may happen to warrant invocation of the privilege—and there is no reason to believe that the number of such suits stays constant from year to year.* Thus, even if we have high confidence in the content of the data set, and even if it shows a statistically significant increase from one year to the next, we still could not say that the increase results from changed executive branch attitudes. This is why I contend in my article that the *quantitative* debate is a red herring.[10]

Qualitative change in the use of the privilege would be a different matter. On this point, Weaver and Escontrias argue that I erred in contending that the Bush administration's use of the privilege is not *qualitatively* different from that of earlier

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[5] Chesney, *supra* note 1, at 1316 n. 336 ("There is some uncertainty . . . ."); *id.* at 1317 & n. 337 (acknowledging uncertainty both in the footnote and the table itself); and *id.* at 1318 n. 338 ("It is a close call . . .").

[6] These matters and many others were addressed during the editing process. In fact, if memory serves, I believe that I made these particular edits precisely because Bill Weaver in an *amicus* filing in the *Hepting* litigation had raised these same concerns about the data in the draft version of my article. My recollection is that I thought he made a good point about *Petrowicz*, while the other three cases were debatable, and that I made changes accordingly.

[7] *See, e.g.*, Arar v. Ashcroft, 2006 U.S. Dist. LEXIS 45550 (E.D. N.Y. July 5, 2006) (denying a motion to certify for immediate appeal the dismissal of certain claims, and making only a passing, non-substantive reference to the government's invocation of the state secrets privilege in that case).

[8] *See, e.g.*, Weaver & Escontrias, *supra* note 2, at nn. 5, 9-11, 14, 19, and 23.

[9] *See id.* at Appendix, *passim*.

[10] *See* Chesney, *supra* note 1 at 1301-02.

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administrations. They suggest that there is an effort afoot to convert the privilege into a "super privilege" in which cases must be dismissed at the pleading stage, as opposed to a privilege that is not used except as a tool to resist specific discovery requests.[11] This view of how the privilege was used in the past simply is not consistent with the facts, however. As described in Table 1 in my article, many motions to dismiss claims on state secret grounds between 1971 and 2000, and a substantial percentage of them were granted.[12] The fact that the privilege has long had harsh results for plaintiffs does not mean, of course, that Congress should not seek ways to ameliorate that impact while still preserving the interests of national security and diplomacy.

I would be happy to address any other concerns or questions you may have.

Very truly yours,

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[11] Weaver & Escontrias, *supra* note 2, at 2.
[12] *See* Chesney, *supra* note 1, at 1307.

ESSAY

THE STATE SECRETS PRIVILEGE AND SEPARATION OF POWERS

*Amanda Frost**

INTRODUCTION

Since September 11, 2001, George W. Bush's Administration has repeatedly asserted the state secrets privilege as grounds for the dismissal of civil cases challenging the legality of its conduct in the war on terror. Specifically, the executive has sought dismissal of all cases concerning two different government programs: the "extraordinary rendition" program, under which the executive removes suspected terrorists to foreign countries for interrogation; and the National Security Agency's warrantless wiretapping of communications by suspected terrorists. The executive argues that these cases raise legal challenges that can neither be proven nor defended against without disclosure of information that would jeopardize national security, and thus it seeks to have all cases related to these programs dismissed on the pleadings. The district courts have split on the issue, and these cases appear to be quickly heading for appellate, and possibly U.S. Supreme Court, review.[1]

The plaintiffs in these cases have responded to the executive's invocation of the privilege with two primary counterarguments: First, they assert that the cases must go forward to remedy past violations of their individual constitutional rights and enjoin ongoing violations; and second, they argue

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1. Al-Haramain Islamic Found., Inc. v. Bush, 451 F. Supp. 2d 1215 (D. Or. 2006) (denying the government's motion to dismiss a challenge to the National Security Agency's (NSA's) warrantless wiretapping program on state secrets grounds); ACLU v. NSA, 438 F. Supp. 2d 754 (E.D. Mich. 2006) (same); Terkel v. AT&T Corp., 441 F. Supp. 2d 899 (N.D. Ill. 2006) (granting the government's motion to dismiss a challenge to the NSA's warrantless wiretapping program on state secrets grounds); Hepting v. AT&T, Corp., 439 F. Supp. 2d 974 (N.D. Cal. 2006) (denying the government's motion to dismiss a challenge to the NSA's warrantless wiretapping program on state secrets grounds); El-Masri v. Tenet, 437 F. Supp. 2d 530 (E.D. Va. 2006) (granting the government's motion to dismiss legal claims arising from extraordinary rendition on state secrets grounds).

that requiring courts to dismiss all such cases in which the executive broadly asserts the state secrets privilege is an unwarranted usurpation of judicial power.[2] Although these are legitimate grounds on which to oppose the executive's motions to dismiss, this Essay raises a third objection that has not been discussed by the litigants: the executive's incursion on legislative authority to assign federal court jurisdiction.[3]

The Constitution gives Congress near-plenary power to decide which kinds of Article III cases and controversies federal courts shall hear,[4] and throughout most of this nation's history Congress has chosen to confer jurisdiction over a wide variety of legal claims against the federal government.[5] Accordingly, when the executive successfully argues that a federal court must dismiss whole categories of cases over which Congress has assigned jurisdiction, it intrudes not just on the power of courts and the rights of individuals, but on the jurisdiction-conferring authority of the legislature as well.

2. *See infra* Part I. Academic discussion of the privilege has also focused on its effect on individual rights and judicial power. *See, e.g.*, Louis Fisher, In the Name of National Security: Unchecked Presidential Power and the *Reynolds* Case 258 (2006) ("Broad deference by the courts to the executive branch, allowing an official to determine what documents are privileged, undermines the judiciary's duty to assure fairness in the courtroom and to decide what evidence may be introduced."); Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 Geo. Wash. L. Rev. (forthcoming 2007) (manuscript at 19), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=946676 ("[T]he privilege has the capacity to prevent courts from engaging the most significant constitutional issue underlying the post-9/11 legal debate: whether and to what extent recognition of an armed conflict with al Queda permits the executive branch to act at variance with the framework of laws that otherwise restrain its conduct."); William G. Weaver & Robert M. Pallitto, *State Secrets and Executive Power*, 120 Pol. Sci. Q. 85, 90 (2005) ("[T]he privilege, as now construed, obstructs the constitutional duties of courts to oversee executive action.").

3. Of course, the state secrets privilege is not the only method by which the executive can seek to dismiss cases challenging executive conduct from a court's docket. In recent litigation, the executive has raised many different grounds for dismissal of cases challenging its conduct in the war on terror, including claims that the courts lack jurisdiction over such cases. *See, e.g.*, Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2762-70 (2006) (discussing the executive's assertion that the Detainee Treatment Act stripped the federal courts of jurisdiction over habeas corpus petitions filed by Guantanamo Bay detainees). Academics have also argued that the courts lack the institutional competence to oversee national security and foreign policy, and thus should play a limited role in such cases. John Yoo, *Courts at War*, 91 Cornell L. Rev. 573, 590-600 (2006). Although this Essay focuses on the executive's assertion of the state secrets privilege, its conclusions would apply to the executive's other grounds for seeking immediate dismissal of litigation challenging its course of conduct in the war on terror.

4. *See infra* Part II; *see also* Richard H. Fallon, Jr., et al., Hart & Wechsler's The Federal Courts and the Federal System 319-22, 330-45 (5th ed. 2003).

5. *See* Fallon, et al., *supra* note 4, at 35-36 (describing the Act of Feb. 4, 1815, ch. 31, § 8, 3 Stat. 195, 198, which provided for the removal of suits against federal officers from state to federal courts, and the Judiciary Act of 1875, ch. 137, 18 Stat. 552 (current version at 28 U.S.C. §§ 1331, 1332 (2000)), which gave the federal courts jurisdiction over all civil cases "arising under" federal law and satisfying an amount-in-controversy requirement). Today, 28 U.S.C. § 1331 grants district courts "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

Furthermore, by seeking dismissal of these cases, the executive is stripping Congress of its ability to collaborate with the judiciary to curb executive power. The constitutional scheme of separated powers not only permits one branch, acting on its own, to check the others; it also allows two branches to work together to keep the third in line.[6] By giving federal courts the authority to hear cases challenging the use of executive power, Congress is enlisting the courts as its partner in executive oversight. When the judicial branch is considering whether to dismiss cases challenging executive action at the executive's behest, it should therefore be cognizant that dismissal undermines the cooperation between courts and Congress, and may leave the executive unchecked and unmonitored by any branch of government.

The executive itself has recognized that Congress has a role to play in these cases. In its motions to dismiss on state secrets grounds, the executive has argued that Congress is the more appropriate institution to review the constitutionality of executive action. For example, in *ACLU v. NSA*,[7] a case challenging the National Security Agency's (NSA's) practice of warrantless wiretapping, the government sought dismissal but noted, "This is not to say there is no forum to air the weighty matters at issue, which remains a matter of considerable public interest and debate, but that the resolution of these issues must be left to the political branches of government."[8] The executive appears to be suggesting that the court should dismiss the case because Congress is capable of policing the executive on its own.

As a threshold matter, the executive's claim that the "political branches," and not the courts, must resolve the issues raised in the litigation ignores the fact that one of the political branches—Congress—gave federal courts the authority to hear suits against the executive for constitutional violations. In other words, that the court has jurisdiction over the case *is* one political branch's method of addressing the problem. Admittedly, however, that logic only goes so far. Congress grants federal courts jurisdiction over broad categories of cases, and it might agree with the executive that a subcategory of those cases involving state secrets should be dismissed. Maybe Congress would prefer that sensitive matters of national security be resolved in another forum—closed-door congressional hearings, for example—as the executive seems to suggest in its motions asserting the privilege. If so, however, then it would seem that judges should not simply dismiss these cases, but should instead insist on some proof that Congress would approve and, just as important, would take over executive branch oversight if the courts bow out.

6. *See infra* Part II.

7. 438 F. Supp. 2d 754 (E.D. Mich. 2006).

8. Memorandum of Points and Authorities in Support of the United States' Assertion of the Military and State Secrets Privilege; Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment; and Defendants' Motion to Stay Consideration of Plaintiffs' Motion for Summary Judgment at 49, *ACLU*, 438 F. Supp. 2d 754 (No. 10204) [hereinafter Memorandum in Support of the Military and State Secrets Privilege].

In this Essay, I explore why courts should be cognizant of the effect of a dismissal on legislative, as well as judicial, power, and how courts should respond to the executive's claims that these issues "must be left to the political branches of government." My tentative conclusion is that when the executive makes such claims, courts should not take its assertions at face value, but rather should determine whether Congress would be willing to assume the oversight function through investigation of executive action. Judges should assure themselves that the executive is, in fact, acceding to congressional demands for information about the challenged conduct, and is fully cooperating with the legislative committees seeking to monitor its conduct. Only if satisfied that Congress is holding the executive accountable should the judiciary be willing to forgo hearing whole categories of cases challenging executive authority.

These proposed responses to the executive's blanket motions to dismiss are grounded in a functional theory of separation of powers, and follow from the widely accepted view that each branch's power fluctuates in accord with the actions of the other two. Functionalists contend that there are no bright lines demarcating the roles of the three branches; their powers are shared, so that oftentimes one branch must obtain another's approval before acting. In his iconic concurrence in the *Steel Seizure* case, Justice Robert H. Jackson—the ultimate functionalist—explained that the President's authority is greatest when he has the express approval of Congress, and is at its "lowest ebb" when he acts contrary to a legislative prohibition.[9] Under Jackson's conception of the separation of powers, the roles of the three branches of government are not rigidly defined, but rather are flexible, shifting to accommodate the positions taken by the others.[10]

The commingling of executive, legislative, and judicial power is usually viewed as a means of limiting each branch's authority to take action. But the three branches can also collaborate to prevent the overreaching of a third. The same fluctuations observed by Justice Jackson in the context of an executive power grab should apply when the branches are sharing the burden of executive oversight. That is, the role of the judiciary in curbing executive power should depend, in part, on whether Congress can do so in the court's stead. If Congress is engaged in oversight, then the judiciary may step aside; if, however, Congress is unable or unwilling to take on that task, then the judiciary's role in checking executive power is paramount. Accordingly, I suggest that the judiciary has an obligation to ascertain Congress's willingness and ability to engage in executive oversight before granting blanket dismissals of cases challenging the constitutionality of executive conduct.

The Essay proceeds in three parts. Part I provides an overview of the state secrets privilege and a brief description of the categories of cases that

9. Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

10. *See infra* Part II.

the executive has recently claimed must be dismissed by federal courts on the basis of that privilege. This part also discusses how the Bush Administration's assertion of the privilege differs from past practice. Part II explains why the judiciary should take into account the effect of dismissal not just on its own constitutional role and on the plaintiff's ability to vindicate his or her individual rights, but also on the legislative power to assign jurisdiction and delegate executive oversight to the federal courts. I contend that if courts fail to take the usurpation of legislative power into account, they are overlooking a key component of the Constitution's tripartite system of government: the ability of two branches to work together to check the excesses of the third. Part III moves from these observations to concrete suggestions about how courts should react to an executive claim that all cases challenging the constitutionality of certain executive programs should be dismissed and left for the "political branches" to resolve. I propose that when the executive makes such a blanket assertion of the privilege, the judiciary should not forgo the exercise of jurisdiction unless it is satisfied that Congress will take over the task of executive oversight.

Finally, a caveat. This is an essay in the original sense of the word, in that it tests out theories and suggests solutions without providing exhaustive background or addressing every objection or concern that could be raised.[11] Due to the limits of space and time, this Essay can only start a conversation about how courts should respond to the executive's attempts to dismiss cases on state secrets grounds. I hope to return to the ideas first raised here in greater detail in articles to come, but it seems important to begin the discussion now in light of the dozens of pending cases in which the executive has invoked this privilege. In the meantime, I welcome others who wish to join the conversation as either critics or proponents of the tentative theories and proposals expressed in the pages that follow.

I. EXECUTIVE ASSERTION OF THE STATE SECRETS PRIVILEGE

A. *History of the State Secrets Privilege*

The state secrets privilege is a common law evidentiary privilege that derives from the President's authority over national security, and thus is imbued with "constitutional overtones."[12] It protects information that

11. One definition of "essay" is a "trial" or "test." Oxford English Dictionary 399 (2d ed. 1989). The French word "essai," from which the modern English word "essay" is derived, stems from the French verb "essayer," which means "to try." The French renaissance philosopher Michel de Montaigne, credited with popularizing the essay as a literary form, used his essays to test and explore his views about the world. *See* Encyclopaedia Britannica Online, Essay, http://www.search.eb.com/eb/article-9033044 (last visited Feb. 25, 2007).

12. United States v. Reynolds, 345 U.S. 1, 6 (1953); *see* United States v. Nixon, 418 U.S. 683, 710 (1974); Memorandum in Support of the Military and State Secrets Privilege; Defendants' Motion to Dismiss, *supra* note 8, at 10 (arguing that the "privilege derives from

would result in "impairment of the nation's defense capabilities, disclosure of intelligence-gathering methods or capabilities, and disruption of diplomatic relations with foreign governments."[13] The privilege can only be asserted by the head of an executive branch agency with control over state secrets, and only after that person has filed an affidavit demonstrating that he or she has personally reviewed the information at issue and determined that it qualifies as state secrets.[14]

1. *United States v. Reynolds*

The privilege was first explicitly recognized by the Supreme Court in *United States v. Reynolds*.[15] *Reynolds* involved a claim for damages against the federal government brought by the widows of three civilians killed in the crash of a B-29 aircraft. During discovery, plaintiffs sought production of the U.S. Air Force's official accident investigation reports, as well as the three surviving crew members' statements taken by the Air Force during its investigation. The United States objected, claiming both that the material was privileged under Air Force regulations and that it must be kept secret to protect national security. The Secretary of the Air Force wrote a letter to the district court explaining that "the aircraft in question, together with the personnel on board, were engaged in a highly secret mission of the Air Force."[16] The Judge Advocate General of the Air Force filed an affidavit making a formal claim of privilege and stating that the material sought by the plaintiffs could not be provided "without seriously hampering national security, flying safety and the development of highly technical and secret military equipment."[17]

The district court ordered the government to produce the documents in camera so that the court could determine whether they contained privileged material. When the government refused to do so, the court ordered that the facts on the question of negligence be found in the plaintiffs' favor, and entered final judgment for the plaintiffs. The government appealed, lost, and then brought the case to the Supreme Court.

The United States argued that the district court's decision ordering disclosure of the report constituted an "unwarranted interference with the powers of the executive," which had the constitutional authority to refuse to disclose information related to national security.[18] The plaintiffs responded that the executive's power to withhold the documents was waived by the

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the President's Article II powers to conduct foreign affairs and provide for the national defense").

13. Ellsberg v. Mitchell, 709 F.2d 51, 57 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1038 (1984).

14. *Reynolds*, 345 U.S. at 7-8.

15. 345 U.S. 1. For an in-depth discussion of the *Reynolds* litigation, see Fisher, *supra* note 2, at 29-118.

16. *Id.* at 4 (internal quotation marks omitted).

17. *Id.* at 5 (internal quotation marks omitted).

18. Brief for the United States at *8, *Reynolds*, 345 U.S. 1 (No. 21), 1952 WL 82378.

Tort Claims Act, which made the government liable "in the same manner" as a private individual.[19] The Supreme Court did not adopt either of the "broad propositions" pressed upon it by the parties.[20] The Tort Claims Act expressly provides that the Federal Rules of Civil Procedure apply to suits against the United States, and because the Rules governing discovery except "privileged" material from disclosure, the Court concluded that the Tort Claims Act is not a waiver of the state secrets privilege. Nor did the Court hold that the bare assertion of the privilege by the executive would be sufficient to invoke it; rather, the "court *itself* must determine whether the circumstances are appropriate for the claim of privilege"[21] by weighing the discovery-seeking party's claim of necessity against the government's explanation of why the information would jeopardize national security.[22] Nonetheless, as recent commentators have noted, the "clear message of the *Reynolds* ruling is that courts are to show utmost deference to executive assertions of privilege."[23] And in *Reynolds* itself, the Court accepted the government's representations about the classified nature of the materials and refused to require their disclosure.[24]

The privilege affects litigation in at least three different ways. First, it can bar evidence from admission in the litigation. The plaintiff's case will then go forward without the barred evidence, and will be dismissed only if the plaintiff is unable to prove the prima facie elements of the claim without it. Second, if the privilege deprives the defendant of information that would provide a valid defense, then the court may grant summary judgment for the defendant. And third, "notwithstanding the plaintiff's ability to produce nonprivileged evidence, if the 'very subject matter of the action' is a state secret, then the court should dismiss the plaintiff's action based solely on the invocation of the state secrets privilege."[25] In *Reynolds*, the Court took the first path, concluding that the privilege only limited sources of evidence and thus remanded to allow plaintiffs to take discovery and attempt to prove their case without the barred material.

19. *Reynolds*, 345 U.S. at 530.

20. *Id.* at 6.

21. *Id.* at 8 (emphasis added).

22. *Id.* at 11.

23. Weaver & Pallitto, *supra* note 2, at 98; *see also* Fisher, *supra* note 2, at 257 ("What *Reynolds* did was to send an ominous signal that in matters of national security, the judiciary is willing to fold its tent and join the executive branch."). Professors William Weaver and Robert Pallitto note that the Supreme Court's decision to uphold the state secrets privilege in *Reynolds* relied in part on analogies to the crown privilege found in English and Scottish law. They criticize the Court for importing this privilege into U.S. law, noting that in Great Britain, "separation of powers is ill-defined and occupies a relatively less important role in the British Constitution than in that of the United States," and that *Reynolds* "fail[ed] to recognize this difference." Weaver & Pallitto, *supra* note 2, at 99.

24. The accident report was eventually declassified and, according to Professor Louis Fisher, "revealed . . . serious negligence by the government" but "contained nothing that could be called state secrets." Fisher, *supra* note 2, at xi.

25. Kasza v. Browner, 133 F.3d 1159, 1166 (9th Cir. 1998) (quoting *Reynolds*, 345 U.S. at 11 n.26).

2. The Evolution of the State Secrets Privilege

For over two decades following *Reynolds*, the executive rarely asserted the state secrets privilege, perhaps in response to the Supreme Court's admonition that the privilege "is not to be lightly invoked."[26] But starting in 1977, the executive raised the privilege with greater frequency. Between 1953 and 1976, there were only eleven reported cases addressing the privilege; between 1977 and 2001 there were fifty-nine reported cases.[27]

Scholars debate whether the Bush Administration's assertion of the state secrets privilege differs from past practice.[28] Several contend that it does, claiming that the executive is now raising the privilege with far greater frequency and is using it to obtain outright dismissals rather than simply to limit discovery.[29] A recent article by Professor Robert Chesney questions these conclusions, however, and thus is worth further discussion.

Professor Chesney reviewed all the published cases in which the executive has invoked the state secrets privilege since the *Reynolds* decision.[30] He found that the privilege was asserted two times between 1961 and 1970, fourteen times between 1971 and 1980, twenty-three times between 1981 and 1990, twenty-six times between 1991 and 2000, and

26. *Reynolds*, 345 U.S. at 7.

27. *See* Chesney, *supra* note 2, app. Professors Weaver and Pallitto report slightly lower numbers for both those time periods. They claim that the privilege was asserted in four reported cases between 1953 and 1976, and then in fifty-one reported cases between 1977 and 2001. Weaver & Pallitto, *supra* note 2, at 101-02.

28. *Compare* Fisher, *supra* note 2, at 212, 245 (stating the privilege is being asserted with greater frequency post-9/11), *and* Weaver & Pallitto, *supra* note 2, at 109 (concluding that the executive is asserting the privilege with increasing frequency, and declaring that the "Bush administration lawyers are using the privilege with offhanded abandon"), *and* Shayana Kadidal, *The State Secrets Privilege and Executive Misconduct*, JURIST Forum, May 30, 2006, http://jurist.law.pitt.edu/forumy/2006/05/state-secrets-privilege-and-executive.php (asserting that "[p]revious invocations of the privilege by the government have most commonly been at the discovery stage, asking the courts to deny private litigants access to documents and witnesses, but more recently the government has moved to dismiss a spate of cases . . . at the pleading stage"), *with* Chesney, *supra* note 2, at 50-52 (surveying the case law and concluding that the Bush Administration's assertion of the privilege is not unprecedented in frequency, scope, or manner).

29. Fisher, *supra* note 2, at 212, 245; Weaver & Pallitto, *supra* note 2, at 109; Kadidal, *supra* note 28.

30. Chesney, *supra* note 2, app. As Professor Robert Chesney is careful to note, using published decisions as the basis for determining the frequency of a particular administration's assertion of the privilege is problematic. *Id.* at 52-54. The executive's claims may often be decided in unpublished rulings that are not available for analysis. Furthermore, cases decided during one administration might have arisen out of the assertion of the privilege by a previous administration. And in any event the frequency of the privilege's assertion might have more to do with the number of cases challenging executive branch activity than a particular administration's policy regarding use of the privilege. Despite these limitations, Professor Chesney analyzes these cases because they provide the only data on the privilege, and because even with the aforementioned limitations they help to guide discussion of patterns in executive assertion of the privilege. *Id.*

twenty times between 2001 and 2006.[31] He concluded that these numbers "do[] not support the conclusion that the Bush Administration employs the privilege with greater frequency than prior administrations."[32]

Professor Chesney also addressed the claim that the Bush Administration is asserting the privilege in a qualitatively different manner than in the past. Some commentators contend that the privilege was once used primarily to restrict discovery, but is now being invoked as grounds for dismissal of entire lawsuits.[33] Professor Chesney's analysis of the published cases reveals that the executive sought outright dismissal based on the privilege in five cases between 1971 and 1980, nine cases between 1981 and 1990, thirteen cases between 1991 and 2000, and fifteen cases between 2001 and 2006.[34] Again, Professor Chesney determined that the data demonstrates that the Bush Administration's use of the privilege is not unprecedented.[35]

Professor Chesney's careful analysis of the case law has provided valuable data with which to analyze claims about the state secrets privilege. I disagree, however, with his conclusion that these numbers prove that the Bush Administration's assertion of the privilege does not differ from that of previous administrations. First, Professor Chesney's survey demonstrates that from 2001 through 2006 both the number of invocations of the privilege and the occasions on which the Administration sought to dismiss a case in its entirety increased significantly. The Bush Administration has raised the privilege in twenty-eight percent more cases per year than in the previous decade, and has sought dismissal in ninety-two percent more cases per year than in the previous decade.

The sample size is small, and it is hard to draw conclusions from published decisions alone, for all the reasons noted by Professor Chesney.[36] But to the degree that the published cases provide any insight into the policy of this Administration, they are consistent with the conclusion that it has raised the privilege with greater frequency than ever before, and has more often sought to remove cases entirely from judicial dockets.

Second, and of greater significance, the Bush Administration's recent assertion of the privilege differs from past practice in that it is seeking blanket dismissal of every case challenging the constitutionality of specific, ongoing government programs. In comparison, the government responded

31. *See id.* In addition, the government informed the court in *Conner v. AT&T* that it "intends to assert the military and state secrets privilege in all of the[] actions" pending against the telephone company that allegedly provided the United States access to telephone communications without a warrant, and would "seek their dismissal." No. CV F 06-0632, 2006 WL 1817094, at *2 (E.D. Cal. June 30, 2006),

32. *See* Chesney, *supra* note 2, at 52.

33. *See* Kadidal, *supra* note 28.

34. As discussed in *supra* note 31, the government has stated that it will seek dismissal on state secrets grounds of all the pending challenges to the NSA's warrantless wiretapping program. Because there have not been published decisions on that issue in most of these cases, they are not included in Professor Chesney's analysis.

35. *See* Chesney, *supra* note 2, at 52.

36. *See supra* note 30.

to lawsuits brought in the 1970s and 1980s challenging its warrantless surveillance programs by seeking to limit discovery, and only rarely filed motions to dismiss the entire litigation.[37] The current practice is thus unique.

I hasten to add, however, that the blanket assertion of the privilege should not be viewed as concrete evidence of the current Administration's overzealous use of the privilege; one would expect all cases challenging a specific government program to raise the same privilege issues. It is fair to say, nevertheless, that this Administration's invocation of the state secrets privilege as grounds for dismissal of all cases challenging the NSA's practice of warrantless wiretapping and the extraordinary rendition program raises new concerns for the courts.

3. *Totten v. United States*

Although *Reynolds* marked the first explicit recognition of the state secrets privilege by the Supreme Court, the privilege has roots in the Court's 1875 decision in *Totten v. United States*.[38] Because the Bush Administration relies on *Totten*, as well as *Reynolds*, to support dismissal of cases challenging its conduct, the case is summarized below.

Totten involved a contract dispute between a Union spy and President Abraham Lincoln. The contract, which the parties entered into in July 1861, provided that the spy was to travel behind "rebel lines" and transmit information about the Confederate Army to the President in return for payment of $200 per month. The spy performed the tasks agreed upon, but was reimbursed only for his expenses.

The Supreme Court concluded that although President Lincoln had the authority to enter into the contract, no court could enforce it. The Court explained that it could not permit a suit against the government to proceed in which "the details of dealings with individuals and officers, might be exposed, to the serious detriment of the public."[39] The Court then stated, "[A]s a general principle . . . public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated."[40] Accordingly, the Court dismissed the case.

The *Totten* bar was recently reaffirmed by the Supreme Court in *Tenet v. Doe*,[41] a case in which two former spies claimed that the government had reneged on its agreement to provide lifetime support for them in the United States in return for espionage services in their native country. Their

37. *See* Chesney, *supra* note 2, app.

38. 92 U.S. 105 (1875); *see* United States v. Reynolds, 345 U.S. 1, 7 n.11 (1953) (citing *Totten*, 92 U.S. at 107).

39. *Totten*, 92 U.S. at 106-07.

40. *Id.* at 107.

41. 544 U.S. 1 (2005).

complaint alleged that the government had violated their equal protection and due process rights by refusing to abide by the terms of their original agreement. The district court denied the government's motion to dismiss pursuant to *Totten* on the ground that *Totten* applied solely to breach of contract claims,[42] and the Ninth Circuit affirmed.[43] The Supreme Court reversed, holding that the *Totten* bar precludes judicial review of any claim based on a covert agreement to engage in espionage for the United States.[44]

B. *The State Secrets Privilege Post-September 11*

In response to the events of September 11, 2001, the executive began taking new steps to combat terrorism. The media has recently reported on two controversial executive practices that have subsequently been challenged in court: the extraordinary rendition program, under which the United States transfers foreigners suspected of having ties to terrorist organizations to foreign countries that practice torture;[45] and the NSA's warrantless wiretapping program, under which the NSA eavesdropped on telephone conversations involving suspected terrorists without first obtaining a warrant.[46]

Lawsuits have been filed challenging the constitutionality of both programs by plaintiffs seeking damages and injunctive relief. In response, the executive has invoked the state secrets privilege, not just as grounds for dismissing some claims, but as a basis for having all litigation challenging these two programs dismissed with prejudice prior to discovery. As of December 31, 2006, six district courts have issued decisions in these categories of cases and have split on the question whether to dismiss on state secrets grounds.[47] The cases appear fast-tracked for appeal to the federal courts of appeals and may end up before the Supreme Court.

42. *See* Doe v. Tenet, No. C99-1597L, 2001 WL 35925897 (W.D. Wash. Jan. 22, 2001).

43. *See* Doe v. Tenet, 329 F.3d 1135 (9th Cir. 2003).

44. *See Tenet*, 544 U.S. at 3.

45. Nina Bernstein, *U.S. Defends Detention at Airports*, N.Y. Times, Aug. 10, 2005, at B1; Don Van Natta, Jr., *Germany Weighs if it Played Role in Seizure by U.S.*, N.Y. Times, Feb. 21, 2006, at A1.

46. James Risen & Erich Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. Times, Dec. 16, 2005, at A1. On January 17, 2007, the Bush Administration announced that it would submit its domestic surveillance program to supervision by the Foreign Intelligence Surveillance Court. *See* Adam Liptak, *The White House as a Moving Legal Target*, N.Y. Times, Jan. 19, 2007, at A1. The effect of this change in conduct on the pending cases is unclear. The Administration has argued that these cases are now moot, but plaintiffs contend that the executive's voluntary cessation of the challenged conduct does not moot their litigation. *See* Adam Liptak, *Judges Weigh Arguments in U.S. Eavesdropping Case*, N.Y. Times, Feb. 1, 2007, at A11 (describing the arguments by the government and the ACLU before the U.S. Court of Appeals for the Sixth Circuit in the government's appeal from the district court's decision in *ACLU v. NSA*, 438 F. Supp. 2d 754 (E.D. Mich. 2006)).

47. *See* Al-Haramain Islamic Found. v. Bush, 451 F. Supp. 2d 1215 (D. Or. 2006) (rejecting the government's claim that the challenge to the NSA's warrantless wiretapping program should be dismissed on state secrets grounds); Terkel v. AT&T Corp., 441 F. Supp. 2d 899 (N.D. Ill. 2006) (dismissing a challenge to the NSA's warrantless wiretapping program on state secrets grounds); Hepting v. AT&T, Corp., 439 F. Supp. 2d 974 (N.D. Cal.

This Essay will not recount in detail all the recent litigation in this area because the government makes almost identical arguments regarding the need for dismissal in each of the extraordinary rendition and NSA warrantless wiretapping cases. Summarized below are a few cases in each category to give the reader a sense of the underlying controversy, the positions taken by the United States and the litigants, and the courts' responses.

1. Challenges to the Extraordinary Rendition Program

a. El-Masri v. Tenet[48]

Khaled El-Masri, a German citizen of Lebanese descent, asserted that on New Year's Eve 2003 he was seized by Macedonian authorities while crossing the border between Serbia and Macedonia. El-Masri alleges that he was imprisoned in a Skopje hotel for twenty-three days, where he was repeatedly questioned about his associations with al Queda by U.S. officials. Despite his denials of any involvement with al Queda, El-Masri contends that the U.S. government then flew him to Kabul, Afghanistan, where he remained until May 28, 2004, when he was taken to an abandoned road in Albania and released.

El-Masri filed a lawsuit in the U.S. District Court for the Eastern District of Virginia alleging that he was transported against his will to Afghanistan as part of the United States' "extraordinary rendition" program, and that he was repeatedly interrogated, drugged, and tortured throughout his ordeal. He named as defendants the former Director of the Central Intelligence Agency (CIA), George Tenet; private corporations allegedly involved in the program; and unknown employees of the CIA and private corporations who participated in his alleged abduction and torture. El-Masri asserted three causes of action. First, he brought a *Bivens* claim against Tenet and unknown CIA agents for violations of his Fifth Amendment right not to be deprived of his liberty without due process and not to be subject to treatment that "shocks the conscience."[49] Second, he brought a claim pursuant to the Alien Tort Statute for violations of international legal norms prohibiting prolonged, arbitrary detention. Third, he brought a claim pursuant to the Alien Tort Statute for each defendant's violation of international legal norms prohibiting cruel, inhuman, and degrading treatment.

2006) (rejecting the government's claim that the challenge to the NSA's warrantless wiretapping program should be dismissed on state secrets grounds); *ACLU*, 438 F. Supp. 2d 754 (same); El-Masri v. Tenet, 437 F. Supp. 2d 530 (E.D. Va. 2006) (dismissing legal claims arising from extraordinary rendition on state secrets grounds); *see also* Arar v. Ashcroft, 414 F. Supp. 2d 250 (E.D.N.Y. 2006) (dismissing legal claims arising from extraordinary rendition without reaching the government's state secrets claim).

48. 437 F. Supp. 2d 530 (E.D. Va. 2006).

49. *Id.* at 534-35.

On March 8, 2006, the United States filed a formal claim of state secrets privilege, supported by an unclassified and a classified (and ex parte) declaration by the Director of the CIA. Five days later, the United States filed a motion to intervene to protect its interests in preserving state secrets, and a motion to dismiss or for summary judgment on the ground that maintenance of the suit would inevitably require disclosure of state secrets.[50] The government asserted that "the plaintiff's claim in this case plainly seeks to place at issue alleged clandestine foreign intelligence activity that may neither be confirmed nor denied in the broader national interest," but could not give more details about the potential damage because "even stating precisely the harm that may result from further proceedings in this case is contrary to the national interest."[51] In addition to seeking dismissal on state secret grounds, the executive argued that the case should be dismissed pursuant to the *Totten* bar.

U.S. District Judge T. S. Ellis granted the government's motion to dismiss. Judge Ellis commented that the state secrets privilege is of "the highest dignity and significance" in light of the "vitally important purposes" it serves.[52] Although Judge Ellis noted that the "courts must not blindly accept the Executive Branch's assertion [of the privilege], but must instead independently and carefully determine whether, in the circumstances, the claimed secrets deserve the protection of the privilege," he qualified this statement by commenting that "courts must also bear in mind the Executive Branch's preeminent authority over military and diplomatic matters and its greater expertise relative to the judicial branch in predicting the effect of a particular disclosure on national security."[53] He also wrote that the privilege is absolute—that is, once a court determined that the privilege had been validly asserted, it applies no matter how great the opposing interests at stake.

Judge Ellis then concluded that the privilege applied to the information sought by El-Masri. The Director of the CIA's unclassified declaration spoke in general terms about the harm to national security that might result were the government forced to admit or deny El-Masri's allegations. Although the Judge could not reveal the contents of the ex parte declaration, he stated that "any admission or denial of [El-Masri's] allegations by defendants in this case would reveal the means and methods employed pursuant to this clandestine program and such a revelation would present a grave risk of injury to national security."[54] Despite the government's public admission that the extraordinary rendition program exists, Judge Ellis concluded that this general information did not render the details of

50. Memorandum of Points and Authorities in Support of the Motion by Intervenor United States to Dismiss or, in the Alternative, for Summary Judgment at 11, *El-Masri*, 437 F. Supp. 2d 530 (No. 01417).

51. *Id.* at 11-12.

52. *El-Masri*, 437 F. Supp. 2d at 536.

53. *Id.*

54. *Id.*

the program as it may have been applied to El-Masri less worthy of being kept classified.

Finally, Judge Ellis dismissed the case after concluding that the privileged material is "central" to the claims and defenses raised in the litigation.[55] He explained that although

> "dismissal is appropriate only when no amount of effort and care on the part of the court and the parties will safeguard privileged material," it is equally well-settled that "where the very question on which the case turns is itself a state secret, or the circumstances make clear that sensitive military secrets will be so central to the subject matter of the litigation that any attempt to proceed will threaten disclosure of the privileged matters, dismissal is the appropriate remedy."[56]

El-Masri's lawsuit must be dismissed, the Judge explained, because any response to his claims of abduction, detention, and torture as part of the United States' extraordinary rendition program would inevitably reveal "specific details" about that program.[57] Moreover, Judge Ellis concluded that protective procedures, such as providing defense counsel with clearance to review classified documents, would be "plainly ineffective" because the "entire aim of the suit is to prove the existence of state secrets."[58] Accordingly, "El-Masri's private interests must give way to the national interest in preserving state secrets."[59]

In a concluding paragraph, Judge Ellis took pains to emphasize that "reasonable and patriotic Americans are still free to disagree about the propriety and efficacy of [the extraordinary rendition program]"—it is just that they may not be able to bring such claims before a court.[60] The district court also noted that if El-Masri's claims were true, then El-Masri "deserves a remedy."[61] The "sources of that remedy," however, "must be the Executive Branch or the Legislative Branch, not the Judicial Branch."[62]

On July 25, 2006, El-Masri's lawyers announced that they had filed an appeal to the U.S. Court of Appeals for the Fourth Circuit.[63]

55. *Id.* at 538.
56. *Id.* (quoting Sterling v. Tenet, 416 F.3d 338, 348 (4th Cir. 2005)).
57. *Id.*
58. *Id.* at 539.
59. *Id.* The district court did not address the United States' alternative argument that the case was nonjusticiable pursuant to the "*Totten* bar." *Id.* at 540.
60. *Id.* at 540.
61. *Id.* at 541.
62. *Id.*
63. *See* Press Release, ACLU, ACLU Appeals Case of German Man Kidnapped by CIA (July 25, 2006), *available at* http://www.aclu.org/safefree/extraordinaryrendition/26219prs20060725.html.

b. Arar v. Ashcroft[64]

Maher Arar's claims parallel those raised by Khaled El-Masri. Like El-Masri, Arar alleges that he was abducted, detained, and then sent to another country where he was tortured as part of the United States' extraordinary rendition program. Arar, a Syrian-born Canadian citizen, was employed as a software engineer in Massachusetts. In September 2002, Arar alleged that he was detained by U.S. authorities at John F. Kennedy International Airport in New York City while flying back from Switzerland, and that he was kept in solitary confinement there for thirteen days. On October 1, 2002, Arar was told by government officials that he could not be admitted back into the United States because they believed that he was a member of al Queda. Although Arar was assured that he would not be sent back to his native Syria, nine days later he alleged that he was flown by private jet to Amman, Jordan, where federal officials delivered him to Jordanian officials, who in turn brought him to Syria. In Syria, Arar contends that he was imprisoned for a year in a small jail cell where he was beaten and tortured by Syrian security forces. He claims that his Syrian interrogators worked with U.S. officials, who provided information and questions and received reports from the Syrians about Arar's responses. Arar was released on October 5, 2003. No charges were ever filed against him.

Arar filed suit in the Eastern District of New York claiming that his removal from the United States violated his Fifth Amendment rights, as well as the Torture Victims Protection Act and other treaties.

Prior to discovery, the government moved for dismissal or summary judgment on state secrets grounds of the three claims concerning the U.S. government's deportation of Arar to Syria and his interrogation and torture while there.[65] The executive's arguments were similar to those made in El-Masri's case: The very subject matter of the case concerned the details of a program that was secret, and needed to be kept that way for national security reasons. The government's reasons for detaining Arar, concluding that he was a member of al Queda, and then sending him to Syria rather than to Canada cannot be disclosed, the government argued, without jeopardizing national security. Because information at the "core" of Arar's first three claims is a state secret, the government concluded that these claims must be dismissed.

The district court issued a decision on February 16, 2006, dismissing all of Arar's claims. The court held that Arar lacked standing to bring claims for declaratory relief against the plaintiffs in their official capacities; that the Torture Victim Protection Act does not provide him with a cause of action; and that he could not bring a *Bivens* action "given the national-

64. 414 F. Supp. 2d 250 (E.D.N.Y. 2006).

65. The government did not seek dismissal of Maher Arar's fourth claim on state secrets grounds. That claim concerned his alleged mistreatment while detained in the United States. The United States and the individual defendants sought to dismiss that claim on other grounds.

security and foreign policy considerations at stake."[66] Because the court dismissed Arar's claims on other grounds, it did not address the executive's claim that the case should also be dismissed on state secrets grounds.[67] Arar's lawyers have filed an appeal to the Second Circuit.

2. Challenges to the NSA's Warrantless Wiretapping Program

a. Hepting v. AT&T Corp.[68]

In *Hepting v. AT&T Corp.*, filed in the Northern District of California, plaintiffs alleged that AT&T is collaborating with the NSA to conduct a warrantless surveillance program that illegally eavesdrops on the communications of millions of Americans. The existence of the program was publicly acknowledged by the President in December 2005 after an article describing the warrantless wiretapping appeared in *The New York Times*. As the President explained at a press conference on December 19, he authorized the NSA to intercept communications for which there were "reasonable grounds to believe that (1) the communication originated or terminated outside the United States, and (2) a party to such communication is a member of al Qaeda, a member of a group affiliated with al Qaeda, or an agent of al Qaeda or its affiliates."[69] The complaint contends that AT&T, acting as an agent of the U.S. government, has violated the First and Fourth Amendment rights of U.S. citizens, as well as the Foreign Intelligence Surveillance Act (FISA) and various other state and federal laws. The plaintiffs seek certification of a class action and damages, restitution, disgorgement, and injunctive and declaratory relief.[70]

On May 13, 2006, the United States sought to intervene and moved for dismissal or summary judgment on the basis of the state secrets privilege.[71] Its assertion of the privilege was supported by public declarations from John Negroponte, Director of National Intelligence, and Keith Alexander, Director of the NSA. The government also invited the court to review classified information supporting the privilege in camera and ex parte, which the court eventually did.[72]

The government argued that the case should be dismissed on the basis of the state secrets privilege for three reasons: first, because the "very subject matter of [the action]" concerns privileged information; second, because the

66. *Arar*, 414 F. Supp. 2d at 287.
67. *Id.*
68. 439 F. Supp. 2d 974 (N.D. Cal. 2006).
69. United States' Reply in Support of the Assertion of the Military and State Secrets Privilege and Motion to Dismiss or, in the Alternative, for Summary Judgment By the United States at 1, *Hepting*, 439 F. Supp. 2d 974 (No. 0672), 2006 WL 2038464 (citing Press Release, Press Conference of the President (Dec. 19, 2005), *available at* http://www.whitehouse.gov/news/releases/2005/12/20051219-2.html).
70. *Hepting*, 439 F. Supp. 2d at 979.
71. *Id.*
72. *Id.*

plaintiffs could not make their prima facie case without the privileged information; and third, because the absence of the privileged information would deprive AT&T of a defense.[73] In addition, because the case concerned a covert agreement between AT&T and the government, the United States contended that it qualified for dismissal under *Totten v. United States*.

District Court Judge Vaughn Walker denied the government's motion on July 20, 2006. The court began by describing the information publicly available about the NSA terrorist surveillance program. Judge Walker noted that the NSA surveillance program had been reported in the press and confirmed by President Bush. When questioned about its involvement in the program, AT&T had refused to confirm or deny existence of the program, but stated that "when the government asks for our help in protecting national security, and the request is within the law, we will provide that assistance."[74] Based on this information, the court concluded that AT&T's involvement in the program was not covert, but rather was public information, and thus the case should not be dismissed under the *Totten* bar.[75]

Turning to the state secrets privilege, the court noted as a threshold matter that "no case dismissed because its 'very subject matter' was a state secret involved ongoing, widespread violations of individual constitutional rights," as were alleged here, but instead most cases concerned "classified details about either a highly technical invention or a covert espionage relationship."[76] In addition, the court stated that the "very subject matter of this action is hardly a secret" because "public disclosures by the government and AT&T indicate that AT&T is assisting the government to implement some kind of surveillance program."[77] For this reason, Judge Walker concluded that the case was distinguishable from *El-Masri v. Tenet*, where the entire purpose of the lawsuit was to reveal classified details regarding the extraordinary rendition program.[78]

Judge Walker declared that it was "premature" to decide whether the case should be dismissed on the ground that the plaintiffs could not make out a prima facie case or AT&T could not assert a valid defense.[79] Instead, Judge Walker determined that he should let discovery proceed and then assess whether any information withheld pursuant to the state secrets privilege would require the suit's dismissal.

73. *Id.* at 985.
74. *Id.* at 992.
75. *Id.* at 993 ("In sum, the government has disclosed the general contours of the 'terrorist surveillance program,' which requires the assistance of a telecommunications provider, and AT&T claims that it lawfully and dutifully assists the government in classified matters when asked.").
76. *Id.*
77. *Id.* at 994.
78. *Id.*
79. *Id.*

In conclusion, Judge Walker commented that he viewed the state secrets privilege as limited, at least in part, by the role of the court in the constitutional structure:

> [I]t is important to note that even the state secrets privilege has its limits. While the court recognizes and respects the executive's constitutional duty to protect the nation from threats, the court also takes seriously its constitutional duty to adjudicate the disputes that come before it. . . . To defer to a blanket assertion of secrecy here would be to abdicate that duty. . . .[80]

Judge Walker certified his denial of the government's motion to dismiss for interlocutory appeal because "the state secrets issues resolved herein represent controlling questions of law as to which there is a substantial ground for difference of opinion."[81] The government immediately petitioned the Ninth Circuit for interlocutory review.[82]

b. American Civil Liberties Union v. National Security Agency[83]

In *ACLU v. NSA*, a group of journalists, academics, attorneys, and nonprofit organizations challenge the same warrantless surveillance program at issue in *Hepting*. The plaintiffs communicate with individuals from the Middle East whom the government might suspect of being affiliated with al Queda, and thus they believe that their telephone calls and internet communications would fall within the scope of the NSA's warrantless wiretapping program. They contend that even the possibility that the government is eavesdropping on their calls has a chilling effect on their communications and thus disrupts their ability to talk to clients, sources, witnesses, and generally engage in advocacy and scholarship.[84] The plaintiffs brought suit in federal court in the Eastern District of Michigan challenging the surveillance program as a violation of the separation of powers doctrine, their First and Fourth Amendment rights, and FISA and other federal laws. They sought declaratory and injunctive relief that would prevent the NSA from eavesdropping on domestic communication without a warrant.

The United States filed a motion to dismiss or for summary judgment very similar to that filed in *Hepting*. Although the executive conceded that the "issues before the Court" regarding the constitutionality of the NSA's surveillance program "are obviously significant and of considerable public interest,"[85] it contended that these questions cannot be explored in litigation

80. *Id.* at 995 (citations omitted).
81. *Id.* at 1011.
82. Petition by Intervenor United States for Interlocutory Appeal Under 28 U.S.C. 1292(b), *Hepting*, 439 F. Supp. 2d 974 (No. 672).
83. ACLU v. NSA, 438 F. Supp. 2d 754 (E.D. Mich. 2006).
84. Complaint at 2, ACLU, 438 F. Supp. 2d (No. 10204).
85. Memorandum in Support of the Military and State Secrets Privilege, *supra* note 8, at 1.

because the evidence supporting the government's program qualifies for the state secrets privilege, as well as specific statutory privileges.[86] In a public and in camera declaration submitted by John Negroponte, Director of National Intelligence, and a public and in camera declaration of Major General Richard J. Quirk, Signals Intelligence Director, National Security Agency, the executive formally asserted the state secrets privilege to prevent disclosure of "intelligence activities, information, sources, and methods" relevant to the litigation.[87] Without this evidence, the executive claimed that plaintiffs could neither establish standing to sue nor prove the merits of their claims. Because the "very subject matter" of the lawsuit is a state secret, the executive asserted that the litigation must be dismissed, or alternatively, the court should grant the defendants' motion for summary judgment.[88]

The plaintiffs responded that statements already in the public record acknowledging the existence of the NSA's surveillance program were sufficient to determine their standing and the lawfulness of the program. The government, however, strongly disagreed: "[T]o decide this case on the scant record offered by Plaintiffs, and to consider the extraordinary measure of enjoining the intelligence tools authorized by the President to detect a foreign terrorist threat on that record, would be profoundly inappropriate."[89] The government argued that the President's exercise of his "core Article II and statutory powers to protect the Nation from attack" cannot be resolved on the basis of the public record alone.[90]

On August 17, 2006, U.S. District Judge Anna Diggs Taylor issued an opinion rejecting the government's claim that the case should be dismissed on state secrets ground, and finding the NSA's warrantless wiretapping program to be unconstitutional.[91] The government's attempt to have the case dismissed prior to discovery suggested to Judge Taylor that the government was arguing that the case was not justiciable under the *Totten* doctrine. Judge Taylor concluded, however, that the *Totten* bar was not applicable because the case did not concern an "espionage relationship between the Plaintiff and the Government," as had been the case in *Totten* and in the most recent application of that doctrine in *Tenet v. Doe*.[92]

Following the lead of Judge Walker, Judge Taylor reviewed the aspects of the NSA's warrantless wiretapping program that had been publicly admitted by the Administration, and the defense of that program that the Administration had articulated thus far. She concluded that the plaintiffs' challenge to the program could be resolved based on the government's on-the-record statements, and that neither the plaintiffs nor the government

86. *Id.*
87. *Id.* at 4.
88. *Id.* at 5 (quoting United States v. Reynolds, 345 U.S. 1, 11 n.26 (1952)).
89. *Id.* at 3.
90. *Id.*
91. ACLU v. NSA, 438 F. Supp. 2d 754 (E.D. Mich. 2006).
92. *Id.* at 763.

needed to discuss details of the program to pursue the litigation. For those reasons, Judge Taylor denied the government's motion to dismiss or for summary judgment, and went on to address the merits of the constitutional and statutory challenges to the NSA warrantless wiretapping program.

The government has filed a notice of appeal to the Sixth Circuit.

c. *Pretrial Consolidation of Challenges to NSA Warrantless Wiretapping*

As of August 2006, several dozen lawsuits have been filed challenging the NSA's practice of wiretapping without first obtaining warrants. On August 9, 2006, the Judicial Panel on Multidistrict Litigation ordered that seventeen of the most closely-related cases be consolidated for pretrial motions before Judge Walker, who had already ruled in *Hepting* that the state secrets privilege does not apply.[93] The panel concluded that the Northern District of California is the "appropriate transferee forum" because it is the district "where the first filed and significantly more advanced action is pending before a judge already well versed in the issues presented by the litigation."[94] It rejected the government's request to have the cases transferred to the District of Columbia because that would require "the very duplication and expansion of access to classified information that the Government deems to be so perilous."[95]

As a result of this consolidation, the state secrets privilege issue should be resolved quickly in those seventeen cases, and that decision will likely be followed by immediate appeal to the Ninth Circuit and possibly the U.S. Supreme Court.

II. CONGRESSIONAL CONFERRAL OF JURISDICTION AS A MEANS OF EXECUTIVE OVERSIGHT

As described in the previous section, the Bush Administration has asserted the state secrets privilege to seek immediate dismissal of all cases challenging the constitutionality of two specific government programs. Commentators dispute whether the Bush Administration is raising the privilege with greater frequency than before, and whether its use of the privilege to obtain dismissals rather than discovery relief differs from past practice.[96] What is undebatable, however, is that the privilege is currently being invoked as grounds for dismissal of entire categories of cases challenging the constitutionality of government action. The executive's concurrent claim that these cases are nonjusticiable under the *Totten* bar is further evidence that, as one commentator put it, "the administration is now well on its way to transforming [the state secrets privilege] from a narrow

93. *In re* NSA Telecomm. Records Litig., 444 F. Supp. 2d 1332 (J.P.M.L. 2006). The court stated in a footnote that twenty-six potentially related actions would be "treated as potential tag-along actions in accordance with Panel and local court rules." *Id.* at 1334 n.1.

94. *Id.* at 1335.

95. *Id.*

96. *See supra* notes 27-31 and accompanying text.

evidentiary privilege into something that looks like a doctrine of broad government immunity."[97]

Conceptualizing the state secrets privilege as an attempt to deprive courts of subject matter jurisdiction over cases challenging the constitutionality of certain executive practices raises new concerns—concerns that differ from those articulated by the litigants. The plaintiffs in these cases have warned that dismissal will prevent injured parties from vindicating their constitutional rights, and will strip the courts of their authority to remedy such violations in individual cases. These objections are certainly valid, and have been cited by some courts as reasons to avoid using the privilege as a basis for dismissal prediscovery.[98] Absent thus far is a discussion of whether dismissals on state secrets grounds diminishes the power of Congress in our constitutional structure, perhaps because concern for Congress's authority only becomes clear when the privilege is recognized as equivalent to an executive attempt to narrow federal jurisdiction.

A. *First Principles: Congressional Control over Federal Jurisdiction as a Means of Executive Oversight*

1. Congressional Control over Federal Jurisdiction

Congress exercises near plenary control over the jurisdiction of the federal courts. Granted, Congress must do so within constitutional confines: Congress can only assign to federal courts cases falling under the nine subject matter headings in Section 2 of Article III, and there are some limits on Congress's ability to strip all federal courts of jurisdiction to hear certain kinds of constitutional claims.[99] But within these parameters Congress has sweeping authority to craft federal jurisdiction through legislation.[100]

Congress's authority over federal jurisdiction arises logically from its control over the very existence of the lower federal courts. The framers

97. Henry Lanman, *Secret Guarding*, Slate, May 22, 2006, http://www.slate.com/id/2142155/.

98. *See supra* Part I.

99. *See, e.g.*, Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. Pa. L. Rev. 1499 (1990); Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. Pa. L. Rev. 1569 (1990); Martin H. Redish, *Text, Structure, and Common Sense in the Interpretation of Article III*, 138 U. Pa. L. Rev. 1633 (1990); Louise Weinberg, *The Article III Box: The Power of "Congress" to Attack the "Jurisdiction" of "Federal Courts,"* 78 Tex. L. Rev. 1405 (2000).

100. *See* Ankenbrandt v. Richards, 504 U.S. 689, 698 (1992) ("'[T]he judicial power of the United States . . . is (except in enumerated instances, applicable exclusively to this Court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) . . . and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.'" (quoting Cary v. Curtis, 44 U.S. (3 How.) 236, 244 (1845))).

disagreed over the need for the "inferior" courts. Under a compromise negotiated by James Madison, they agreed to give Congress the choice whether to create lower federal courts, and, as part and parcel of that compromise, the authority to decide which cases those courts could hear. Thus, every time a lower federal court hears a case, it does so at Congress's pleasure.[101]

The existence of the Supreme Court, unlike the lower federal courts, is constitutionally mandated, but Congress retains a great deal of control over the jurisdiction of the nation's highest court as well. Article III provides that the "Supreme Court shall have appellate jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." Although Congress's power to strip the Supreme Court of jurisdiction is also not absolute,[102] Congress has significant latitude to shape Supreme Court jurisdiction in the course of crafting "exceptions" to the Court's appellate jurisdiction.[103]

2. Legislative and Judicial Collaboration in Executive Oversight

Congress's extensive control over federal jurisdiction has important ramifications. First, it bolsters the democratic legitimacy of judicial decision making. Because courts are counter-majoritarian institutions, their decisions are in some tension with a democratic system of government. Indeed, the federal courts are insulated from politics precisely so that they can serve as a check on the tyranny of the majority. Nonetheless, our constitutional structure provides the judiciary with second-order democratic legitimacy by giving the political branches the power not just to select and impeach judges, but also to determine which cases they will hear. When an unelected federal judge issues a decision that affects thousands or millions of Americans, his authority to do so comes in part from the grant of jurisdiction bestowed by elected members of Congress.[104]

Second, Congress's power to confer jurisdiction permits Congress to work together with courts to police the activities of the executive branch. Once Congress passes a statute it is then the duty of the executive branch to "faithfully execute" the law.[105] Although Congress has no formal role in implementing statutes, it has several indirect methods of checking the executive's performance of that function. For example, Congress can

101. *See* Erwin Chemerinsky, Federal Jurisdiction § 3.3 (4th ed. 2003).

102. *See, e.g.*, United States v. Klein, 80 U.S. (13 Wall.) 128 (1871); *see also* Chemerinsky, *supra* note 98, § 3.2.

103. *See* Chemerinsky, *supra* note 101, § 3.2.

104. *See, e.g.*, David Cole, *Jurisdiction and Liberty: Habeas Corpus and Due Process as Limits on Congress's Control of Federal Jurisdiction*, 86 Geo. L.J. 2481, 2508 (1998) ("Congress's power to control the jurisdiction of federal courts finds solid support in the text of the Constitution, and plays an important structural role in legitimating the courts' antidemocratic decisions: the very fact that Congress could limit the federal courts' jurisdiction, but has not, affords the courts' decisions a degree of political legitimacy.").

105. U.S. Const. art. II, § 1.

reduce or increase funding for the executive's favored programs, and it can hold oversight hearings at which executive branch officials must explain themselves. In addition, Congress can grant federal courts jurisdiction to hear cases challenging the executive's implementation of the law, or claiming that executive action exceeds statutory or constitutional limits. This last method of executive oversight differs from the others in that Congress is not acting on its own, but rather is delegating executive oversight to the judicial branch.[106]

Congress has good reasons to utilize the courts to assist it in overseeing the executive branch. Allowing courts to hear such cases keeps Congress and the executive from clashing directly. A lawsuit challenging executive action will be brought by a private citizen, and the decision will be made by a court and not Congress. Furthermore, because courts are somewhat insulated from political pressures, judicial decisions regarding the constitutionality of executive action may be more acceptable to a public suspicious of the President's or Congress's motives—particularly when the executive and legislative branches are controlled by opposing parties. Courts also have the advantage of hearing challenges to executive conduct in the context of a concrete injury suffered by the plaintiff, whereas Congress's inquiries may be more abstract and general. The judicial process, with its many fact-finding mechanisms and opportunities to be heard, is perhaps the better way to resolve some of these debates. Finally, members of Congress are burdened with many responsibilities—the primary one being to enact legislation—and thus they do not have the time to devote to executive oversight. By creating federal jurisdiction over cases challenging executive action, Congress has enlisted approximately 900 federal judges to assist it in this task.[107]

The ability of two branches to coordinate oversight of the third is an often overlooked aspect of our tripartite system of government, and yet it serves an important role in the system of checks and balances established by the Constitution. The formalist view of separation of powers requires that each branch perform its assigned tasks with rigid independence from

106. Theoretically, Congress could provide for resolution of cases challenging executive conduct in state courts alone. Many of the same observations stated here would continue to apply were Congress to select the state rather than federal judiciary to be its partner in federal oversight. However, there are some limits on state courts' authority to compel federal officials to take action. *See* McClung v. Silliman, 19 U.S. (6 Wheat.) 598 (1821) (holding that a state court lacked the power to issue a mandamus to a federal executive official); Tarble's Case, 80 U.S. (13 Wall.) 397 (1872) (holding that a state court lacked power to issue a writ of habeas corpus for a federal prisoner). These restrictions suggest that Congress has conferred broad federal question jurisdiction on federal courts (and provided for removal of federal question cases from state to federal courts) because federal courts are the more appropriate and able partner to curb executive overreaching. *See* 28 U.S.C §§ 1441, 1442 (2000).

107. *See* Weaver & Pallitto, *supra* note 2, at 102 ("In recognition of its limited capacities of oversight, Congress facilitates executive accountability by transferring much of its oversight function to the judiciary.").

the others.[108] The dominant functionalist theory is more flexible, conceding that the branches may engage in activities outside of their narrow, constitutionally assigned tasks, but only so long as they do not diminish the constitutional stature of another branch by taking over its essential functions.[109] The latter view, in the words of Justice Jackson in the *Steel Seizure* case, "contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."[110] When Congress drafts the courts to assist in executive oversight, it is drawing upon the flexibility of the constitutional structure to keep the executive in line.

B. *Applying First Principles to the Executive's Assertion of the State Secrets Privilege*

1. Judicial Discretion to Exercise Jurisdiction

The litigants and courts addressing the state secrets privilege have viewed it as an evidentiary restriction, and not as the executive's attempt to carve out a set of cases from the jurisdiction conferred on the courts by Congress. Yet the executive is using the privilege to seek dismissal of every case challenging the constitutionality of the extraordinary rendition and warrantless wiretapping programs. The end result is the same as if the executive branch told the courts that cases challenging the constitutionality of this set of executive actions are beyond the judiciary's power to hear and decide.

The executive's assertion of the privilege thus undermines Congress's authority to assign federal jurisdiction and simultaneously to enlist the courts as its partner in executive oversight. When a litigant claims that the executive has violated a statute or engaged in unconstitutional conduct—as is alleged in the challenges to both the warrantless wiretapping and extraordinary rendition programs—courts serve as a check on the potential abuse of executive authority. They do so because Congress gave the federal judiciary the authority to hear cases in which executive power is challenged by enacting 28 U.S.C. § 1331, which grants courts broad federal question

108. *See, e.g.*, Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. Pa. L. Rev. 1513, 1530 (1991).

109. *See id.* at 1530 (describing "the scholarly debate about separated powers" as "polarized, for the most part, between the formalists and the functionalists—a battle between those who would pay the price of rigidity in order to achieve an elusive determinacy on the one hand, and those who would pay the price of indeterminacy in order to achieve unguided flexibility on the other").

110. Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 635 (1952) (Jackson, J., concurring); *see also* The Federalist No. 51, at 337 (James Madison) (Edward Mead Earle ed., 1937). The framers sought to prevent any one branch from aggrandizing power by "so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places." *Id.*

jurisdiction, and by enacting specific statutory limits on executive power in the area of national security, such as in the Foreign Intelligence Surveillance Act. If the judiciary agrees with the executive branch that it must dismiss these cases to protect state secrets, it is abdicating its congressionally assigned task to restrain executive power.

For this reason, the executive's assertion of the state secrets privilege in the cases outlined in Part I cannot be equated with the use of the privilege in either *Reynolds* or *Totten*. In the latter two cases, the plaintiffs were seeking damages for negligence and breach of contract, respectively; they made no claims that the executive had overstepped its constitutional authority. Although the *Totten* bar was recently affirmed in *Tenet v. Doe*, in which the plaintiffs did allege that their constitutional rights were violated by the government's failure to adhere to the terms of their contract, *Tenet* did not involve any ongoing executive branch program or practice and the dispute was limited to the parties before the Court. The executive's assertion of the privilege in all of these cases was not part of a broad pattern under which it raised the privilege to bar any case of this type from being heard in court. Certainly, *Reynolds*, *Totten*, and *Tenet* all involved legal claims that Congress had granted federal courts jurisdiction to hear and decide. But the judicial role in these cases was to determine whether an individual deserved a remedy, and not to act as Congress's deputy in curbing ongoing abuse of executive power.

In its post-9/11 assertions of the state secrets privilege, the executive branch acknowledges that it is seeking to eliminate judicial oversight of some executive programs, but contends that the legality of executive action is better addressed by the "political branches" and not the courts.[111] That argument overlooks the primary role that Congress—one of the "political branches"—plays in granting federal courts jurisdiction in the first instance. Indeed, for the reasons described above, the "political branch" solution to the problem might well be to permit courts to determine the legality of such executive conduct.

Admittedly, Congress's decision to grant federal courts jurisdiction over cases challenging executive authority does not require courts to ignore executive claims of privilege and hear cases that jeopardize national security. Congress provides federal jurisdiction over large categories of cases, such as 28 U.S.C. § 1331's broad grant of jurisdiction over cases "arising under the Constitution, laws, or treaties of the United States." When faced with a specific case that would force disclosure of information vital to national security, and perhaps for little benefit, Congress might well prefer that courts decline jurisdiction. (Although its enactment of statutes limiting executive power in the area of national security suggests otherwise.) Furthermore, courts have long asserted that they have some discretion about whether to hear cases that Congress has assigned to them, and have often chosen to abstain or defer to some other political institution

111. *See supra* note 8 and accompanying text.

rather than reach out and decide a matter that is technically within their purview.[112] Thus, simply because courts have authority to hear cases challenging executive action does not mean that they are constitutionally required to do so. It does suggest, however, that courts should examine more closely the role that the federal judiciary and Congress play in working together to check executive authority before granting executive demands to dismiss these cases.

2. Congressional Reliance on the Courts to Police the Executive's "War on Terror"

Congress has been criticized for failing to enact legislation that would clarify the legality of executive action in the war on terror, and for leaving these hard questions for the courts to struggle with alone.[113] For example, the Senate Judiciary Committee was accused of ducking responsibility for its proposal to send questions about the constitutionality of the warrantless surveillance program to the Foreign Intelligence Surveillance Court,[114] and Congress failed to pass any legislation in response to that controversial executive practice. During three years of contentious litigation over the legality of detentions at Guantanamo Bay, Congress remained silent while the executive branch, detainees, and courts struggled with the question whether the detentions were permitted by the Authorized Use of Military Force Act, which was passed shortly after September 11, 2001. After judicial prodding,[115] Congress did enact legislation expressly addressing the treatment of Guantanamo Bay detainees, first in the Detainee Treatment Act of 2005 and then in the Military Commissions Act of 2006, but it has left most aspects of the executive's war on terror untouched. In short, Congress's supervision of the executive branch's conduct in the war on

112. *See* David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. Rev. 543 (1985) (describing when courts may appropriately refuse to hear cases over which they have jurisdiction).

113. *See, e.g.*, Kenneth Anderson, *It's Congress's War, Too*, N.Y. Times, Sep. 3, 2006, § 6 (Magazine), at 20 (arguing that Congress can no longer avoid legislating in the fight against global terrorism). For a more detailed discussion of Professor Kenneth Anderson's views, see Kenneth Anderson, *Law and Terror*, Pol'y Rev., Oct.-Nov. 2006, at 3.

114. Eric Lichtblau, *Administration and Critics, in Senate Testimony, Clash Over Eavesdropping Compromise*,N.Y . Times, July 27, 2006, at A21.

115. The Supreme Court repeatedly invited Congress to enact legislation addressing the rights of Guantanomo Bay detainees. *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004) ("Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake."); *see also* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2799 (2006) (Breyer, J., concurring) ("Congress has denied the President the legislative authority to create military commissions of the kind at issue here. Nothing prevents the President from returning to Congress to seek the authority he believes necessary.").

terror has been far from comprehensive, and has often relied on judicial review as the backstop for aggressive assertions of executive power.[116]

Congress's deliberate use of the courts as a check on abuse of executive power should be a factor in the court's analysis of the state secrets privilege. Courts should always be cautious when faced with executive assertion of the privilege, but they should be especially reluctant to dismiss entire categories of challenges to executive actions that Congress intended them to hear. By declining to hear these cases, courts are not just diminishing their own role in the constitutional structure, they are eliminating a constitutionally prescribed method through which Congress can curb the executive.

Of course, Congress could check the executive almost entirely on its own, without judicial assistance. Congress can hold hearings at which it closely questions executive officers about their actions and demands an accounting of executive conduct. Congress can enact laws prohibiting some types of executive action, although it may have to do so over an executive veto. In the most extreme circumstances, Congress can seek to impeach the President for acting extra-constitutionally. These alternative methods of checking the executive are not without costs for Congress, however. They set up an unmediated showdown between these two powerful branches of government, and lead to the kind of infighting and partisan wrangling that has been demonstrated to alienate the public. Perhaps for these reasons, Congress has been slow to enact legislation to address the war on terror despite repeated calls for it to do so. Instead, Congress has turned to the courts, heightening the judicial obligation to entertain legal challenges to executive conduct.

III. PUTTING THEORY INTO PRACTICE: SUGGESTED JUDICIAL RESPONSES TO THE EXECUTIVE'S ASSERTION OF THE STATE SECRETS PRIVILEGE

Part II sought to establish a few basic propositions. First, that the executive's invocation of the state secrets privilege as grounds for dismissing certain categories of cases is akin to claiming that courts lack jurisdiction to hear these cases. Second, by doing so, the executive diminishes not just judicial power, but congressional power as well, because Congress normally controls federal jurisdiction. And third, Congress's grant of federal jurisdiction over claims challenging the legality of executive action has added significance as a congressional-judicial collaboration intended to prevent the executive from overreaching. This

116. Senator Arlen Specter, who voted for the Military Commissions Act, has stated that he believed (and hoped) that the courts would hold significant aspects of those laws to be unconstitutional. *See* Jeffrey Toobin, *Killing Habeas Corpus*, New Yorker, Dec. 4, 2006, at 46 (describing Senator Specter's belief that the "courts will invalidate" the provision of the Military Commissions Act that strips the federal courts of jurisdiction over habeas corpus petitions filed by detainees in U.S. custody).

part discusses how these conclusions should shape judicial analysis of the executive's efforts to obtain blanket dismissals on state secrets grounds.

A. *Courts Should be Especially Reluctant to Dismiss When the Executive Is Seeking to Prevent Judicial Review of All Constitutional Challenges to Specific Executive Programs*

Courts should be particularly hesitant to forgo jurisdiction when the executive is seeking an across-the-board dismissal of all cases challenging particular executive branch programs, because such claims implicate Congress's constitutional authority, as well as the courts'. Congress has delegated part of its executive oversight function to the judiciary, and thus courts should not be as quick to leave the field as they might be were that checking function not at issue. In short, judges should adopt a more holistic view in such cases by taking into account the effect that blanket dismissals will have on the relationship between the three branches of government.

Courts need not ignore executive concerns, however. There are many steps short of outright dismissal that judges can adopt to protect state secrets from public disclosure. Courts should attempt to respond to the executive's claim of privilege by narrowing discovery, providing for discovery under seal, or modifying plaintiff's claims—all steps that have been taken by courts in previous cases.[117] At the very least, judges should allow discovery to proceed in some fashion before deciding whether the "very subject matter" of the case requires its dismissal. A case may still be able to go forward without requiring the executive to disclose details of programs designed to protect national security.

B. *An Alternative to Outright Dismissal: Transferring Executive Oversight Back to Congress*

If, however, a judge is genuinely convinced that state secrets are implicated by the subject matter of a lawsuit to a degree that requires its dismissal, then she might consider transferring the task of curbing executive power back to Congress.

Legal scholars have written extensively on judicial discretion to accept or reject jurisdiction. Some claim that courts have very little leeway to refuse to hear a case over which the Constitution and Congress grant it subject matter jurisdiction,[118] while others assert that courts have historically had some latitude to accept or reject jurisdiction, and should continue to exercise this discretion within reasonable boundaries.[119] Although the latter view is more widely accepted, no one contends that courts are free to pick and choose their caseload.

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117. *See* Weaver & Pallitto, *supra* note 2, at 86.

118. *See, e.g.*, Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 Yale L.J. 71 (1984).

119. *See, e.g.*, Shapiro, *supra* note 110.

When a court exercises its discretion to forgo jurisdiction, it sometimes justifies doing so on the ground that another arm of government is better situated to address the matter. So, for example, a court may abstain when faced with an unclear state law that appears to transgress constitutional boundaries, but only after sending a question about the meaning of state law to the state court (or by directing the parties to bring their litigation before a state tribunal).[120] When a court engages in this type of abstention—referred to as *Pullman* abstention after the first case in which the Supreme Court advocated this course of conduct—it is not abandoning the field and leaving the litigants without recourse for their constitutional claim. Rather, the court is suggesting to the parties that there is a more appropriate institution to address the problem in the first instance—the state courts, which are more familiar with state law and will perhaps construe that law in ways that prevent a court from ever having to reach the constitutional problem. The *Chevron* deference that courts routinely grant to agencies' interpretation of their governing statutes provides another significant example of the abdication of judicial power to a political institution that is better suited to resolve the issue.[121]

Similarly, if a court concludes that the state secrets privilege applies such that the dispute is not appropriately resolved in a judicial forum, it should consider sending the legal question to a more suitable decision maker—namely, Congress. Congress has the power to curb the executive through oversight hearings, the enactment of new laws reining in executive action, the withdrawal of funds, and impeachment. If a court is not the proper institution to delve into the constitutionality of executive conduct because its inquiry would jeopardize national security, then Congress can take over that task. Moreover, because Congress was responsible for assigning jurisdiction to the court in the first instance, it makes sense to return to Congress with a dispute that a court has decided is not fit for judicial review.[122]

Admittedly, transferring oversight from the courts back to Congress is logistically complicated and, some might argue, constitutionally suspect. If Congress is already investigating the executive conduct in question, however, a judge need not do anything more than stay the case and await further developments—an act of restraint that is surely constitutionally permissible. But if Congress has not yet given the issue its attention, the court would have to seek Congress's involvement by instructing the executive branch officials in the case before it to bring the issue to

120. *See* Fallon et al., *supra* note 4, at 1186-1213.

121. *See, e.g.*, Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

122. *Cf.* Amanda Frost, *Certifying Questions to Congress*, 101 Nw. U. L. Rev. (forthcoming 2007) (manuscript at 45-52), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=896794 (discussing Congress's institutional superiority over courts in resolving questions about the meaning of truly ambiguous statutes).

Congress's intention, or even by contacting Congress itself and requesting that it take over executive oversight. Whichever course of action the court took to gain Congress's attention, it could then stay the case without removing it from its docket while awaiting a congressional response.

Such direct judicial interaction with Congress concededly comes close to the constitutional line that separates judging from legislating. Yet even though this type of congressional-judicial interaction is atypical, it is not unprecedented. Judges on occasion issue opinions asking Congress to fix a poorly drafted statute, and at least one appellate panel sent its opinion to the House and Senate Judiciary Committees in the hope of inspiring Congress to amend the legislation at issue in the case.[123] Furthermore, the executive's claim that courts must dismiss all cases challenging the legality of specific government programs is also remarkable, and thus merits a similarly unusual judicial response.

Of course, the executive branch may object to sharing information concerning national security with members of Congress, just as it does to providing that information to judges and plaintiffs. But most Presidents have accepted (albeit reluctantly) that they need to keep Congress informed about executive branch programs and policies regarding national security, and they instruct their staffs to give at least some information about ongoing programs and policies to Congress. The President's staff regularly briefs members of the House and Senate Defense Committees in closed-door sessions, where they provide these committees' members with classified information that the executive branch would not similarly share with a plaintiff or a judge.[124]

Moreover, members of Congress can demand that the executive keep relevant committees informed about national security programs. For example, the National Security Act requires the executive to submit written reports to congressional intelligence committees, and these committees regularly seek information about intelligence gathering and national security issues from the executive. The current President contends, however, that he has inherent constitutional authority to withhold classified information under some circumstances. President Bush has stated that he

123. *See, e.g.*, Exxon Mobil Corp. v. Allapattah Servs., Inc., 125 S. Ct. 2611, 2624 (2005) (noting that 28 U.S.C. § 1367 may contain an "unintentional drafting gap" but concluding that "[i]f that is the case, it is up to Congress rather than the courts to fix it" (internal quotation marks omitted)); Gustafson v. Alloyd Co., 513 U.S. 561, 603-04 (1995) (Ginsburg, J., dissenting) ("If adjustment [of the statute] is in order, as the Court's opinion powerfully suggests it is, Congress is equipped to undertake the alteration." (footnote omitted)); Reves v. Ernst & Young, 494 U.S. 56, 63 n.2 (1990) ("If Congress erred, however, it is for that body, and not this Court, to correct its mistake."); Abdul-Malik v. Hawk-Sawyer, 403 F.3d 72, 76 (2d Cir. 2005) (noting that circuit courts have disagreed over the meaning of federal sentencing statutes and directing the Clerk of the Court to forward the opinion to the Chairs and Ranking Members of the House and Senate Judiciary Committees). For a more detailed discussion of the method by which courts and Congress communicate during pending cases, see *infra* Part III.B.

124. *See* P. Stephen Gidiere III, The Federal Information Manual 102-04 (2006).

would construe the National Security Act's disclosure requirement "in a manner consistent with the President's constitutional authority to withhold information the disclosure of which could impair foreign relations, [or] the national security."[125] Congress has responded to such statements by noting that, like the executive, Congress has the constitutionally assigned responsibility to safeguard the nation, and it is empowered to declare war and establish and fund intelligence gathering.[126] Although the issue is a contentious one, the executive has rarely held out against sustained congressional efforts to obtain information about the executive's national security activities.

But what should the judiciary do if the executive was able to obstruct congressional investigations? A court could inquire into the degree of the executive's cooperation with Congress by asking the executive to disclose to the court whether it has provided the information asked of it by Congress, and whether Congress is satisfied with its level of cooperation. The plaintiff's counsel might also give his or her views about the quality of congressional oversight. And members of Congress on the relevant oversight committees might choose to inform the court as to whether they are satisfied with the executive's response. The court could then weigh this information when considering whether to dismiss the case entirely or, alternatively, lift the stay and continue with the litigation.[127]

These proposed judicial communications with the other branches are not a threat to the separation of powers. Judges could only request, not demand, that Congress take up the task of executive oversight and that the executive cooperate with a congressional investigation; the other two branches are free to ignore judicial efforts to transfer executive oversight

125. Press Release, White House, President Signs Intelligence Authorization Act (Dec. 28, 2001), *available at* http://www.whitehouse.gov/news/releases/2001/12/20011228-3.html.

126. *See Disclosure of Classified Information to Congress: Hearings Before the Select Comm. on Intelligence of the U.S. Senate*, 105th Cong. 5 (1998) (statement by Sen. Richard C. Shelby) ("The issue before us is whether the Congress and the President share constitutional authority over the regulation of classified information. As one might expect, the Administration has asserted that the President has ultimate and unimpeded authority over the collection, retention, and dissemination of national security information. We disagree. While the Constitution grants the President, as Commander-in-Chief, the authority to regulate classified information, this grant of authority is by no means exclusive."); *see also* Chesney, *supra* note 2, at 61 (stating that the executive must provide some information relating to national defense and diplomacy to Congress, but noting that "the line between that which [the executive] may [withhold from Congress] and that which it may not is notoriously disputed").

127. Congress could also insist that the judicial branch hear these cases despite executive assertions of the state secrets privilege. The state secrets privilege has been described as consisting of a "potentially-inalterable constitutional core surrounded by a revisable common law shell." *See* Chesney, *supra* note 2, at 61. Accordingly, Congress could legislatively override the privilege but provide additional procedural protections to safeguard information related to national security. For example, as Professor Chesney suggests, Congress could require that such cases be heard in a classified forum akin to the Foreign Intelligence Surveillance Court. *See id.* at 63; *see also* Halpern v. United States, 258 F.2d 36 (2d Cir. 1958) (ordering that the courtroom be closed to the public in order to protect national security).

back to Congress. Moreover, these admittedly exceptional judicial referrals to Congress are justified by the executive's extraordinary demand that courts relinquish their statutory and constitutional obligation to hear challenges to executive action. Finally, the Bush Administration has suggested to the courts that the legality of its conduct in the war on terror should be resolved by the "political branches," which comes close to inviting congressional involvement in these pending cases. Under such circumstances, the judiciary is justified in bringing Congress's attention to the matter rather than simply dismissing a case Congress intended it to hear.

C. *The Judicial Response Should Congress Fail Effectively to Oversee the Executive*

Concededly, judicial efforts to focus Congress's attention on the dispute may fail. Congress may choose not to do much in the way of oversight, trusting that the executive is acting within constitutional limits and unwilling to push for detailed information about programs that concern national security. Or Congress may attempt to examine executive conduct, only to be stymied by the executive's refusal to cooperate. If Congress appears unwilling or unable to inquire into the legality of executive conduct, however, then the judiciary's obligation to review that conduct is all the stronger.

Despite the rhetoric found in many judicial decisions—most notably *Marbury v. Madison*[128]—our system of government cannot guarantee a remedy for every constitutional violation. As Professors Richard Fallon and Daniel Meltzer have written, competing values and practical considerations prevent courts from granting a full and complete relief for the abrogation of constitutional rights in certain circumstances.[129] Yet even though our constitutional structure tolerates the occasional unredressed injury, it nonetheless "demands a system of constitutional remedies adequate to keep government generally within the bounds of law."[130] Thus, the executive's assertion of the state secrets privilege in an individual personal injury case—such as *United States v. Reynolds*—calls for a different judicial response than the blanket assertion of the same privilege to prevent judicial review of entire categories of executive conduct. In *Reynolds*, the Supreme Court concluded that the plaintiffs' ability to obtain compensation for possible government negligence must be sacrificed to

128. 5 U.S. (1 Cranch) 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury . . . . The government of the United States has been emphatically termed a government of laws and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.").

129. *See* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity and Constitutional Remedies*, 104 Harv. L. Rev. 1731, 1778 (1991) ("[W]e begin by locating *Marbury*'s assertion in its historical and institutional context, within which the principle of a remedy for every rights violation cannot plausibly claim status as an unyielding imperative.").

130. *Id.* at 1778-79.

prevent the release of a document that could jeopardize national security. That calculus should come out differently when the executive is seeking to remove all of the constitutionally-provided checks on its conduct.

For these reasons, when litigants challenge an executive branch program on the ground that it constitutes an abuse of executive power, courts should hesitate to abandon the field unless Congress is willing to step in. I propose this as a general principle, however, and not an ironclad rule. In some rare circumstances, when the nation is under grave threat of imminent and wide-scale attack, the executive should be given more latitude, at least for a time, without having to explain itself. But when the executive is engaged in constitutionally questionable conduct that lasts for a period of years, and occurs during a time when the nation's populace is relatively safe, our constitutional structure demands that it be subject to oversight from either the courts or Congress.

CONCLUSION

When the executive seeks dismissal of a case on state secrets grounds, the judiciary usually reacts as if it has a binary choice: to dismiss the case, or to continue to hear it. But even if a court agrees with the executive that the subject matter of a case raises questions that cannot be answered without disclosing state secrets, the court should not assume that dismissal is its only option. There is an alternative: The judge could issue a stay and inform the parties that she will continue to abstain only if she is convinced that Congress will take back the oversight role that it delegated to the courts when it granted jurisdiction over cases challenging the legality of executive action.

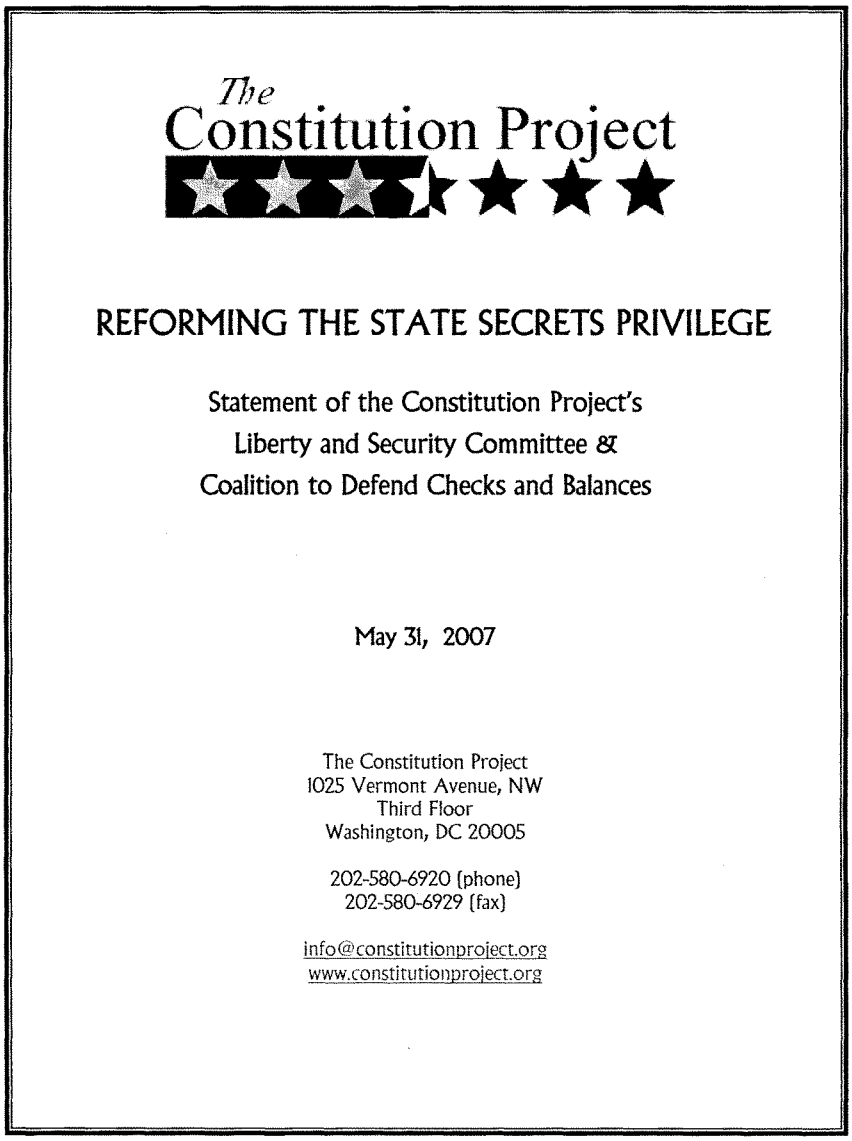
Indeed, this Essay posits that when the executive attempts to dismiss all challenges to specific executive branch programs, courts have an obligation not to abandon the field without first attempting to delegate the oversight function back to Congress. The benefit of this approach is that it defers to the executive's view that a private citizen's lawsuit should not be allowed to jeopardize national security, and it takes courts out of the untenable position of demanding disclosure of information that the executive contends would endanger the nation. Furthermore, it accepts the executive's claim that the issues at the heart of the litigation should be resolved by the political branches of government, not the courts. Yet it does so without permitting the executive to evade the oversight our tripartite system of government generally requires. Although the judiciary need not be the institution performing the checking function, it is vital that some institution does.

The principle at work here is loosely related to Justice Jackson's classic articulation of the relationship between the three branches in the *Steel Seizure* case. Justice Jackson declared, "When the President takes measures incompatible with the express or implied will of Congress, his power is at

its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."[131] Conversely, the President's power is at its broadest when he acts with Congress's imprimatur, and falls somewhere between those two poles when Congress is silent on the matter.

This Essay's proposal—that courts should first determine whether Congress is willing and able to engage in executive oversight before dismissing entire categories of cases challenging executive conduct—is rooted in the same constitutional structure of checks and balances that inspired Justice Jackson's three-tiered view of executive power. The three branches not only share power, they also share a responsibility to curb the excesses of the others. To keep this delicate balance, a court should consider whether Congress can perform that task before it bows out, and should be more reluctant to do so if Congress cannot, or if the executive is obstructing congressional oversight. In other words, courts should not give up their constitutional role as a check on the executive unless another branch that shares that role is able to take over.

131. Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 637 (1952) (Jackson, J., concurring).



REFORMING THE STATE SECRETS PRIVILEGE

Statement of the Constitution Project's
Liberty and Security Committee &
Coalition to Defend Checks and Balances

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Executive Summary*

What is the state secrets privilege? Under this privilege, the executive branch claims that the disclosure of certain evidence in court may damage national security and therefore cannot be released in litigation. Beginning with the Supreme Court decision in *United States v. Reynolds* (1953), some federal judges have treated as absolute the executive branch's assertion about dangers to national security.

Why should the privilege be limited? Unless claims about state secrets evidence are subjected to independent judicial scrutiny, the executive branch is at liberty to violate legal and constitutional rights with impunity and without the public scrutiny that ensures that the government is accountable for its actions. By accepting these claims as valid on their face, courts undermine the principle of judicial independence, the adversary process, fairness in the courtroom, and our constitutional system of checks and balances.

Significant ambiguities in the *Reynolds* decision have produced overbroad judicial readings of the state secrets privilege. Although the Supreme Court stated that judicial control over evidence in a case "cannot be abdicated to the caprice of executive officials," the Court nevertheless allowed the courts to abdicate their responsibility by its statement that:

> [W]e will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case. It may 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. When this is the case, the occasion for the privilege is appropriate, and 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.

What are some recent examples of assertions of the state secrets privilege? The state secrets privilege is currently being invoked in cases challenging the NSA eavesdropping program and in the extraordinary rendition cases of Maher Arar and Khalid El-Masri.

Can judges review classified matter without jeopardizing national security? Why is independent judicial review essential? Judges can, if necessary, review documents in private (also known as *in camera* review) without disclosing them to the public. Unless a judge independently examines the evidence claimed to be subject to the state secrets privilege, there is no basis for accepting the claim as valid. In litigation, to automatically accept an assertion as truth violates elementary principles of courtroom procedure. Review by an independent judge is especially

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* The Constitution Project sincerely thanks Coalition to Defend Checks and Balances Member Louis Fisher, Specialist in Constitutional Law, Law Library, Library of Congress, for drafting this Executive Summary to accompany the Constitution Project Statement on Reforming the State Secrets Privilege.

important when the government is the party to the case and when, if the information is not disclosed, individual rights and liberties may be abused.

Judges' acceptance of these executive branch claims as absolute reduces the public's trust and confidence in the judiciary by creating the appearance that two separate and co-equal branches of our government are instead operating as one. Judicial deference to executive claims of state secrets does not protect national security, but instead seriously weakens the interests of our country and our constitutional system of government.

History teaches that without independent judicial review of the executive branch's claim, the judge, the other parties to the case, and the public cannot know whether the claim is being asserted for legitimate reasons or to conceal embarrassment, illegality, or constitutional violations. In fact, as we now know, the documents withheld from the plaintiffs in the *Reynolds* case, which established this doctrine, themselves contained no state secrets. The executive branch misled the Supreme Court to cover up its negligence in a military airplane crash and to seek judicial endorsement of the state secrets privilege.

What Options Are Available to Courts Reviewing a State Secrets Claim? The courts have many options. In cases in which the government is a party, judges could offer the executive branch a choice between surrendering the requested documents for *in camera* inspection or forfeiting the case. In any kind of case, in exercising their independent role, judges should not consider edited documents or classified affidavits, statements, and declarations prepared by executive officials as adequate substitutes for the disputed evidence itself. If an entire document contains names, places, or other information that might jeopardize sources and methods, or present other legitimate reasons for withholding the full document from the other parties to the lawsuit, the judge – not the executive branch – should decide what type of redaction and editing will permit release of the document to the private litigant. Otherwise, the judge's independent review and authority will be replaced by the assertions of a party with an interest in shielding the information – and its own actions – from public scrutiny and accountability.

What Steps Should be Taken to Reform the Privilege? This report calls on judges to exercise their independent duty to assess the credibility and necessity of state secrets claims by the executive branch. Judges have the constitutional and legal authority to review and evaluate any evidence that the executive branch claims should be subject to the state secrets privilege. They are entrusted by the public to secure the rights of litigants and safeguard constitutional principles.

We therefore recommend that Congress conduct hearings to investigate the ways in which the state secrets privilege is asserted, and craft statutory language to clarify that judges, not the executive branch, have the final say about whether disputed evidence is subject to the state secrets privilege. This legislative action is essential to restore and strengthen the basic rights and liberties provided by our constitutional system of government, to provide fairness to parties to litigation, and to enable public scrutiny of governmental conduct and thus preserve accountability for executive actions.

REFORMING THE STATE SECRETS PRIVILEGE*

As interpreted by some courts, the state secrets doctrine places absolute power in the executive branch to withhold information to the detriment of constitutional liberties. We, the undersigned members of the Constitution Project's Liberty and Security Committee and the Project's Coalition to Defend Checks and Balances, urge that the "state secrets doctrine" be limited to balance the interests of private parties, constitutional liberties, and national security. Specifically, Congress should enact legislation to clarify the scope of this doctrine and assure greater protection to private litigants. In addition, courts should carefully review any assertions of this doctrine, and treat it as a qualified privilege, not an absolute one.

Since the terrorist attacks of September 11, 2001, the government has repeatedly asserted the state secrets privilege in court, in a variety of lawsuits alleging that its national security policies violate Americans' civil liberties. In these cases, the government has informed federal judges that litigation would necessitate disclosure of evidence that would risk damage to national security, and that consequently, the lawsuits must be dismissed. The government is presently invoking the privilege in such cases as NSA eavesdropping and the "extraordinary rendition" cases of Maher Arar and Khalid El-Masri. The fundamental issue: what constitutional values should guide a federal judge in evaluating the government's assertion?

The state secrets privilege was first recognized in the United States Supreme Court decision *United States v. Reynolds*, 345 U.S. 1 (1953). Because of ambiguities in this landmark case, federal judges have discharged their responsibilities in widely different ways. Some have insisted on examining the document *in camera* to decide whether the private party should

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* The Constitution Project sincerely thanks Louis Fisher, Specialist in Constitutional Law, Law Library, Library of Congress, for serving as the principal author of this statement and for guiding committee members to consensus on these issues. We are also grateful to Shayana Kadidal, Senior Managing Attorney, Center for Constitutional Rights; Robert Pallitto, Assistant Professor of Political Science, University of Texas at El Paso; William G. Weaver, Associate Professor, University of Texas at El Paso; and Mark S. Zaid, Krieger & Zaid, PLLC, for sharing their expertise on this subject and for their substantial assistance in the drafting of this statement.

receive the document unchanged or in some redacted form. Other judges adopt the standard of (1) "deference," (2) "utmost deference," or (3) treat the privilege as an "absolute" when appropriately invoked. The conduct of courts in these cases raises important questions about the principle of judicial independence, the concept of a neutral magistrate, fairness in the courtroom, the adversary model, and the constitutional system of checks and balances. The reforms we outline below would help to safeguard these important principles.

The Problem with *Reynolds*. The Supreme Court's 1953 ruling in *Reynolds* involved the authority of the executive branch to withhold certain documents from three widows who sued the government for the deaths of their husbands in a B-29 crash. They asked for the Air Force accident report and statements from three surviving crew members. In bringing suit under the Federal Tort Claims Act, they won in district court as well as on appeal to the U.S. Court of Appeals for the Third Circuit. Both those courts told the government that if it failed to surrender the documents, at least to the district judge to be read in chambers, it would lose the case. Under the tort claims statute, the government is liable "in the same manner" as a private individual and is entitled to no special privileges.

However, without ever looking at the report, the Supreme Court sustained the government's claim of privilege. It stated: "Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers. Yet we will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case. It may 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. When this is the case, the occasion for the privilege is appropriate, and 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." *Reynolds*, 345 U.S. at 9-10.

In deciding not to examine the report, the Court was in no position to know if there had been "executive caprice" or not. On its face, the Court's ruling marked an abdication by the judiciary to a governmental assertion. What principled objection could be raised to the executive branch showing challenged documents to a district judge in chambers? Unless an independent magistrate examined the accident report and the statements of surviving crew members, there was no way to determine whether disclosure posed a reasonable danger to national security, that the assertion of the privilege was justified, or that any jeopardy to national security existed.

Moreover, the Court's ruling left unclear the meaning of "disclosure." Why would a federal court "jeopardize the security which the privilege is meant to protect" by examining the document in private? On what ground can it be argued that federal judges lack authority, integrity, or competence to view the contents of disputed documents in their private chambers to determine the validity of the government's claim? No jeopardy to national security emerges with *in camera* inspection.

The Court advised the three widows to return to district court and depose the three surviving crew members. There is evidence that depositions were taken, but after weighing the emotional and financial costs of reviving the litigation, the women decided to settle for 75% of what they would have received under the original district court ruling. As noted below, it was revealed years later that there were no state secrets to protect and that the government was simply seeking to avoid releasing embarrassing information.

Application of *Reynolds*. The inconsistent signals delivered in *Reynolds* regarding judicial responsibility, reappear in contemporary cases. For example, on May 12, 2006, a district judge held that the state secrets privilege was validly asserted in a civil case seeking damages for "extraordinary rendition" and torture based on mistaken identity, and on March 2, 2007, this decision was upheld on appeal. Khalid El-Masri sued the government on the ground that he had been illegally detained as part of the CIA's "extraordinary rendition" program, tortured,

and subjected to other inhumane treatment. His treatment resulted from U.S. government officials mistakenly believing that he was someone else.

The district court offered two conflicting frameworks. On the one hand, the court noted that it is the responsibility of a federal judge "to determine whether the information for which the privilege is claimed qualifies as a state secret. Importantly, courts must not blindly accept the Executive Branch's assertion to this effect, but must instead independently and carefully determine whether, in the circumstances, the claimed secrets deserve the protection of the privilege. . . . In those cases where the claimed state secrets are at the core of the suit and the operation of the privilege may defeat valid claims, courts must carefully scrutinize the assertion of the privilege lest it be used by the government to shield 'material not strictly necessary to prevent injury to national security.'" *El-Masri v. Tenet*, 437 F.Supp.2d 530, 536 (E.D. Va. 2006), quoting *Ellsberg v. Mitchell*, 709 F.2d 51, 58 (D.C. Cir. 1983).

Those passages suggest an independent role for the judiciary. However, the district court also offered reasons to accept executive claims. When undertaking an inquiry into state secret assertions, "courts must also bear in mind the Executive Branch's preeminent authority over military and diplomatic matters and its greater expertise relative to the judicial branch in predicting the effect of a particular disclosure on national security." *Id.* The state secrets privilege "is in fact a privilege of the highest dignity and significance." *Id.* The state secrets privilege "is an evidentiary constitutional authority over the conduct of this country's diplomatic and military affairs and therefore belongs exclusively to the Executive Branch." *Id.* at 535. The court stated that, "unlike other privileges, the state secrets privilege is absolute and therefore once a court is satisfied that the claim is validly asserted, the privilege is not subject to a judicial balancing of the various interests at stake." *Id.* at 537. Ultimately, the court upheld the government's claim of privilege and dismissed the case. On appeal, the Fourth Circuit affirmed the District Court's ruling, noting that "in certain circumstances a court may conclude that an explanation by the Executive of why a question cannot be answered would

itself create an unacceptable danger of injurious disclosure." *El-Masri v. United States*, 479 F.3d 296, 305 (4th Cir. 2007). In these situations, the Fourth Circuit stated, "a court is obliged to accept the executive branch's claim of privilege without further demand." *Id.* at 306.

Judicial Competence. The remarks above by both the district court and the Fourth Circuit in *El-Masri* imply that in national security matters the federal judiciary lacks the competence to independently judge the merits of state secrets assertions. The *El-Masri* district court cited this language from a 1948 Supreme Court decision: "The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret." 437 F.Supp.2d at 536 n.7, quoting *C. & S. Air Lines v. Waterman S.S. Corp.* 333 U.S. 103, 111 (1948).

We object to this notion that the federal courts lack the competence to assess state secrets claims. First, nothing in state secrets cases involves publishing information "to the world." Second, the capacity of the Supreme Court in 1948 to independently examine and assess classified documents has been vastly enhanced over the past half-century by the 1958 amendments to the Housekeeping Statute, the 1974 amendments to the Freedom of Information Act (FOIA), the 1978 creation of the Foreign Intelligence Surveillance Act (FISA) Court, and the Classified Information Procedures Act (CIPA) of 1980. Louis Fisher, IN THE NAME OF NATIONAL SECURITY 124-64 (2006). Third, long before those enactments, federal courts have always retained an independent role in assuring that the rights of defendants are not nullified by claims of "state secrets." The 1807 trial of Aaron Burr illustrates this point. The court understood that Burr, having been publicly accused of treason on the basis of certain letters in the hands of the Jefferson administration, and therefore facing the death sentence if convicted, had every right to gain access to those documents to defend himself. *Id.* at 212-20. Thus, courts are fully competent to review and evaluate the evidence supporting a claim of

state secrets. If in such a case the government decides that the documents are too sensitive to release, even to the trial judge, the appropriate consequence in a criminal trial is for the government to drop the charges.

The Deference Standard. Another ground upon which courts have erroneously relied in upholding government claims of state secrets has been the deference standard from administrative law. In this context, the Supreme Court's 1984 decision in *Chevron* adopted the principle that when a federal court reviews an agency's construction of a statute, and the law is silent or ambiguous about the issue being litigated, agency regulations are to be "given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984). If the agency's interpretation is reasonable it is "entitled to deference." *Id.* at 865.

The *Chevron* model has no application to the state secrets privilege. When application of the state secrets doctrine is litigated in court, this is not a situation in which Congress has delegated broad authority to an agency. Nor is there any opportunity, as there is in administrative law, for Congress to reenter the picture by enacting legislation that overrides an agency interpretation or by passing restrictive appropriations riders. Moreover, agency rulemaking invites broad public participation through the notice-and-comment procedure. By definition, the public is barred from reviewing executive claims of state secrets. Agency rulemaking is subject to public congressional hearings, informal private and legislative pressures, and the restrictive force of legislative history. Those mechanisms are absent from litigation involving state secrets. When the state secrets privilege is invoked, the sole check on arbitrary and possibly illegal executive action is the federal judiciary.

***Ex Parte* Review.** The deference standard is poorly suited for state secrets cases for another reason. When the executive branch agrees to release a classified or secret document to a federal judge, it will be read not only in private but *ex parte*, without an opportunity for private litigants to examine the document. The judge may decide to release the document to the

private parties, in whole or in redacted form, but the initial review will be by the judge. This procedure already presents the appearance of serious bias toward the executive branch and its asserted prerogatives. To add to that advantage the standard of "deference," "utmost deference," or treating the state secrets privilege as an "absolute" makes the federal judiciary look like an arm of the Executive. It undermines judicial independence, the adversary process, and fairness to private litigants. When the state secrets privilege is initially invoked, no federal judge can know whether it is being asserted for legitimate reasons or to conceal embarrassment, illegality, or constitutional violations.

Who Decides a Privilege? In his classic 1940 treatise on evidence, John Henry Wigmore recognized that a state secrets privilege exists covering "matters whose disclosure would endager [sic] the Nation's governmental requirements or its relations of friendship and profit with other nations." 8 Wigmore, EVIDENCE § 2212a (3d ed. 1940). Yet he cautioned that this privilege "has been so often improperly invoked and so loosely misapplied that a strict definition of its legitimate limits must be made." *Id.* When he asked who should determine the necessity for secrecy -- the executive or the judiciary -- he concluded it must be the court: "Shall every subordinate in the department have access to the secret, and not the presiding officer of justice? Cannot the constitutionally coördinate body of government share the confidence? . . . The truth cannot be escaped that a Court which abdicates its inherent function of determining the facts upon which the admissibility of evidence depends will furnish to bureaucratic officials too ample opportunities for abusing the privilege . . . Both principle and policy demand that the determination of the privilege shall be for the Court." § 2378.

When the Third Circuit decided the *Reynolds* case in 1951, it warned that recognizing a "sweeping privilege" against the disclosure of sensitive or confidential documents is "contrary to sound public policy" because it "is but a small step to assert a privilege against any disclosure of records merely because they might prove embarrassing to government officers." 192 F.2d at 995. The district judge directed the government to produce the B-29 documents for his

personal examination, stating that the government was "adequately protected" from the disclosure of any privileged matter. *Id.* at 996. To permit the executive branch to conclusively determine the government's claim of privilege "is to abdicate the judicial function and permit the executive branch of the Government to infringe the independent province of the judiciary as laid down by the Constitution." *Id.* at 997. Moreover: "Neither the executive nor the legislative branch of the Government may constitutionally encroach upon the field which the Constitution has reserved for the judiciary by transferring to itself the power to decide justiciable questions which arise in cases or controversies submitted to the judicial branch for decision. . . . The judges of the United States are public officers whose responsibility under the Constitution is just as great as that of the heads of the executive departments." *Id.*

Judges are entrusted with the duty to secure the rights of litigants in court cases. Beyond this protection to individual parties, however, lies a broader institutional interest. Final say on the claim of a state secret must involve more parties than just the executive branch. Unchecked and unexamined assertions of presidential power have done great damage to the public interest and to constitutional principles.

From Rule 509 to 501. In the late 1960s and early 1970s, there were efforts to statutorily define the state secrets privilege. An advisory committee appointed by Chief Justice Earl Warren completed a preliminary draft of proposed rules of evidence in December 1968. Among the proposed rules was Rule 5-09, later renumbered 509. It defined a secret of state as "information not open or theretofore officially disclosed to the public concerning the national defense or the international relations of the United States." Here "disclosure" meant release to the public. Nothing in that definition prevented the executive branch from releasing state secrets to a judge to be read in chambers. Louis Fisher, "State Your Secrets," *Legal Times*, June 26, 2006, at 68; Fisher, IN THE NAME OF NATIONAL SECURITY, at 140-45.

The advisory committee concluded that if a judge sustained a claim of privilege for a state secret involving the government as a party, the court would have several options. If the claim

deprived a private party of material evidence, the judge could make "any further orders which the interests of justice require, including striking the testimony of a witness, declaring a mistrial, finding against the government upon an issue as to which the evidence is relevant, or dismissing the action." The Justice Department vigorously opposed the draft and wanted the proposed rule changed to recognize that the executive's classification of information as a state secret was final and binding on judges. A revised rule was released in March 1972, eliminating the definition of "a secret of state" but keeping final control with the judge. A third version was presented to Congress the next year, along with other rules of evidence. Congress concluded that it lacked time to thoroughly review all the rules within 90 days and vote to disapprove particular ones. It passed legislation to prevent any of the proposed rules from taking effect.

When Congress passed the rules of evidence in 1975, it included Rule 501 on privileges. It does not recognize any authority on the part of the executive branch to dictate the reach of a privilege and makes no mention of state secrets. Rule 501 expressly grants authority to the courts to decide privileges. The rule, still in effect, states: "Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof *shall be governed by the principles of the common law as they may be interpreted by the courts of the United States* in the light of reason and experience" (emphasis added). One exception expressly stated in Rule 501 concerns civil actions at the state level where state law supplies the rule of decision. Advocates of executive power might read the language "[e]xcept as otherwise required by the Constitution" to open the door to claims of inherent presidential power under Article II. However, even if this interpretation supports the existence of a state secrets privilege, it cannot overcome the rule that courts must assess and determine whether the privilege applies in a given case.

Agency Claims. The principle of judicial authority over rules of evidence included in Rule 501 appeared in a dispute that reached the Court of Federal Claims in *Barlow v. United States*, 2000

U.S. Claims LEXIS 156 (2000). On February 10, 2000, then-CIA Director George Tenet signed a formal claim of state-secrets privilege, but added: "I recognize it is the Court's decision rather than mine to determine whether requested material is relevant to matters being addressed in litigation." Tenet's statement reflects executive subordination to the rule of law and undergirds the constitutional principle of judicial independence. Most agency claims and declarations, however, simply assert the state secrets privilege without recognizing any superior judicial authority in deciding matters of relevancy and evidence. When an agency head signs a declaration invoking the privilege, is there any reason to believe the agency has complied with the procedural safeguard discussed in *Reynolds* that the official has actually examined the document with any thoroughness and reached an independent, informed decision? Agencies should not be permitted to police themselves in determining whether the state secrets privilege properly applies in a given case. As Tenet recognized, it is for the courts to decide whether the requested materials should be disclosed.

Aftermath of *Reynolds*. In its 1953 decision, the Court referred to the secret equipment on the B-29: "On the record before the trial court it appeared that this accident occurred to a military plane which had gone aloft to test secret electronic equipment. Certainly 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." In fact, the report was never given to the district court and there were no grounds for concluding that the report made any reference to secret electronic equipment. The Court was content to rely on what "appeared" to be the case, based on government assertions in a highly ambiguous statement by Secretary of the Air Force Thomas K. Finletter. His statement referred to the secret equipment and to the accident report, but never said clearly or conclusively that the report actually mentioned or discussed the equipment.

The Air Force declassified the accident report in the 1990s. Judith Loether, daughter of one of the civilian engineers who died on the plane, located the report during an Internet search in

February 2000. Indeed the report does not discuss the secret equipment. As a result, the three families returned to court in 2003 on a petition for *coram nobis*. Under this procedure, they charged that the judiciary had been misled by the government and there had been fraud against the courts. As recounted in Fisher, IN THE NAME OF NATIONAL SECURITY, the families lost in district court and in the Third Circuit. On May 1, 2006, the Supreme Court denied *certiorari*. The Third Circuit decided solely on the ground of "judicial finality." That is certainly an important principle. Not every case can be relitigated. However, the Third Circuit gave no attention to another fundamental value. The judiciary cannot allow litigants to mislead a court so that it decides in a manner it would not have if in possession of correct information. Especially is that true when the litigant is the federal government, which is in court more than any other party.

On the basis of the ambiguous Finletter statement produced by the executive branch, the Supreme Court assumed that the claim of state secrets had merit. By failing to examine the document, the Court risked being fooled. As it turned out, it was. Examination of the declassified accident report reveals no military secrets. It contained no discussion of the secret equipment being tested. The government had motives other than protecting national security, which may have ranged from withholding evidence of negligence about a military accident to using the B-29 case as a test vehicle for establishing the state secrets privilege.

What happened in *Reynolds* raises grave questions about the capacity and willingness of the judiciary to function as a separate, trusted branch in the field of national security. Courts must take care to restore and preserve the integrity of the courtroom. To protect its independent status, the judiciary must have the capacity and determination to examine executive claims. Otherwise there is no system of checks and balances, private litigants will have no opportunity to successfully contest government actions, and it will appear that the executive and judicial branches are forming a common front against the public on national security cases. The fact that the documents in the B-29 case, once declassified, contained no state secrets produced a

stain on the Court's reputation and a loss of confidence in the judiciary's ability to exercise an independent role.

Options Available to Judges. As with the district court and the Third Circuit in the original *Reynolds* case, federal courts can present the government with a choice: either surrender a requested document to the district judge for *in camera* inspection, or lose the case. That is an option when private litigants sue the government, as with the B-29 case. When the government sues a private individual or company, assertion of the state secrets privilege can also come at a cost to the government. In criminal cases, it has long been recognized that if federal prosecutors want to charge someone with a crime, the defendant has a right to documents needed to establish innocence. The judiciary should not defer to executive departments and allow the suppression of documents that might tend to exculpate. As noted by the Second Circuit in 1946, when the government "institutes criminal procedures in which evidence, otherwise privileged under a statute or regulation, becomes importantly relevant, it abandons the privilege." *United States v. Beekman*, 155 F.2d 580, 584 (2d Cir. 1946).

When the government initiates a civil case, defendants also seek access to federal agency documents. Lower courts often tell the government that when it brings a civil case against a private party, it must be prepared to either surrender documents to the defendant or drop the charges. Once a government seeks relief in a court of law, the official "must be held to have waived any privilege, which he otherwise might have had, to withhold testimony required by the rules of pleading or evidence as a basis for such relief." *Fleming v. Bernardi*, 4 F.R.D. 270, 271 (D. Ohio 1941).

If the government fails to comply with a court order to produce documents requested by defendants, the court can dismiss the case. The government "cannot hide behind a self-erected wall [of] evidence adverse to its interest as a litigant." *NLRB v. Capitol Fish Co.*, 294 F.2d 868, 875 (5th Cir. 1961). Responsibility for deciding questions of privilege rests with an impartial

independent judiciary, not the party claiming the privilege, and certainly not when the party is the executive branch.

Whether the government initiates the suit or is sued by a private party, the procedure followed *in camera* to evaluate claims of state secrets should be the same. Federal courts should receive and review the entire document, unredacted. They should not be satisfied with a redacted document or with classified affidavits, statements, and declarations that are intended to be substitutes for the disputed document. If the entire document contains names, places, or other information that might jeopardize sources and methods or present other legitimate reasons for withholding the full document from the private party, the judge should decide the redaction and editing needed to permit the balance to be released to the private litigants.

Qualified, Not Absolute. The state secrets privilege should be treated as qualified, not absolute. Otherwise there is no adversary process in court, no exercise of judicial independence over available evidence, and no fairness accorded to private litigants who challenge the government. These concerns were well stated by the U.S. Court of Appeals for the D.C. Circuit in a 1971 case in which the court ordered the government to produce documents for *in camera* review to assess a claim of executive privilege. The D.C. Circuit argued that "[a]n essential ingredient of our rule of law is the authority of the courts to determine whether an executive official or agency has complied with the Constitution and with the mandates of Congress which define and limit the authority of the executive." Claims of executive power "cannot override the duty of the court to assure than an official has not exceeded his charter or flouted the legislative will." The court proceeded to lay down this warning: "no executive official or agency can be given absolute authority to determine what documents in his possession may be considered by the court in its task. Otherwise the head of an executive department would have the power on his own say so to cover up all evidence of fraud and corruption when a federal court or grand jury was investigating malfeasance in office, and this is not the law." *Committee*

for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 783, 794 (D.C. Cir. 1971). See Louis Fisher, "State Secrets Privilege: Invoke It at a Cost," NATIONAL LAW JOURNAL, July 31, 2006, at 23.

Legislative Action. We recommend that the responsible oversight committees in Congress, such as those handling issues relating to intelligence, judiciary, government reform and homeland security, conduct public hearings and craft statutory language designed to clarify judicial authority over civil litigation involving alleged state secrets. In the past, as with the 1974 amendments to FOIA, the creation of the FISA Court, and enactment of CIPA in 1980, Congress has recognized major responsibilities of federal judges in the area of national security. Judges now regularly review and evaluate highly classified information and documents to a degree that would have been unheard of even a half century ago. To maintain our constitutional system of checks and balances, and especially to assure that fairness in the courtroom is accorded to private civil litigants, Congress should adopt legislation clarifying that civil litigants have the right to reasonably pursue claims in the wake of the invocation of the state secrets privilege. These hearings are important to restore and strengthen the basic rights and liberties provided by our constitutional system of government.

Conclusion. For the reasons outlined above, application of the "state secrets doctrine" should be strictly limited. We urge that Congress enact legislation to clarify the narrow scope of this doctrine and safeguard the interests of private parties. In addition, courts should carefully assess any executive claims of state secrets, and treat this doctrine as a qualified privilege, not an absolute one. Such reforms are critical to ensure the independence of our judiciary and to provide a necessary check on executive power.

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Neal Sonnett, Chair, American Bar Association Task Force on Treatment of Enemy Combatants and Task Force on Domestic Surveillance in the Fight Against Terrorism

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Statement by Louis Fisher

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Appearing before the

Senate Committee on the Judiciary

"Examining the State Secrets Privilege: Protecting National Security While Preserving Accountability"

February 13, 2008

Mr. Chairman, thank you for inviting me to testify on the "state secrets privilege." I want to express my appreciation to Senators Kennedy and Specter for their leadership in drafting remedial legislation, S. 2533. It is a very thoughtful, constructive bill. The state secrets privilege is now a central issue and Congress is the appropriate branch of government to supply much needed procedures and governing principles.

My interest in state secrets is a natural one. For the past 38 years I have helped Congress with separation of power issues, working first with Senator Sam Ervin in the early 1970s on the impoundment of funds dispute. In recent decades I have focused my research on questions of presidential power in the field of national security. My book on the state secrets case, *United States* v. *Reynolds* (1953), was published in 2006 and I have worked closely with the Constitution Project on its efforts to reform the state secrets privilege.[1]

What Constitutional Principles Guide Us?

Reforming the state secrets privilege is necessary to protect constitutional principles, particularly the system of checks and balances. It is critical that we be able to rely on an independent judiciary to weigh the competing claims of litigants and preserve the adversary process. No litigant, including the executive branch, should be presumed in advance to be superior to another. A sense of fairness in the courtroom is essential in protecting the integrity and credibility of the judiciary.

We all understand the need to protect state secrets and recognize an appropriate role for the state secrets privilege. The U.S. Code is filled with penalties to be applied to those who misuse classified information. That value, however, is balanced by another. We know that the executive branch regularly overclassifies documents. We have seen documents stamped "secret" and "top secret" that, once released, should never have been classified in the first place. Moreover, whichever party is in power, the executive branch has a pattern of presenting false and unreliable information to the judiciary. The Japanese-American cases of 1943-44 and the Pentagon Papers Case of 1971 are examples of administrations making misrepresentations to federal judges. Other countries, such as Canada, recognize that there is a natural tendency for executive officials to exaggerate the sensitivity of government documents in order to hide embarrassments (Appendix A).

Some court decisions and private studies date the state secrets privilege to the Aaron Burr trial of 1807 and the *Totten* case of 1875. For reasons I provide at the end of this statement, those precedents have no application to the kinds of state secrets cases that concern us today and that prompted the need for this hearing and a legislative remedy (Appendix B).

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[1] Louis Fisher, In the Name of National Security: Unchecked Presidential Power and the *Reynolds* Case (2006); The Constitution Project, "Reforming the State Secrets Privilege," May 31, 2007, available at http://www.constitutionproject.org/pdf/Reforming_the_State_Secrets_Privilege_Statement1.pdf

How the Judiciary was Misled in *Reynolds*

The executive branch made misrepresentations in *United States* v. *Reynolds* (1953), the very case in which the Supreme Court first recognized the state secrets privilege. In that lawsuit, the widows of three civilian engineers killed in the crash of a B-29 sought production of an Air Force accident report. The trial court and the Third Circuit gave the government a choice: either turn over the requested documents to the trial judge, to be read in chambers, or you lose the case. The lower courts understood that Congress, in the Federal Tort Claims Act, had established the policy that when private individuals sue the United States, the government is to be treated like any private party. When the government chose to withhold the documents, the district court and the Third Circuit ruled in favor of the three widows (Appendix C).

Those decisions were reversed by the Supreme Court, which produced a decision with many inconsistent principles. It claimed that judicial control over evidence "cannot be abdicated to the caprice of executive officers," but did precisely that by holding for the government without ever looking at the disputed documents, including the accident report. Instead, the Court relied entirely on assertions by executive officials about the content of the documents (Appendix D). We now know, by looking at the documents, that they contain no state secrets (Appendix E). The Court was misled by the executive branch and allowed itself to be misled.

Deference?

In state secrets cases, federal judges have at times treated executive assertions about state secrets with "deference" or "utmost deference." Either standard undermines the principle of judicial independence, the essential safeguard of checks and balances, and the right of private litigants to have a fair hearing in court. Unless federal judges look at disputed documents, we do not know if national security interests are actually at stake or whether the administration seeks to conceal not only embarrassments but violations of law.

Executive officials have unquestioned expertise and experience in the field of national security, but they also have a record of making misleading and false claims to the public, to Congress, and the courts. Executive claims inevitably have a quality of self-interest, as would be expected of any litigant. The duty of a federal court is to assure that all litigants to a lawsuit are properly heard and that the judge is sufficiently informed before reaching a judgment. The executive branch already has a decided advantage in state secrets cases when judges look at documents *in camera* and *ex parte*, with private parties and their counsel excluded. There is a need to restore the independence and integrity of court proceedings when state secrets are involved. As noted in the statement by William Webster, former CIA Director, FBI Director, and federal judge: "It is judges, more so than executive branch officials, who are best qualified to balance the risks of disclosing evidence with the interests of justice. . . . Granting executive branch officials

unchecked discretion to determine whether evidence should be subject to the state secrets privilege provides too great a temptation for abuse."[2]

There have been many state secrets cases over the years. The stakes today are much higher. Following the terrorist attacks of 9/11, the administration has invoked the state secrets privilege to block efforts in court by private litigants who claim that the government, in such cases as NSA surveillance and extraordinary rendition, has violated statutes, treaties, and the Constitution. The use of the privilege is no longer limited to efforts to prohibit disclosure of particular documents, as in the *Reynolds* case. It is now relied on to bar challenges to government national security programs. The executive branch argues that the President possesses certain "inherent" powers in times of emergency that override and countervail limits set by the other branches. Even if it appears that the administration has acted illegally, the executive branch advises federal judges that a case cannot allow access to secret documents without jeopardizing national security.

Deference has several meanings. It can imply a partiality and favoritism toward someone or an agency. That should not be the position of federal courts in state secrets cases. It is has been suggested that the proper standard for deference is the *Chevron* standard, used by courts to review the reasonableness of agency regulations. Yet unlike the field of administrative law, in which Congress plays an active role in monitoring and checking executive actions, the sole check over state secrets is the judiciary. State secrets are not part of an open, public political process, as is the case with agency regulations.

Deference has a second meaning: indicating respect toward a party. That is the appropriate posture for the courts in state secrets cases, respect not only toward the executive branch but respect toward private parties bringing a case.

Defining "State Secret"

These comments lead me to some thoughts about the definition of "state secret" that appears in S. 2533. Section 4051 provides: "In this chapter, the term 'state secret' refers to any information that, if disclosed publicly, would be reasonably likely to cause significant harm to the national defense or foreign relations of the United States." Even with these qualifiers ("reasonably likely" and "significant harm"), I think the definition favors executive power over private plaintiffs. Few judges, reading this definition, will feel comfortable in substituting their opinions about national defense or foreign relations for those of the executive branch. The very solid sections later in the bill, giving judges access to evidence and establishing procedures for redacted and non-privileged substitutes, do not erase the advantage the definition gives to the executive branch. As a result, the principles of judicial independence, checks and balances, and fairness in the courtroom are endangered.

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[2] Statement of William H. Webster, submitted to the Senate Committee on the Judiciary, February 13, 2008, at 2.

I would prefer to add a second sentence to the definition: "The assertion of a state secret by the executive branch is to be tested by independent judicial review." I think those two sentences accurately reflect the content and purpose of the bill. Courts would be directed to treat executive claims about state secrets initially as an assertion, subject to independent judicial analysis. This definition protects the integrity of the courtroom and gives private parties the hope of fair treatment. Even those who generally support a broad view of executive power over state secrets, such as recent testimony by Patrick Philbin, recognize that the "mere assertion of the privilege by the Executive does not require a court to accept without question that the material involved is a state secret."[3]

Immunity?

I would also like to see a third sentence added to the definition: "The 'state secrets privilege' may not shield illegal or unconstitutional activities." We all recognize the need for state secrets. I see no reason why the state secrets privilege should sanction violations of statutes, treaties, or the Constitution (violations either by the government or by private parties). If I read Section 4055 of S. 2533 correctly, it seems to open the possibility that the state secrets privilege could be used to shield and immunize illegal conduct. The section authorizes a federal court to dismiss a claim or counterclaim brought by a private party against the government if continuing with the litigation "in the absence of the privileged material evidence would substantially impair the ability of a party to pursue a valid defense to the claim or counterclaim." The language appears to allow private parties like the telecoms to violate FISA or other laws and be immunized on the ground that the existence of state secrets in the case prevents them from mounting a valid defense. Is that the intent or effect of the bill?

Conclusions

Our experience with state secrets cases underscores the need for judicial independence in assessing executive claims. Assertions are assertions, nothing more. Judges need to look at disputed documents and not rely solely on how the executive branch characterizes them. Affidavits and declarations signed by executive officials, even when classified, are not sufficient.

For more than fifty years, lower courts have tried to apply the inconsistent principles announced by the Supreme Court in *Reynolds*. Congress needs to enact statutory standards to restore judicial independence, provide effective checks against executive mischaracterizations and abuse, and strengthen the adversary process that we use to pursue truth in the courtroom. Otherwise, private plaintiffs have no effective way to challenge the government through lawsuits that might involve sensitive documents or evidence. Judges, not the executive branch, must have the final say about whether disputed evidence is subject to the state secrets privilege.

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[3] Prepared Statement by Patrick F. Philbin, former Associate Deputy Attorney General, Department of Justice, "Oversight Hearing on the Reform of State Secrets," House Committee on the Judiciary, Subcommittee on the Constitution, Civil Rights, and Civil Liberties, January 29, 2008, at 6.

Congress has constitutional authority to provide new guidelines for the courts. Article III, section 2, of the Constitution specifically grants Congress the power to enact "regulations" regarding the jurisdiction of federal courts. Article I empowers Congress to "constitute Tribunals inferior to the supreme Court" and to enact all laws necessary and proper to carry into effect that power. Congress has full authority to adopt rules of evidence and to assure private parties that they have a reasonable opportunity to bring claims in court. What is at stake is more than the assertion by the executive branch regarding state secrets. Congress has a duty to protect the health of a political system that depends on separation of powers, checks and balances, and safeguards to individual rights.

In the past-half century, Congress has repeatedly passed legislation to fortify judicial independence in cases involving national security and classified information. Federal judges now gain access to and make judgments about highly sensitive documents. Congressional action with the FOIA amendments of 1974, the FISA statute of 1978, and the CIPA statute of 1980 were conscious decisions by Congress to empower federal judges to review and evaluate highly classified information. Congress now has an opportunity to pass effective state secrets legislation.

Appendix A:
Concealing Executive Mistakes

Administrations have invoked the claim of state secrets to hide misrepresentations and falsehoods. In the Japanese-American cases of 1943 and 1944, the Roosevelt administration told federal courts that Japanese-Americans were attempting to signal offshore to Japanese vessels in the Pacific, providing information to support military attacks along the coast. Analyses by the Federal Bureau of Investigation and the Federal Communications Commissions disproved those assertions by the War Department. Justice Department attorneys recognized that they had a legal obligation to alert the Supreme Court to false accusations and misconceptions, but the footnote designed for that purpose was so watered down that Justices could not have understood the extent to which they had been misled. Scholarship and archival discoveries in later years uncovered this fraud on the court and led to coram *nobis* (fraud against the court) lawsuit that reversed the conviction of Fred Korematsu.[4]

A second *coram nobis* case was brought by Gordon Hirabayashi, who had been convicted during World War II for violating a curfew order. The Justice Department told the Supreme Court in 1943 that the exclusion of everyone of Japanese ancestry from the West Coast was due solely to military necessity and the lack of time to separate loyal Japanese from those who might be disloyal. The Roosevelt administration did not disclose to the Court that a report by General John L. DeWitt, the commanding general of the Western Defense Command, had taken the position that because of racial ties, filial

[4] Korematsu v. United States, 584 F.Supp. 1406 (D. Cal. 1984). See Louis Fisher, In the Name of National Security: Unchecked Presidential Power and the *Reynolds* Case 172 (2006).

piety, and strong bonds of common tradition, culture, and customs, it was impossible to distinguish between loyal and disloyal Japanese-Americans. To General DeWitt, there was no "such a thing as a loyal Japanese."[5] Because this racial theory had been withheld from the courts, Hirabayashi's conviction was reversed in the 1980s.[6]

Insights into executive secrecy also come from the Pentagon Papers Case of 1971. This was not technically a state secrets case. It was primarily an issue of whether the Nixon administration could prevent newspapers from continuing to publish a Pentagon study on the Vietnam War. Solicitor General Erwin N. Griswold warned the Supreme Court that publication would pose a "grave and immediate danger to the security of the United States" (with "immediate" meaning "irreparable"). Releasing the study to the public, he warned the Court, "would be of extraordinary seriousness to the security of the United States" and "will affect lives," the "termination of the war," and the "process of recovering prisoners of war." In an op-ed piece, published in 1989, he admitted that he had never seen "any trace of a threat to the national security" from the publication and that the principal concern of executive officials in classifying documents "is not with national security, but rather with governmental embarrassment of one sort or another."[7]

During a October 18, 2007 hearing before the House Foreign Affairs and Judiciary subcommittees, Kent Roach of the University of Toronto law school reflected on similar problems in Canada of executive misuse of secrecy claims. He served on the advisory committee that investigated the treatment by the United States of Maher Arar, who was sent to Syria for interrogation and torture. Mr. Roach said the experience of the Canadian commission "suggests that governments may be tempted to make overbroad claims of secrecy to protect themselves from embarrassment and to hinder accountability processes." The commission concluded that much of the information about contemporary national security activities "can be made public without harming national security." A court decision in Canada authorized the release "of the majority of disputed passages."[8] The Royal Canadian Mounted Police (RCMP) described Arar and his wife as "Islamic Extremist individuals suspected of being linked to the Al Qaeda terrorist movement." The Canadian commission concluded that the RCMP "had no basis for this description."[9]

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[5] Hirabayashi v. United States, 627 F.Supp. 1445, 1452 (W.D. Wash. 1986); Fisher, In the Name of National Security, at 173.

[6] Hirabayashi v. United States, 828 F.2d 591 (9th Cir. 1987).

[7] Erwin N. Griswold, "Secrets Not Worth Keeping," Washington Post, February 15, 1989, at A25; Fisher, In the Name of National Security, at 154-57.

[8] Kent Roach, Professor of Law and Prichard and Wilson Chair in Law and Public Policy, Witness Statement for Appearance before the House Foreign Affairs Subcommittees on International Organizations, Human Rights and Oversight and House Judiciary's Subcommittee on the Constitution, Civil Rights, and Civil Liberties, "Rendition to Torture: The Case of Maher Arar," October 18, 2007, at 2.

[9] Id. at 3.

Appendix B
Aaron Burr and *Totten*

There are many reasons why the Aaron Burr trial of 1807 has no application to current state secrets cases. A main reason is that he was tried in a criminal case for treason. Lawsuits over state secrets are civil cases. It is true that at one point the Jefferson administration claimed that some of the letters sought by Burr for his defense contained "state secrets," but the administration and the court understood that a defendant in a criminal case had a right to gain access to evidence used against him. If the government declines to surrender the evidence, it must drop the charges against the defendant. The administration took steps to place the documents in the hands of the court and his attorneys. In the end, Burr was found not guilty.[10]

Totten involves a very narrow and special category of cases where individuals enter into secret agreements with the government to spy. President Lincoln had agree to a contract with William A. Lloyd to have him proceed south and collect data on the number of Confederate troops stationed in different places, plans of forts and fortifications, and other information that might be useful to the Union government. For his services, he was to be paid $200 a month, but he received funds only to cover his expenses. His heirs tried to collect for the monthly allowance. The Supreme Court held that any individual who enters into a secret contract cannot expect relief from the courts.[11] A distinction exists between ordinary contracts (enforceable in court) and secret contracts (which are not). The *Totten* type of case is not justiciable; state secrets cases are.[12]

Totten was recently at issue in the case of *Tenet* v. *Doe* (2005).[13] Once again private parties alleged that they had not received promised assistance for espionage work. The Court found that the lawsuit was barred by *Totten*. In the current NSA cases, there have been arguments that the telecoms had entered into a secret espionage agreement with the government, but in the *Totten/Tenet* cases the private parties are plaintiffs; the telecoms are defendants.[14]

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[10] Fisher, In the Name of National Security, at 212-20.

[11] Totten v. United States, 92 U.S. 105, 107 (1875).

[12] Fisher, In the Name of National Security, at 221-27.

[13] 544 U.S. 1 (2005).

[14] *Totten* "precludes judicial review in cases such as respondents' [plaintiffs] where success depends upon the existence of their secret espionage relationship with the Government." 544 U.S. at 8.

Appendix C
Reynolds: Trial Court and Third Circuit

The pattern of misrepresentations by executive officials described above applies to the Supreme Court decision that first recognized the state secrets privilege, *United States* v. *Reynolds* (1953). On October 6, 1948, a B-29 plane exploded over Waycross, Georgia, killing five of eight crewmen and four of the five civilian engineers who were assisting with secret equipment on board. Three widows of the civilian engineers sued the government under the recently enacted Federal Tort Claims Act of 1946. Under that statute, Congress established the policy that when individuals bring lawsuits the federal government is to be treated like any private party. The United States would be liable in respect of such claims "in the same manner, and to the same extent as a private individual under like circumstances, except that the United States shall not be liable for interest prior to judgment, or for punitive damages."[15] Thus, private parties who sued the government were entitled to submit a list of questions (interrogatories) and request documents. The wives asked for the statements of the three surviving crewmen and the official accident report.

District Judge William H. Kirkpatrick of the Eastern District of Pennsylvania directed the government to produce for his examination the crew statements and the accident report. When the government failed to release the documents for the court's inspection, he ruled in favor of the widows.[16] The Third Circuit upheld his decision. The appellate court said that "considerations of justice may well demand that the plaintiffs should have had access to the facts, thus within the exclusive control of their opponent, upon which they were required to rely to establish their right of recovery."[17] In so deciding, the Third Circuit supported congressional policy expressed in the Federal Tort Claims Act and the Federal Rules of Civil Procedure, all designed to give private parties a fair opportunity to establish negligence in tort cases. Because the government had consented to be sued as a private person, whatever claims of public interest might exist in withholding accident reports "must yield to what Congress evidently regarded as the greater public interest involved in seeing that justice is done to persons injured by governmental operations whom it has authorized to enforce their claims by suit against the United States."[18]

In addition to deciding questions of law, the Third Circuit considered the case from the standpoint of public policy. To grant the government the "sweeping privilege" it claimed would be contrary to "a sound public policy." It would be a small step, said the court, "to assert a privilege against any disclosure of records merely because they

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[15] 60 Stat. 843, §410(a) (1948).

[16] Fisher, In the Name of National Security, at 29-58,

[17] Reynolds v. United States, 192 F.2d 987, 992 (3d Cir. 1951).

[18] Id. at 994.

might be embarrassing to government officers."[19] The court reviewed the choices available to government when it decides to withhold information. In a criminal case, if the government does not want to reveal evidence within its control (such as the identity of an informer), it can drop the charges. To the court, the Federal Tort Claims Act "offers the Government an analogous choice" in civil cases. It could produce relevant documents under Rule 34 and allow the case to move forward, or withhold the documents at the risk of losing the case under Rule 37. In *Reynolds*, at the district and appellate levels, the government decided to withhold documents.

On the question of which branch has the final say on disclosure and access to evidence, the Third Circuit summarized the government's position in this manner: "it is within the sole province of the Secretary of the Air Force to determine whether any privileged material is contained in the documents and . . . his determination of this question must be accepted by the district court without any independent consideration of the matter by it. We cannot accede to this proposition."[20] A claim of privilege against disclosing evidence "involves a justiciable question, traditionally within the competence of the courts, which is to be determined in accordance with the appropriate rules of evidence, upon the submission of the documents in question to the judge for his examination *in camera*."[21] To hold that an agency head in a suit to which the government is a part "may conclusively determine the Government's claim of privilege is to abdicate the judicial function and permit the executive branch of the Government to infringe the independent province of the judiciary as laid down by the Constitution."[22]

Were there risks in sharing confidential documents with a federal judge? The Third Circuit dismissed the argument that judges could not be trusted to review sensitive or classified materials: "The judges of the United States are public officers whose responsibility under the Constitution is just as great as that of the heads of executive departments." Judges may be depended upon to protect against disclosure those matters that would do damage to the public interest. If, as the government argued, "a knowledge of background facts is necessary to enable one properly to pass on the claim of privilege those facts also may be presented to the judge *in camera*."[23]

Appendix D:
The Supreme Court's Opinion

The government's insistence in the *Reynolds* case that it has a duty to protect military secrets came at the height of revelations about Americans charged with leaking

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[19] Id. at 995.

[20] Id. at 996-97.

[21] Id. at 997.

[22] Id.

[23] Id. at 998.

sensitive and classified information to the Soviet Union. During this period Julius and Ethel Rosenberg were prosecuted for sending atomic bomb secrets to Russia. They were convicted in 1951, pursued an appeal to the Second Circuit the following year, and after a failed effort to have the Supreme Court hear their case they were executed on June 19, 1953. The years after World War II were dominated by congressional hearings into communist activities, the Attorney General's list of subversive organizations, loyalty oaths, security indexes, reports of espionage, and counterintelligence efforts. Alger Hiss, convicted of perjury in 1950 concerning his relationship to the Communist Party, served three and a half years in prison. The government pursued J. Robert Oppenheimer for possible espionage, leading to the loss of his security clearance in 1954.

In *Reynolds*, the government argued that it had exclusive control over what documents to release to the courts. Its brief stated that courts "lack power to compel disclosure by means of a direct demand on the department head" and "the same result may not be achieved by the indirect method of an order against the United States, resulting in judgment when compliance is not forthcoming."[24] It interpreted the Housekeeping Statute (giving department heads custody over agency documents) "as a statutory affirmation of a constitutional privilege against disclosure" and one that "protects the executive against direct court orders for disclosure by giving the department heads sole power to determine to what extent withholding of particular documents is required by the public interest."[25] Congress had never provided that authority and earlier judicial rulings specifically rejected that interpretation.[26]

In its brief, the government for the first time pressed the state secrets privilege: "There are well settled privileges for state secrets and for communications of informers, both of which are applicable here, the first because the airplane which crashed was alleged by the Secretary to be carrying secret equipment, and the second because the secrecy necessary to encourage full disclosure by informants is also necessary in order to encourage the freest possible discussion by survivors before Accident Investigation Boards."[27]

The fact that the plane was carrying secret equipment was known by newspaper readers the day after the crash. The fundamental issue, which the government repeatedly muddled, was whether the accident report and the survivor statements contained secret information. Because those documents were declassified in the 1990s and made available to the public, we now know that secret information about the equipment did not appear either in the accident report or the survivor statements. As to the second point, about the role of informants in contributing to an accident report, that issue had been

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[24] "Brief for the United States," United States v. Reynolds, No. 21, October Term 1952, at 9 (hereafter "Government's Brief").

[25] Id. at 9-10.

[26] Fisher, In the Name of National Security, at 44-48, 54-55, 61, 64-68, 78, 80-81.

[27] "Government's Brief," at 11.

analyzed in previous judicial rulings and dismissed as grounds for withholding evidence from a court.[28]

Toward the end of the brief, the government returned to "the so-called 'state secrets' privilege."[29] The claim of privilege by Secretary of the Air Force Finletter "falls squarely" under that privilege for these reasons: "He based his claim, in part, on the fact that the aircraft was engaged 'in a highly secret military mission' and, again, on the 'reason that the aircraft in question, together with the personnel on board, were engaged in a highly secret mission of the Air Force. The airplane likewise carried confidential equipment on board and any disclosure of its mission or information concerning its operation on performance would be prejudicial to this Department and would not be in the public interest."[30]

Nothing in this language has anything to do with the *contents* of the accident report or the survivors' statements. Had those documents been made available to the trial judge, he would have seen nothing that related to military secrets or any details about the confidential equipment. He could have passed them on the plaintiffs, possibly by making a few redactions.

At various points in the litigation the government misled the Court on the contents of the accident report. It asserted: "to the extent that the report reveals military secrets concerning the structure or performance of the plane that crashed or deals with these factors in relation to projected or suggested secret improvements it falls within the judicially recognized 'state secrets' privilege."[31] *To the extent*? In the case of the accident report the extent was zero. The report contained nothing about military secrets or military improvements. Nor did the survivor statements.

On March 9, 1953, Chief Justice Vinson for a 6 to 3 majority ruled that the government had presented a valid claim of privilege. He reached that judgment without ever looking at the accident report or the survivor statements. He identified two "broad propositions pressed upon us for decision." The government "urged that the executive department heads have power to withhold any documents in their custody from judicial review if they deem it to be in the public interest." The plaintiffs asserted that "the executive's power to withhold documents was waived by the Tort Claims Act." Chief Justice Vinson found that both positions "have constitutional overtones which we find it unnecessary to pass upon, there being a narrower ground for decision."[32] When a formal claim of privilege is lodged by the head of a department, the "court itself must determine

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[28] Fisher, In the Name of National Security, at 39-42.

[29] "Government's Brief," at 42.

[30] Id. at 42-43.

[31] Id. at 45.

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

whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect."[33]

That point is unclear. If the government can keep disputed documents from the judge, even for *in camera* inspection, how can the judge "determine whether the circumstances are appropriate for the claim of privilege"? The judge would be arms-length from making an informed decision. Moreover, there is no reason to regard *in camera* inspection by a judge as "disclosure." As pointed out by Judge Kirkpatrick and the Third Circuit in *Reynolds*, judges take the same oath to protect the Constitution as do executive officials. In the Supreme Court, Chief Justice Vinson said that in the case of the privilege against disclosing documents, the court "must be satisfied from all the evidence and circumstances" before accepting the claim of privilege.[34] Denied disputed documents, a judge has no "evidence" other than claims and assertions by executive officials.

Chief Justice Vinson stated that judicial control "over the evidence in a case cannot be abdicated to the caprice of executive officers."[35] If an executive officer acted capriciously and arbitrarily, a court would have no independent basis for perceiving that conduct unless it asked for and examined the evidence. Chief Justice Vinson said that the Court "will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case."[36] He anticipated circumstances where there would be no opportunity even for *in camera* inspection: "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."[37] On what grounds would *in camera* inspection jeopardize national security? It is more likely that national security is damaged by executive assertions that are never checked and evaluated by other branches.

Chief Justice Vinson further stated: "On the record before the trial court it appeared that this accident occurred to a military plane which had gone aloft to test secret electronic equipment."[38] There was nothing sensitive about that information. On the day following the crash, newspaper readers around the country knew that the plane had been testing secret electronic equipment.[39] Chief Justice Vinson concluded that there was a "reasonable danger" that the accident report "would contain references to the secret

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[33] Id. at 8.

[34] Id. at 9.

[35] Id. at 9-10.

[36] Id. at 10.

[37] Id.

[38] Id.

[39] Fisher, In the Name of National Security, at 1-2.

electronic equipment which was the primary concern of the mission."[40] There was no reasonable danger that the accident report would discuss the secret electronic equipment. The purpose of the report was to determine the cause of the accident. There were no grounds to believe that the electronic equipment caused the crash. Instead of speculating about what the accident report included and did not include, the Court needed to inform itself by examining the report and not accept vague assertions by the executive branch. Without access to evidence and documents, federal courts necessarily abdicate their powers "to the caprice of executive officers."

Appendix E:
The Declassified Accident Report

Judith Loether was seven weeks old when her father, Albert Palya, died in the B-29 accident. On February 10, 2000, using a friend's computer, she entered a combination of words into a search engine and was brought into a Web site that kept military accident reports. By checking that site, she discovered that the accident report withheld from federal courts in the *Reynolds* litigation was now publicly available. Expecting to find national security secrets in the report, she found none. After contacting the other two families, it was agreed to return to court by charging that the government had misled the Supreme Court and committed fraud against it.[41]

Unlike the successful *coram nobis* cases brought by Fred Korematsu and Gordon Hirabayashi, Loether and the other family members lost at every level. Initially they went directly to the Supreme Court. Later they went to district court and the Third Circuit. Their appeal to the Court was denied on May 1, 2006. When the Third Circuit ruled on the issue, only one value was present: judicial finality. The case had been decided in 1953 and the Third Circuit was not going to revisit it, even if the evidence was substantial that the judiciary had been misled by the government.[42] There appeared to be no value for judicial integrity and judicial independence.

The Third Circuit pointed to three pieces of information in the accident report that might have been "sensitive." The report revealed "that the project was being carried out by 'the 3150th Electronics Squadron,' that the mission required an 'aircraft capable of dropping bombs' and that the mission required an airplane capable of 'operating at altitudes of 20,000 feet and above.'"[43]

If those pieces of information were actually sensitive, they could have been easily redacted and the balance of the report given to the trial judge and to the plaintiffs. They were looking for evidence of negligence by the government, not for the name of the squadron, bomb-dropping capability, or flying altitude. As for the sensitivity, newspaper

[40] United States v. Reynolds, 345 U.S. at 10.

[41] Fisher, In the Name of National Security, at 166-69.

[42] Herring v. United States, 424 F.3d 384, 386 (3d Cir. 2005).

[43] Id. at 391, n.3.

readers the day after the crash understood that the plane was flying at 20,000 feet, it carried confidential equipment, and it was capable of dropping bombs. That is what bombers do.

Biosketch

Louis Fisher is a Specialist in Constitutional Law with the Law Library of the Library of Congress. Earlier he worked for the Congressional Research Service from 1970 to March 3, 2006. During his service with CRS he was Senior Specialist in Separation of Powers and research director of the House Iran-Contra Committee in 1987, writing major sections of the final report. Fisher received his doctorate in political science from the New School for Social Research and has taught at a number of universities and law schools.

He is the author of seventeen books, including *In the Name of National Security: Unchecked Presidential Power and the* Reynolds *Case* (2006), *Presidential War Power* (2d ed. 2004), *American Constitutional Law* (with David Gray Adler, 7th ed. 2007), and the forthcoming *The Constitution and 9/11: Recurrent Threats to America's Freedoms*. He has received a number of book awards.

Dr. Fisher has been invited to testify before Congress on such issues as war powers, state secrets, CIA whistleblowing, covert spending, NSA surveillance, executive privilege, executive spending discretion, presidential reorganization authority, Congress and the Constitution, the legislative veto, the item veto, the pocket veto, recess appointments, the budget process, the Gramm-Rudman-Hollings Act, the balanced budget amendment, biennial budgeting, presidential impoundment powers, and executive lobbying.

Statement of Senator Patrick Leahy
Chairman, Senate Judiciary Committee
On "Examining the States Secrets Privilege:
Protecting National Security While Preserving Accountability"
February 13, 2008

Today, the Judiciary Committee turns its attention to the state secrets privilege – a common law doctrine the government can claim in court to prevent evidence that could harm national security from being publicly revealed. I want to thank Senators Specter and Kennedy for their help in planning this hearing, and commend them for their work on legislation that would create uniform standards to guide courts in evaluating state secrets privilege claims.

Over the past seven years, the Bush administration has aggressively sought to expand executive power in alarming ways. Public accountability has been repeatedly frustrated because so many of the administration's actions have been cloaked in secrecy. Time and again, the administration has fought tooth and nail to prevent the American people and Congress from having information about its policies and practices.

It is through the press that we first learned about secret surveillance of Americans by their own government in the years after 9/11, secret renditions abroad in violation of U.S. laws, secret prisons abroad, secret decisions to fire some of the nation's top prosecutors, and the secret destruction of interrogation tapes that may have contained evidence of torture. Having relied on an overly expansive, self-justifying view of executive power, the Bush administration now seeks secrecy for its actions. It has taken a legal doctrine that was intended to protect sensitive, national security information and seems to be using it to evade accountability for its own misdeeds.

The state secrets privilege has been used in recent years to stymie litigation at its very inception in cases alleging egregious government misconduct, such as extraordinary rendition and warrantless eavesdropping on the communications of American citizens. Reflecting on recent state secrets litigation, *The New York Times* has observed: "To avoid accountability, [the Bush] administration has repeatedly sought early dismissal of lawsuits that might finally expose government misconduct, brandishing flimsy claims that going forward would put national security secrets at risk."

The clearest example of the state secrets privilege short-circuiting litigation is the 2006 case of Khaled El-Masri. Mr. El-Masri, a German citizen of Lebanese descent, alleged that he was kidnapped on New Year's Eve in 2003 in Macedonia, and transported against his will to Afghanistan, where he was detained and tortured as part of the Bush administration's extraordinary rendition program. He sued the government over his alleged detention and harsh treatment. A district court judge in Virginia dismissed the entire lawsuit on the basis of an *ex parte* declaration from the Director of the CIA and despite the fact that the government has admitted that the rendition program exists. Mr. El-Masri has no other remedy. Our justice system is off limits to him, and no judge ever reviewed any of the actual evidence.

The government has also asserted the state secrets privilege in the litigation over the warrantless wiretapping of Americans that took place for more than five years. There, a district court judge has rejected the government's claim that the very subject matter at issue was a state secret, but the government is appealing.

The state secrets privilege serves important goals where properly invoked. But there are serious consequences for litigants and for the American public when the privilege is used to terminate litigation alleging serious government misconduct. For the aggrieved parties, it means that the courthouse doors are closed – forever – regardless of the severity of their injury. They will never have their day in court. For the American public, it means less accountability, because there will be no judicial scrutiny of improper actions of the executive, and no check or balance.

Senator Specter, Senator Kennedy and I have introduced a bill to help guide the courts to balance the government's interests in secrecy with accountability and the rights of citizens to seek judicial redress. The bill does not restrict the government's ability to assert the privilege in appropriate cases. Rather, the bill would allow judges to look at the actual evidence that the government submits is protected by the state secrets privilege so that they, neutral judges, rather than self-interested executive branch officials, would render the ultimate decision whether the state secrets privilege should apply. This is consistent with the procedure for other privileges recognized in our courts.

When I think about this administration's expansive use of the state secrets privilege, I am reminded of another secretive administration that was involved in the Watergate scandal and the Pentagon Papers case. That was a case about the government's attempt to hide an historical study of this country's involvement in Vietnam. The Nixon administration contended that knowledge of the study would pose "grave and immediate danger to the security of the United States." Fortunately, the United States Supreme Court reaffirmed the vitality of our rights and system of government when it decided the Pentagon Papers case. In his concurring opinion Justice Black noted: "The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic." The same government tendency toward self-serving secrecy that the Nixon administration was promoting then is evident once again in the Bush-Cheney administration's aggressive use of the state secrets privilege.

Secrecy can be important to national security, but it can also deprive the American people of their ability to judge the effectiveness of their government on national security matters. It is critical that federal judges not abdicate their role in our system of checks and balances as a check on the executive.

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Statement of Patricia Reynolds Herring
for the
Senate Judiciary Committee Hearing on
"Examining the State Secrets Privilege: Protecting National Security
While Preserving Accountability"

My name is Patricia Reynolds Herring and I'm the *Reynolds* in the 1953 case , *U.S. v Reynolds.*

My husband was one of the nine men killed in an air force crash over Waycross, GA. on Oct.6, 1949 . We were young newlyweds of less than two years and my husband was a civilian engineer working on an experimental Air Force project named Banshee. Much was written about it at the time in various news articles. After the crash we three widows filed a negligence suit against the government, which we won. The government appealed , and we again won. The case was then sent to the U.S. Supreme Court. At that time, the government , as it had in the previous trials, refused to release the crash report, even in camera. They cited classified material that would jeopardize the national security of the country. The Court then allowed the ruling of the District Court to stand, thus establishing the State Secret Privilege (*U.S. v Reynolds), a* precedent which has since been used by the government again and again throughout the years.

When the crash report was declassified in the late 1990s, however, it became clear that NO sensitive material was involved. What WAS apparent was the negligence and cover-up that had occurred, needlessly costing the lives of these innocent men, It was this mishandling by the Air Force that was being protected NOT state secrets. When reading the original report, in page after page, the culpability of the Air Force was obvious. At all levels. In 2003 the remaining family members and I filed a Writ to be reheard by the Supreme Court, but it was denied.

In the intervening years since 1953 the State Secret Privilege has been repeatedly used – and misused – especially in recent years. I am saddened to see my former husband's name evoked in cases that fail to give private citizens the full measure of protection of the law, as intended by our Constitution. Our country is better than that.

I am very grateful, therefore – and hopeful – to have seen S.2533, presented to the U.S. Senate by Senator Edward Kennedy on February 3, 2008 . I'm confident that this bill could be a positive step in creating a safeguard balance to *U. S v Reynolds.* This would give me great comfort .

Department of Justice

STATEMENT

OF

CARL J. NICHOLS
DEPUTY ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION
DEPARTMENT OF JUSTICE

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

"EXAMINING THE STATE SECRETS PRIVILEGE:
PROTECTING NATIONAL SECURITY WHILE PRESERVING ACCOUNTABILITY"

PRESENTED ON
FEBRUARY 13, 2008

Chairman Leahy, Ranking Member Specter, Members of the Committee, thank you for the opportunity to appear before you to address the important subject of today's hearing, the state secrets privilege. Since March 2005, I have served as a Deputy Assistant Attorney General in the Civil Division in the Department of Justice. In that capacity I both have been involved in the decisionmaking process regarding whether and when the Executive Branch will assert the state secrets privilege in civil litigation, and have gained an appreciation for the important role that the privilege plays in preventing the disclosure of national security information.

I would like to address two separate but related points in my testimony.

First, the state secrets privilege serves a vital function by ensuring that private litigants cannot use litigation to force the disclosure of information that, if made public, would directly harm the national security of the United States. The privilege has a longstanding history and has been invoked, during periods of both conflict and peace, to protect such information. But the role of the state secrets privilege is particularly important when, as now, our Nation is engaged in a conflict with a terrorist enemy in which intelligence is absolutely vital to protecting the homeland. The privilege is thus firmly rooted in the constitutional authorities and obligations assigned to the President under Article II to protect the national security of the United States.

Second, accountability is preserved by a number of procedural and substantive requirements that must be satisfied before a court may accept an assertion of the state secrets privilege. These protections ensure that the privilege is asserted by the Executive Branch, and accepted by the courts, only in the most appropriate cases.

I. The State Secrets Privilege Plays a Critical Role in Preventing the Disclosure of National Security Information.

Any discussion of the state secrets privilege must begin with the vital role it plays in protecting the national security. The state secrets privilege permits the United States to ensure that civil litigation does not result in the disclosure of information related to the national security that, if made public, would cause serious harm to the United States. As the Supreme Court held in *United States v. Reynolds*, 345 U.S. 1, 10 (1953), such information should be protected from disclosure when there is a "danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged." The Supreme Court recognized the imperative of protecting such information when it further held that even where a litigant has a strong need for that information, the privilege is absolute: "Where there is a strong showing of necessity, 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.*" *Id.* (emphasis added). As the Court of Appeals for the Fifth Circuit has noted, the "greater public good – ultimately the less harsh remedy – " is to protect the information from disclosure, even where the result might be dismissal of the lawsuit. *Bareford v. General Dynamics Corp.*, 973 F.2d 1138, 1144 (5th Cir. 1992).

The state secrets privilege thus plays a critical role, even in peacetime. But the privilege is particularly important during times, such as the present, when our Nation is engaged in a conflict with an enemy that seeks to attack the homeland. We remain locked in a struggle with al Qaeda, a terrorist enemy that does not acknowledge or comply with basic norms of warfare; that seeks to operate by stealth and secrecy, using the openness of our society against us; and that intends to inflict indiscriminate, mass casualties in the civilian population of the United States.

In these circumstances, litigation may risk disclosing to al Qaeda or other adversaries details regarding our intelligence capabilities and operations, our sources and methods of foreign intelligence gathering, and other important and sensitive activities that we are presently undertaking in our conflict. The state secrets privilege ensures that critical national security efforts are not weakened or endangered through the forced disclosure of highly sensitive information.

The state secrets privilege is rooted in the constitutional authorities and obligations assigned to the President under Article II as Commander in Chief and representative of the Nation in the realm of foreign affairs. It is well established that the President is constitutionally charged with protecting information relating to the national security. As the Supreme Court has stated, "[t]he authority to protect such information falls on the President as head of the Executive Branch and as Commander in Chief." *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988).

The state secrets privilege is not, therefore, a mere "common law" privilege. Instead, as the courts have long recognized, the privilege has a firm foundation in the Constitution. Any doubt that the privilege is rooted in the Constitution was dispelled in *United States v. Nixon*, 418 U.S. 683 (1974), in which the Supreme Court explained that, to the extent a claim of privilege "relates to the effective discharge of the President's powers, it is constitutionally based." *Id.* at 711. The Court then went on to expressly recognize that a "claim of privilege on the ground that [information constitutes] military or diplomatic secrets" – that is, the state secrets privilege – necessarily involves "areas of Art. II duties" assigned to the President. *Id.* at 710. The lower courts have reaffirmed this conclusion. *See, e.g., El-Masri v. United States*, 479 F.3d 296,

303-04 (4th Cir.), *cert. denied*, 128 S.Ct. 373 (2007) (holding that the state secrets privilege "has a firm foundation in the Constitution"). As the D.C. Circuit has noted, the state secrets privilege "must head the list" of "the various privileges recognized in our courts." *Halkin v. Helms*, 598 F. 2d 1, 7 (D.C. Cir. 1978).

Before I turn to the second subject of my testimony, I would like to take an opportunity to discuss an issue arising out of *Reynolds* itself. Some have claimed that a review of declassified information in *Reynolds* demonstrates that the United States' assertion of the state secrets privilege in that case was somehow improper. Not only is that claim incorrect, but it has been rejected by two federal courts. In *Herring v. United States*, 2004 WL 2040272 (E.D. Pa. 2004), living heirs to those killed in the air crash at issue in *Reynolds* filed suit to set aside a settlement agreement, alleging that the United States' state secrets privilege assertion in *Reynolds* was fraudulent. After again reviewing the matter in 2004, Judge Davis held that the Air Force had not "misrepresent[ed] the truth or commit[ted] a fraud on the court" in *Reynolds*. *See Herring*, 2004 WL 2040272, at *5; *see also id.* at *6. Judge Davis reached this conclusion after analyzing precisely why disclosure of the information contained in an accident report of the crash would have caused harm to national security by revealing flaws in the B-29 aircraft. *See id.* at 9. As Judge Davis found, "[d]etails of flight mechanics, B-29 glitches, and technical remedies in the hands of the wrong party could surely compromise national security," and thus "may have been of great moment to sophisticated intelligence analysts and Soviet engineers alike." *Id.* The Court of Appeals for the Third Circuit, reviewing the matter *de novo*, unanimously affirmed Judge Davis's decision. *See Herring v. United States*, 424 F.3d 384 (3rd Cir. 2005), *cert. denied*, 547 U.S. 1123 (2006).

II. Various Procedural and Substantive Requirements Ensure that the Privilege Is Invoked and Accepted Only in the Most Appropriate Cases.

Any discussion of the state secrets privilege should also recognize the significant procedural and substantive requirements for asserting the privilege. Several of these requirements are set forth in the Supreme Court's decision in *Reynolds*, and ensure that the privilege is invoked and accepted only in appropriate cases. This careful process ensures – and my experience confirms – that the privilege is not, in the words of the Supreme Court, "lightly invoked." 354 U.S. at 7.

Starting with the procedural protections, *Reynolds* enumerates three basic but important requirements. First, the privilege can be invoked only by the United States (that is, it cannot be invoked by a private litigant), and only through a "formal claim of privilege." *Reynolds*, 345 U.S. at 7-8. Second, the privilege cannot be invoked by a low-level government official, but instead must be "lodged by the head of the department which has control over the matter" – in other words, only an agency head may assert the privilege. *Id.* at 8. Third, that official must give "actual personal consideration" to the matter before asserting the privilege. *Id.* Separate from these important requirements, because the state secrets privilege is asserted in litigation, the Department of Justice, as the agency charged with conducting litigation involving the United States, 28 U.S.C. §§ 516 & 519, must also agree that asserting the privilege in a particular situation is appropriate. Only if there is a "reasonable danger" that disclosure of the privilege will cause harm to the national security, *see Reynolds* at 10, will the privilege be asserted.

In practice, satisfying these requirements typically involves many layers of substantive review and protection. The agency with control over the information at issue reviews the information internally to determine if a privilege assertion is necessary and appropriate. That

process typically involves considerable review by agency counsel and officials. Once that review is completed, the agency head – such as the Director of National Intelligence or the Attorney General – must personally satisfy himself or herself that the privilege should be asserted.

An important part of that process is the agency head's personal review of various materials, including the declaration (or declarations) that he or she must sign in order to assert the privilege. The point of such declarations is to formally invoke the privilege and to explain to the court the factual basis supporting the privilege. If the head of the department concludes that the privilege is warranted, the official formally invokes the privilege by signing the declarations, which are then made available to the court along with any supporting declarations. By signing the declarations, the department head and any supporting official attest, under penalty of perjury, to the truthfulness of their statements and to their personal attention to the matter.

Once the privilege is asserted, it is up to the court to decide whether, based on its review of the unclassified and classified materials that have been made available to it, the assertion should be upheld. It is well established that the court, in reviewing the privilege assertion, must accord the "utmost deference" to the privilege assertion and to the national security judgments of the Executive Branch. *Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998); *see also Al-Haramain Islamic Foundation, Inc. v. Bush*, 507 F.3d 1190, 1203 (9th Cir. 2007) (reaffirming "the need to defer to the Executive on matters of foreign policy and national security" and concluding that the court "surely cannot legitimately find [itself] second guessing the Executive in this arena"). Still, notwithstanding this deferential standard of review, "[t]he court itself must determine whether the circumstances are appropriate for the claim of privilege." *Reynolds*, 345

U.S. at 8. In other words, it is for the court to determine, after applying the appropriate level of deference, whether the Executive Branch has adequately demonstrated that there is a reasonable danger that disclosure of the information would harm the national security. This review serves as an important check in the state secrets process.

In making its determination, moreover, a court often reviews not just the public declarations of the Executive officials explaining the basis for the privilege, but also classified declarations providing further detail for the court's *in camera, ex parte* review. One misperception about the state secrets privilege is that the underlying classified information at issue is not shared with the courts, and that the courts instead are simply asked to dismiss cases based on trust and non-specific claims of national security. Instead, in every case of which I am aware, out of respect for the Judiciary's role the Executive Branch has made available to the courts both unclassified and classified declarations that justify, often in considerable detail, the bases for the privilege assertions. By way of example, the Court of Appeals for the Ninth Circuit recently noted in upholding the government's assertion of the state secrets privilege that the panel had:

> spent considerable time examining the government's declarations (both those publicly filed and filed under seal). *We are satisfied that the basis for the privilege is exceptionally well documented. Detailed statements [in the government's classified filings] underscore that disclosure of information concerning the Sealed Document and the means, sources and methods of intelligence gathering in the context of this case would undermine the government's intelligence capabilities and compromise national security.*

Al-Haramain Islamic Foundation, Inc. v. Bush, 507 F.3d 1190, 1204 (9th Cir. 2007) (emphasis added); *see also id.* ("We take very seriously our obligation to review the documents with a very careful, indeed a skeptical eye, and not to accept at face value the government's claim or

justification of privilege. Simply saying 'military secret,' 'national security,' or 'terrorist threat' or invoking an ethereal fear that disclosure will threaten our nation is insufficient to support the privilege. Sufficient detail must be – *and has been* – provided for us to make a meaningful examination.") (emphasis added).

Finally, I should also address the common misperception that the Executive Branch always seeks dismissal in each case in which it has asserted the state secrets privilege, and that the courts must dismiss each case in which the privilege has been asserted. That is incorrect. Instead, once a court has concluded that the privilege has been properly asserted, the privileged information is removed from the case, and the court must then decide whether, and how, the case can proceed without that information. To be sure, the result is that some cases must be dismissed because there is no way to proceed without the information. But in other cases, the privileged information is peripheral and the case can proceed without it. By way of example, in *BCG v. Guerrieri, et al.*, No. 2004CV395 (Weld Cty., Colo. 19th Dist. Ct.), a real estate and contract dispute between private parties, the United States asserted the state secrets privilege over certain information and moved for a protective order precluding disclosure of that information, but did *not* seek dismissal of the action.

* * *

Thank you, Mr. Chairman, for the opportunity to address the Committee. I would be happy to address any questions that the Members may have.

October 4, 2007

The Hon. Harry Reid
Majority Leader
United States Senate
Washington, D.C. 20510

The Hon. Mitch McConnell
Minority Leader
United States Senate
Washington, D.C. 20510

The Hon. Nancy Pelosi
Speaker
U.S. House of Representatives
Washington, DC 20515

The Hon. John Boehner
Minority Leader
U.S. House of Representatives
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The Hon. Patrick Leahy
Chairman
Senate Judiciary Committee
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The Hon. Arlen Specter
Ranking Minority Member
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The Hon. Silvestre Reyes
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U.S. House of Representatives
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The Hon. Peter Hoekstra
Ranking Minority Member
Permanent Select Committee
on Intelligence
U.S. House of Representatives
Washington, D.C. 20515

Dear Members of Congress:

We are scholars of constitutional law and students of public policy, and we write to urge that Congress has an important role to play in providing guidance to federal courts on the state secrets privilege.

Under the state secrets privilege, the executive branch claims that the disclosure of certain evidence in court may damage national security and therefore cannot be released in litigation and that its word on the risk to national security is conclusive.

However, unless claims about state secrets evidence are subjected to independent judicial scrutiny, the executive branch is at liberty to violate legal and constitutional rights with impunity and without the public scrutiny that ensures that the government is accountable for its actions.

The United States Constitution specifically grants Congress the power to enact "Regulations" regarding the jurisdiction of federal courts. U.S. Const. Art. III, Sec. 2. This includes the power to legislate reforms to the state secrets privilege. Congress regularly reviews and approves rules of civil and criminal procedure as well as rules of evidence. It may take the initiative at any time to correct deficiencies in regulations that guide the courts. Congress now has the opportunity to enact legislation reforming the state secrets doctrine to balance the interests of private parties, constitutional liberties, and national security. Specifically, Congress should enact legislation to clarify the scope of this doctrine and assure greater protection to private litigants.

When the state secrets privilege was first recognized in *United States* v. *Reynolds* (1953), the Supreme Court tilted far too much in the direction of executive power and seriously undercut the legitimate interests of private plaintiffs. That bias has continued with the current state secrets cases involving such areas as NSA surveillance and extraordinary rendition.

The *Reynolds* case involved the deaths of three civilian contractors in the crash of a B-29 over Waycross, Georgia. The widows of these men brought wrongful death suits against the Air Force, and sought production of the accident report. The district court and the Third Circuit understood that the three widows had a right to sue under the Federal Tort Claim Act of 1946. Those courts also understood that once a litigant is entitled to sue the government, the statute treated the government as any private party. It was given no special privileges or benefits.

Both the district court and the Third Circuit agreed that the government had a choice: either surrender the official accident report and statements of the three surviving crew members to the district judge, to be read in chambers, or lose the case. The government refused to release the documents and lost at each level.

In deciding how to weigh the interests of the government and the three widows, the district court and the Third Circuit recognized that Congress had already decided the balance by writing the tort claims statute as it did. By the express terms of the statute, Congress "has divested the United States of its normal sovereign immunity to the extent of making it liable in actions such as those now before us in the same manner as if it were a private individual." 192 F.2d at 993 (3d Cir. 1951). In this type of case, where the government has consented to be sued, whatever claims of public interest might exist in withholding government documents "must yield to what Congress evidently regarded as the greater public interest involved in seeing that justice is done to persons injured by governmental operations whom it has authorized to enforce their claims by suit against the United States." *Id.* at 994.

The Third Circuit understood the dangers of automatically acquiescing in claims by the government regarding the sensitivity or secret nature of documents. Recognizing a "sweeping privilege" against the disclosure of executive branch operations was

"contrary to a sound public policy. . . . It is but a small step to assert a privilege against any disclosure of records merely because they might prove embarrassing to government officers." *Id.* at 995.

This thoughtful consideration of congressional policy, set forth in statute, and the structural protections of the U.S. Constitution and its system of separation of powers were ignored by the Supreme Court. It claimed that "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." 345 U.S. at 9-10. However, the Court then proceeded to abdicate by holding for the government without ever looking at the official accident report or ordering that it be produced for review by the trial court.

The post-decision history of the *Reynolds* case demonstrates that this degree of deference to executive branch state secrets claims is not warranted, and instead creates an all-too tempting invitation to executive abuse. In the 1990s, a number of military accident reports were declassified. The three families involved in the original case gained access to the accident report on the B-29 crash and discovered that not only did it not contain any state secrets but it revealed that the government had indeed been negligent in having the aircraft fly without installing heat shields to protect against engine fires.

In its decision in *Reynolds,* the Supreme Court examined two constitutional claims, but concluded that it was "unnecessary to pass upon" these claims. 345 U.S. at 6. It chose, instead, to analyze the case in terms of the Federal Rules of Civil Procedure, particularly Rules 34 and 37. *Id.* at 6-7. The decision was not grounded in constitutional law.

Congress has full authority to revisit the rules of civil procedure and rewrite them in a way to assure fairness in the courtroom and to strengthen the adversary process in state secrets cases. In the late 1960s and early 1970s, Congress considered legislation that would have established a new rule for state secrets (Rule 509). It was rejected in 1973, along with many other rules of evidence. That history and the B-29 litigation are analyzed in a book published last year by Louis Fisher, *In the Name of National Security: Unchecked Presidential Power and the* Reynolds *Case.* Congress can hold hearings, receive testimony from experts, and take a fresh look at the state secrets privilege in light of *Reynolds* and subsequent cases.

The urgency of congressional action is evident by examining such cases as that of Khaled El-Masri, who charges that he was an innocent victim of the United States' program of extraordinary rendition. His suit was dismissed by the U.S. Court of Appeals for the Fourth Circuit on the basis of the state secrets privilege at the pleading stage, before Mr. El-Masri had sought discovery of a single piece of evidence. He is now seeking review of his case in the U.S. Supreme Court.

In such cases as *El-Masri,* federal courts are placing an individual's interest on one side and the "national interest" on the other. The branch of government that decides the national interest is Congress. Congress has a duty to examine how the state secrets privilege is being invoked by the executive branch and interpreted by federal courts. There is a need for new rules designed to protect the system of checks and balances, individual rights, national security, fairness in the courtroom,

and the adversary process. Congress possesses the constitutional authority to act, and it should do so.

Sincerely,

David Gray Adler, Professor of Political Science, Idaho State University

Steven Aftergood, Project Director, Federation of American Scientists

David Cole, Professor of Law, Georgetown University Law Center

Phillip J. Cooper, Professor of Public Administration, Mark O. Hatfield School of Government, Portland State University

Eugene R. Fidell, Partner, Feldesman Tucker Leifer Fidell LLP; Adjunct Professor of Law, Washington College of Law; and Visiting Lecturer in Law, Yale Law School

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Melvin A. Goodman, Senior Fellow at the Center of International Policy; and Professor of Government at Johns Hopkins University

Dr. Katy J. Harriger, Professor of Political Science, Wake Forest University

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Jack N. Rakove, William Robertson Coe Professor of History and American Studies, Stanford University

Peter Raven-Hansen, Glen Earl Weston Research Professor of Law, George Washington University Law School

Coleen Rowley, retired FBI agent and former Minneapolis Chief Division Counsel

James A. Thurber, Distinguished Professor and Director, Center for Congressional and Presidential Studies, American University

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Hearing before the
United States Senate, Committee on the Judiciary

on

"Examining the State Secrets Privilege: Protecting National Security While Preserving Accountability"

Wednesday, February 13, 2008

Chairman Leahy, Senator Specter, and Members of the Committee: Thank you for inviting me to testify today concerning the state secrets privilege and S. 2253, the "State Secrets Protection Act." My fellow panelists have testified with great knowledge and insight concerning the history of the state secrets privilege and some of the constitutional questions it raises. I will seek to avoid retreading ground that my colleagues have already ably covered, and instead devote my remarks to the issue of government secrecy in general and how judicial oversight should be crafted to preserve the Executive Branch's discretion and authority in national security matters while advancing the significant interests in government openness and accountability.

I start from two bedrock principles, both of which may be considered truisms, but which also happen to lie in great tension with each other. First, secrecy in government can be absolutely necessary to the protection of our national security. This is especially so today, when secret intelligence sources and methods are vital to our ability to learn about, penetrate and disrupt terrorist groups and other non-state actors that, because of their access to advanced technology and weapons of mass destruction, pose grave threats to our security. Many sources and methods of gathering intelligence on such groups, as

well as on nations that would do us harm now or in the future, must remain secret if they are to remain effective. Similarly, the details of advanced weapons systems must be remain secret if we are to maintain our battlefield advantage over our present and potential adversaries. And our ability to work effectively with other nations, to engage in sensitive negotiations with friendly or hostile governments, often requires that the details of diplomacy not be revealed publicly.

At the same time, the second principle is equally true, and no less important: secrecy in government is antithetical to democratic governance. Too much secrecy shields officials from oversight and inevitably breeds abuse and misconduct; it thus can fatally weaken the system of checks and balances that defines our system of government. At rock bottom, government "by the people" becomes impossible if the people do not know what their government is doing.

Add to these two principles a corollary derived less from theory than from observation: there are secrets, and then there are *secrets*. Too often, information deemed classified by the Executive Branch merely echoes what was in last week's newspapers, or in yesterday's blogs, sometimes with less detail. At other times, information the Executive Branch deems "Top Secret" one day—information that, if disclosed, "reasonably could be expected to cause exceptionally grave damage to the national security"[1]—is leaked by a senior government official the next day, or is declassified for a political purpose. These situations—which occur again and again, across Administrations—tend to undermine sweeping, absolutist claims for secrecy, and for unilateral Executive prerogatives to define and determine what remains "secret."

[1] Executive Order 12958, § 1.2(a)(1) (April 17, 1995), as amended by Executive Order 13292 (March 25, 2003).

The fundamental question, then, is how to balance these competing principles. In considering this question, it is helpful to recall one of the central insights of the so-called Moynihan Commission (formally known as the Commission on Protecting and Reducing Government Secrecy) just over a decade ago. In his Chairman's Forward to the Commission's Report, Senator Patrick Moynihan, citing Max Weber, observed that

> secrecy is a mode of regulation. In truth, it is the ultimate mode, for the citizen does not even know that he or she is being regulated. Normal regulation concerns how citizens must behave, and so regulations are widely promulgated. Secrecy, by contrast, concerns what citizens may know; and the citizen is not told what may not be known.

Given the lack of transparency of the "regulatory" process, the modern administrative state tends to overregulate, rather than underregulate, information. This tendency is exacerbated by the fact that, in bureaucracies, information is power. Secrecy serves to tighten the bureaucrat's grip on power, and that grip is not easy to dislodge. As Weber, again quoted by the Moynihan Commission, wrote:

> The pure interest of the bureaucracy in power…is efficacious far beyond those areas where purely functional interests make for secrecy. The concept of the "official secret" is the specific invention of bureaucracy, and nothing is so fanatically defended by the bureaucracy as this attitude, which cannot be substantially justified beyond these specifically qualified areas….Bureaucracy naturally welcomes a poorly informed and hence a powerless parliament—at least in so far as ignorance somehow agrees with the bureaucracy's interests.[2]

Substitute "Congress" – as well as "courts" – for "parliament," and Weber's assessment is no less true in Washington, D.C. today than in Europe a century ago.

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[2] Max Weber, *Essays in Sociology*, trans. and ed. H.H. Gerth and C. Wright Mills (New York: Oxford University Press, 1946), 233-34 (quoted in Report of the Commission on Protecting and Reducing Government Secrecy, Appendix A.3.).

As with other forms of regulation, Executive Branch secrecy can and should be subject to legislative and judicial oversight. This is, of course, not an entirely new idea. Congress has seen fit—in legislation such as the Classified Information Procedures Act,[3] the Foreign Intelligence Surveillance Act,[4] and the Freedom of Information Act[5]—to make rules governing the protection and disclosure of national security-related information. What has been lacking is a legislative prescription as to how courts should assess Executive Branch assertions of the state secrets privilege in civil litigation, leading to confusion in the courts about the standards to apply, the procedures to use, and the deference to accord Executive Branch claims.

S. 2253 represents a much needed and commendable first step toward the necessary legislative role in setting the ground rules for the state secrets privilege. In particular, it recognizes the need to balance and reconcile, where possible, the sometimes competing interests of justice and openness, on the one hand, and national security, on the other, through several procedural mechanisms.

Most notable is the bill's requirement that a court review all evidence that the government asserts is protected from disclosure by the privilege. This represents a departure from the approach established by the Supreme Court in *Reynolds v. United States*,[6] which specifically declined to require such review:

> [W]e will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case. It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that

[3] 18 U.S.C. App. 3.
[4] 50 U.S.C. § 1801 et seq.
[5] 5 U.S.C. § 552 et seq.
[6] 345 U.S. 1 (1953).

> compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and 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.[7]

This requirement in the bill seems necessary, in order to ensure that courts do not assess state secrets claims in a vacuum, without fully understanding the nature of the information at issue, the government's reason for wanting to keep it secret, or even whether the secret information is really at issue in the material to which a civil litigant might be seeking access. Requiring judicial consideration of the evidence will improve government accountability, promote justice for individuals who might be harmed by government misconduct or by private parties, and enhance our system of checks and balances. At the same time, the procedural mechanisms afforded by the bill—such as *in camera* hearings, attorneys and special masters with security clearances, the sealing of records, and expedited interlocutory appeals—help ensure that such judicial consideration will not itself pose a threat to security.

One point that seems lacking from the bill, however, is any reference to the standard of review or level of deference courts should apply in assessing government assertions of the privilege. Given the President's constitutional responsibilities under Article II as Commander-in-Chief of the armed forces and the organ of the government in foreign affairs, and the Executive Branch's superior expertise in such matters, courts should be required to give deference to the Executive Branch's determination that disclosure would be "reasonably likely

[7] *Id.* at 10.

to cause significant harm to the national defense or foreign relations of the United States." Indeed, if the bill remains silent on this crucial issue, courts will likely struggle for years over the appropriate level of deference to accord Executive determinations. Better for Congress to set the standard now—both for district courts and for appellate courts on review—and to require an appropriate level of deference at both stages. This same principle of deference should apply to courts' determinations of whether an adequate non-privileged substitute can reasonably be crafted.

The mere fact of judicial review of the evidence in dispute should serve to check unreasonable, arbitrary or abusive assertions of the privilege. Allowing courts to exercise *de novo* review and substitute their own judgment for that Executive Branch officials, however, would pay short shrift to the President's constitutional responsibilities and Executive officials' superior expertise in defense and foreign relations. Deferential review—combined with expedited appeals and regular, meaningful reporting to Congress—would strike the appropriate balance.

In sum, S. 2253 is a commendable effort to provide needed guidance to courts on how to assess Executive Branch assertions of the state secrets privilege, and provides valuable mechanisms for balancing and reconciling the sometimes conflicting interests of justice and transparency in government, on the one hand, and protection of national security information, on the other.

TESTIMONY OF PATRICIA M WALD ON S 2533 (REFORM OF STATE SECRETS PRIVILEGE) BEFORE SENATE JUDICIARY COMMITTEE

FEBRUARY 13,2008

Former Judge, United States Court of Appeals for District of Columbia Circuit (1979-1999; Chief Judge (1986-91); Judge, International Criminal Tribunal for the former Yugoslavia (1999-2001); Member, President's Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass ?destruction (2004-5)

Chairman Leahy, Senator Specter, Committee Members:

Thank you for inviting me to testify briefly today on S 2533 , a bill to regulate the state secrets privilege which is being increasingly raised as a determinative issue in federal court civil litigation involving alleged violations of civil and constitutional rights .My testimony will deal with the capability of federal judges to administer the privilege in a manner that will not endanger national security at the same time it permits litigants to the maximum degree feasible to pursue valid civil claims for injuries incurred at the hands of the government or private parties. In that regard let me make a few points.

I. The state secrets privilege is a common law privilege originating with the judiciary which enunciated its necessity and laid down some directions for its scope in cases going back to the nineteenth century but more recently highlighted in United States v Reynolds, 345 U.S. 1 (1953). Reynolds recognized the government's privilege in that case to refuse to reveal an airplane accident report in private injury litigation because of a "reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged" Id at 10. (as you undoubtedly know it turned out that there were no such secrets in the report).Since Reynolds, courts have been deciding cases where the government raises the privilege on their own in terms of its scope and its consequences and producing often inconsistent results. There is a wide consensus in the legal community as the American Bar Association Recommendations and Report 116A demonstrate that the importance of the issue and the varying results of leaving the implementation of the privilege totally within the discretion of individual judges militate toward the exercise by Congress of its acknowleged power under Article I, Section 8 and Article III, Section 2 of the U.S. Constitution to prescribe regulations concerning the taking of evidence in the federal courts. Again as you are aware Congress has legislated many times on the Rules of Evidence governing federal court procedures including those for proceedings like habeas corpus and FISA proceedings that may involve matters of national security. In the criminal area, the Classified Intelligence Procedures Act (CIPA) provides a relevant model for alternatives to full disclosure of classified information which allow a prosecution to continue while affording a defendant his or her due process rights. The time is now ripe for such legislation in the civil arena; litigants and their counsel are confused and unsure as to how to proceed in cases where the government raises the privilege; the courts themselves are confronted with precedent going in many different directions as to the scope of their authority and the requirements for exercising it.

2. I believe there are several principles which need to be considered in such legislation , and I believe as well that S.2533 has incorporated those principles.. Many come from the cases themselves, others from experience with the CIPA legislation and a few from my own judicial experience with cases involving national security information such as the FOIA (Freedom of Information Act). Still others are included in the ABA Report and in a Judicial Conference Advisory Committee Report back in 1969. dealing

with codification of the privilege (hereafter Advisory Committee).These principles to be found in S 2533 I believe are capable of being observed by federal judges without making their jobs unduly onerous and are within their competence to administer, as proven by their current use in other kinds of litigation. They will, I also believe, contribute to the uniformity of the privilege's application throughout the federal judiciary and to both the reality and the perception of fairness for deserving litigants with valid civil claims.

a) Reynolds made it clear and subsequent cases have verbally agreed that whether the evidence sought to be withheld by the government if disclosed publicly would present "a reasonable danger" of significant harm to national defense or foreign relations is ultimately a matter for the judge, not the government to decide. Thus it should not be enough—though some cases appear to come close to saying it is—that a prima facie plausible claim of state secret be raised by the government. Rather the judge must make an independent evaluation of whether a state secret is involved. This does not of course mean that he will not give due weight to the government's evidence and expert opinion in making his determination but ultimately it will be his decision. Here I point out that there are other contexts in which secrecy and national security are involved such as the FOIA., where the judge performs a similar function. There in Exemption 1, the government may withhold from public disclosure material that has been duly classified under Executive Order criteria if that classification is reasonable. Under a specific amendment in 1974 however, the court has the authority to look at and decide de novo (though giving "substantial weight" to government affidavits) whether the classification is reasonable. The courts' use of that authority I will say has been cautious to the extreme, but it does exist and on occasion has been employed to reject unjustified claims. A case for even more intense scrutiny of the state secret privilege by judges can be made on the basis that the need for such information is more compelling in the case of a civil plaintiff than any member of the public making a request under FOIA But the FOIA example makes a basic point that judges do deal with national security information on a regular basis and can be entrusted with its evaluation on the relatively modest decisional threshold of whether its disclosure is "reasonably likely" to pose a national security risk(Sec. 4051). To my knowledge there have been no court "leaks" of any such information There is no doubt that such a decision is a weighty one but if our courts are to continue their best tradition of constitutional guardianship it is an obligation that they cannot avoid, And the potentiality of a serious judicial review of the material in conjunction with the governments affidavits on the need for nondisclosure even in a courtroom setting will itself pose a deterrent to the dangers of the privilege being too "lightly invoked" (Reynolds)

b)This brings me to the question of whether unlike FOIA which allows but does not require a judge to look at the allegedly risky material himself in camera rather than relying on the government's affidavits, state secret legislation should require the judge to himself or herself review the material before making a decision on whether the privilege applies. I am of the view that it should. The stakes in civil litigation-as I said- tend to be higher than in FOIA for the plaintiff and our traditions of fair hearing dictate that to the maximum degree feasible all relevant evidence be admitted in judicial proceedings.

Reynolds itself left open the possibility that in some contexts where the plaintiffs' showing of need was not compelling, the judge need not do so ., and as I have related ,in FOIA cases the judge may decide not to. On the other hand the judge in CIPA and in FISA cases does regularly inspect the material. in camera. I read the ABA Report to recommend a similar approach here. Only in that way can the judge fulfill the judicial obligation to insure a fair hearing but just as important only if he sees the evidence for himself can he make the CIPA like decision whether there are alternative ways than its presentation in original form to satisfy the plaintiff's need but not to impugn national security as well as whether the objected to material can be segregated from other material in the same document that does not qualify for protection. (I do not discount the possibility that an extraordinary case might arise where both the government and the judge agree that his examination of the secret evidence would be unduly risky and alternatives c an be put in place that will insure fairness but this should not be the usual or ev en a frequent practice). My own experience with highly sensitive information is that our court security safekeeping facilities and procedures can insure its protection; law clerks or masters can be given clearances to handle it and if even that is not possible, the government's own cleared employees can be sent over to stand guard outside the chambers door while the judge reads it. (I have had this done on at least one occasion). I have heard other district judges like Judge Brikema who presided over the Padilla case express sentiments that it is neither unusual nor unduly burdensome for federal judges to handle classified information ; many do it on a daily basis.

(c) The thrust of legislation on state secrets should be to emphasize judicial flexibility and creativity in finding alternatives to the original material that will permit the case to proceed whenever possible. Reynolds itself stressed this approach and it has been a hallmark of reform efforts on the privilege since the 1969 Advisory Report.. Since then however CIPA has listed and judges have used measures such as requiring the government to produce an unclassified document with as much of the material as possible in the original, stipulating to facts that the original material was designed to prove or contravert, or producing a summary of the controversial document that allows the defendant "substantially the same ability to make his defense". 18 USC app 3 Sec. 6. In this regard I think the drafters of S.2533 have done an excellent and comprehensive job of setting out the steps a judge should take in first determining whether in camera hearings, record sealing, protective orders, or use of a cleared master can permit the case to go ahead or whether more stringent measures are required. (Sec.4052). Especially important is the requirement that if the case may be decided on a legal issue alone even if the substantive matter involved maybe a state secret that the judge proceed to decide the legal issue and not hold a state secret hearing. (Sec. 4052(b)(B) When however the judge decides a genuine issue as to state secrets exists, the bill provides a full array of time-tried techniques for crafting alternatives to its revelation that may allow the case to proceed.: unclassified summaries, redactions, segregation of secret fropm nonsecret material. The specific authorization of Vaughn indices in Section 4052(d) is particularly useful in that in FOIA cases they require the government to justify in detail-sometimes line by line-the need for secrecy.

(d) These tools of judicial flexibility in Sections 4054-5 should permit a judge to make a conscious decision after a state secrets claim is raised whether the plaintiff's case may proceed to the next stage without the secret material. Premature dismissals should be eschewed. Unless then without such material a party's affirmative case or defense surely falls short of the threshold required by the federal rules of civil procedure(Rules 12(b)(6) and 12(c), the party suffering disadvantage from nondisclosure should be allowed to supplement their case by additional discovery whenever it could reasonably bolster their case. This actually is a very important point because a high percentage of cases are dismissed at the pleading stage without additional discovery being allowed, and the interposition of the secrets claim makes it fair to mandate special caution in such cases to let the party play out its nonsecret case. Also worth noting is the difficulty of plaintiffs who cannot show standing to bring the suit unless they are allowed to see secret evidence. Here particular care should be taken to allow maximum access to nonsecret discovery or even postponement of the standing decision until the secrecy claim is decided. Standing is after all a judicial doctrine which has become increasingly onerous and complex in the past few decades; since state secrets is also a judicially implemented doctrine the two should be brought into some form of coexistence that does not fatally disadvantage valid civil claimants. As the ABA Report pointed out while the Totten and Tenet cases in the Supreme Court involving espionage employment contracts do present an absolute bar to justiciability , other cases do not. I agree with the bill as well that the government not be required to immediately plead" confirm or deny " at the pleading stage when the secrets claim is planning to be raised. FOIA practice provides an analog-the government has been allowed to raise a "neither confirm nor deny" answer as to whether a requested document exists in its pleadings in Exemption 1 cases.

(e) Once the government raises a secrets claim, the question arises as to how it will be litigated and by whom. The government is certainly required by affidavit or testimony to justify the claim but where and who can take part in the litigation at that stage may be an issue. The 1969 Advisory Committee Report permitted the judge to hear the matter in chambers "but all counsel are entitled to inspect the claim and showing and to be heard thereon", subject to protective orders. In general every effort should be made to provide the regular counsel with the necessary clearances to litigate the claim, and where that turns out to be impossible to substitute counsel who have such clearances. In some cases the validity of the secrets claim can be litigated at a level which does not require special clearances. through devices like the Vaughn index Another device used successfully by our district court was the appointment of a master with the necessary clearances to organize and separate out sample categories of documents in a voluminous submission for which total secrecy was originally claimed under FOIA Exemption 1 and to present them to the judge with the arguments pro and con for the judges decision. As a result 64% of the material was eventually released. See In re United States Department of Defense,848 F2d 232 (1988). In short, judges are used to handling con fidential material through sealing, protective orders against disclosure by counsel, screened masters, and in camera or even ex parte submissions. But the need for guidance and a protocol for using such devices in a uniform manner is dominant. The mere exercise of going through

the required procedural steps will concentrate the judge's attention and sharpen his or her awareness of the interests involved at each stage.

(f) Dismissal of a private party claim should be a last resort if it is based on the unavailability of state secret evidence. There will of course be cases where the judge ultimately and rightly decides that a state secret of significant consequence and risk cannot be revealed even under safeguards an d that without such evidence a fair hearing cannot be held. See Sec.4055. I do suggest legislators give some thought as to whether there are any compensatory remedies to the injured party in such cases. I note that back in 1969 the Advisory Committee to the Judicial Conference advised that if a partyis deprived of material evidence by the state secrets claim the judge shall make further orders in theinterests of justice including striking witness testimony, finding against the government on the relevant issue or dismissing the action. It may soundsimpleminded but sometimes the ordinary human reaction of an apology from the government can do much to quell rancor from being deprived of an opportunity to rectify an injustice; private bills are also a possibility.Or conversely thought might be given whether when a secrets claim is upheld at the same time the court finds it is covering governmental misbehavior some form of accountability through reporting is in order. Finally expedited appeal-interlocutory in many cases- should be allowed on a truncated record (sealed if necessary) with cutback briefing and absent any requirement for a detailed written opinion by either court, although I do think a few sentences of explanation are always necessary for any kind of meaningful review at any level. But the expedited appeal-especially if the government loses its claim-should insure against prolonged delays in the trial itself.

Thank you for this opportunity to present my views. I do believe thoughtful legislation is needed to insure that maximum and uniform efforts are made to strike the right balance between national security needs and fair judicial proceedings. I believe base d on my experience as a federal judge and my international war crimes experience that such a balance can be struck and that our federal judges are already acquainted with the use of many of the proper tools for doing so. I am confident that S 2533 is a sound beginning for needed reform.

The Honorable Ted Kennedy
Committee on the Judiciary
U.S. Senate
Washington, D.C.

February 8, 2008

Dear Senator Kennedy:

Thank you for allowing us to comment for the record concerning use of the state secrets privilege by the President and executive departments of the United States government.

There is much about the state secrets privilege and its use over the last 50 years that warrants extended discussion, but we will constrain our comments here to two issues raised by Professor Robert Chesney in his remarks to the media and in scholarship that has incorrectly colored views concerning executive branch use of the state secrets privilege.

First, Professor Chesney claims that increased use of the privilege over time is of little significance in its impact on our institutions and oversight processes. Recently a *Washington Post* article quoted and paraphrased Chesney's views in the following way:

> . . . [T]he researcher who totaled the use of the privilege in published legal opinions said the increase is insignificant. Robert Chesney, an associate professor at Wake Forest University School of Law, showed that the Bush administration had invoked the state secrets privilege 20 times since 2001, while the same privilege was invoked 26 times from 1991 to 2000 and 23 times from 1981 to 1990.
>
> Chesney . . . said . . . that while the numbers show an upward trend, administration critics do not take into account the fact that the nation has been at war since 2001. As a result, the government is undertaking a larger number of secret operations. "There's this strong desire to show that this is something the Bush administration has seized upon to put things under the rug," Chesney said. "They have seized on it, but they also have been confronted with dozens and dozens of lawsuits seeking to explore classified programs."[1]

It is unclear how Chesney is counting invocations of the privilege, but since 2002 courts have issued 34 opinions where the privilege has been pressed by the Bush administration. This far outstrips the number of opinions issued for any similar period of time.[2] Yet Chesney claims that increased use of the privilege is "insignificant." Appendix A shows that use of the privilege has increased dramatically over the last three decades. Discounting the pre-1975 cases Chesney erroneously includes in his table of cases discussed below, the privilege was invoked on only five occasions between 1953 and 1975 (including the invocation in United States v. Reynolds, the case that established the privilege in U.S. jurisprudence). While Chesney claims increased use of

[1] http://www.washingtonpost.com/wp- dyn/content/story/2008/01/29/ST2008012900463.html?sid=ST2008012900463

[2] See Appendix A. In analyzing five-year rolling numbers, 2003-2007, with 34 reported opinions, is by far the most active period for opinions concerning state secrets claims. The next most active five-year periods not involving the administration of George W. Bush are 1979-1983 and 1980-1984, each with 22 reported opinions concerning United States assertion of the privilege.

the privilege may be substantially explained by the fact that we are "at war," it should be noted that between 1953 and 1975 we were also at war; for a full decade or more of that time frame.

The fact is that prior to 1975 use of the privilege was an extraordinary event. Since that time use of the privilege has become routinized and primary decisions about whether or not it should be deployed have migrated from department heads to the Attorney General's office. In the words of one government attorney: "For those of us defending the government from the range of legal assaults, openness is like AIDS – one brief exposure can lead to the collapse of the entire immune system . . . but we can always play the trump card – state secrets – and close down the game."[3] And a high ranking CIA official noted that in an assertion of the privilege taken up in the administration of President Bill Clinton, "We were forced to accept Justice's assurances that the sky would fall if [then-CIA Director John] Deutch didn't act at that very moment . . . We had no alternative but to accept Justice's litigation strategy, which was frankly, brinkmanship."[4] Even when agencies have no objection to release of information or to review of information toward possible release, Justice officials step in to block what they believe to be actions that may undercut executive power. This is not a goal of the state secrets privilege as intended in the *Reynolds* case. The privilege exists not to serve one branch, and is not intended to protect executive branch policy and shield agencies from oversight. It has been converted by the Department of Justice from a functional, practical litigation rule into part of a comprehensive strategy to reduce public exposure of executive branch activities.

The Department of Justice appears to employ the privilege in support of executive branch policy, rather than out of a main concern to protect against the disclosure of information that would harm the national security if made public. A telling feature that the privilege is now a captive of executive branch policy and is detached from the pragmatic moorings announced in *Reynolds* is the Department of Justice's movement toward a super privilege, one that would require dismissal upon the pleadings whenever the government asserts that "national security" would be imperiled by allowing a case to go to discovery.[5]

Under these circumstances it is incorrect to say that increased use of the privilege does not represent a significant alteration of the privilege's affect on democratic government compared to use in previous times. The privilege is obviously an inconvenient necessity in a democratic government, but exploitation of the privilege over the last several decades, apparently to the unwarranted aggrandizement of executive power, represents a serious threat to congressional oversight and the ends of justice.

Second, Professor Chesney submitted an article, "State Secrets and the Limits of National Security Litigation," for the record before this committee that is substantially biased in favor of deference to executive power. The Addendum to his article includes a problematic table of cases purporting to be "Published Opinions Adjudicating Assertions of the State Secrets Privilege after Reynolds, 1954-2006."

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[3] Scott Armstrong, "Do You Wanna Know a Secret," Washington Post, 16 February 1997.

[4] Ibid.

[5] See In re NSA Tel. Rec., 444 F. Supp. 2d 1332 (J.P.M.L. 2006) for a list of dozens of actions against the United States alleging unconstitutional and illegal electronic surveillance of U.S. citizens. This case considered and approved consolidation of these cases in the Northern District of California. In many of these cases, the United States asserted that Totten v. United States (92 U.S. 105 (1875)) barred suit (espionage contracts may not be sued upon for breach, since the very nature of the suit concerns secret matters). The government seems to want the *Totten* doctrine to do a good deal more than preclude suits for breach of contract, arguing that whenever a matter is claimed to be clothed in national security the case should be dismissed on the pleadings.

Four of the ten cases included in the table before 1975 are not state secrets cases at all.[6] In none of those four cases did the government assert the privilege or apparently even bring up the privilege, and it can hardly be said that the courts involved "adjudicated" any matter concerning the privilege. This apparent substantial selection bias would by itself seriously compromise the value of the table, but this bias is also double-edged: Chesney fails to include cases after 1975 that are similar to those he includes prior to 1975.[7] This bias has the effect of making it appear as if pre-1975 use of the privilege is more extensive and has greater continuity than actually existed. The inclusion of the four non-state secrets cases helps to obscure a distinct shift in use of the privilege during the administration of Jimmy Carter. In the late 1970s, use of the privilege began to expand rapidly.

Additionally, a fifth case Chesney includes, the 1956 case Republic of China v. National Fire Union, helps to skew the pre-1975 results that Chesney seems intent on filling out to greater numbers. While the privilege was asserted in *National Fire Union*, it was an assertion made by China, and assertions by foreign entities are not treated with the same deference and respect as assertions by the U.S. Government. Cases of foreign assertion are rarely cited to as part of the state secrets jurisprudence and it is clear that different standards apply to such assertions.

In the end, half of the cases in Chesney's table prior to 1975 should not have been included. Their inclusion creates an erroneous impression that the privilege had a more frequent use and a much broader and deeper jurisprudence during its first 22 years than what is the case.

As a result of selection bias concerning front end, pre-1975 cases, Chesney must make sure that his wide open acceptance of cases of that era does not translate into huge numbers of post-1975 non-state secrets cases entering the table on the back end. Chesney's refusal to include similar post-1975 cases to those he included pre-1975 is made necessary because if he had used the same criteria for inclusion his table could be diluted with dozens of cases that cited to and discussed *Reynolds* but had no connection with state secrets. The dividing point represented by the year 1975 is important, since, as noted above, increased use of the privilege clearly began during the administration of President Jimmy Carter.[8] This increased use appears to be a response to establishment of the select committees on intelligence in Congress, more aggressive oversight activity by this committee, passage of the Foreign Intelligence Surveillance Act, which injected judicial review into the arena of national security surveillance, and a defensive reaction by the executive branch to mistrust of the presidency after the events of the administration of Richard M. Nixon.

Turning to the cases erroneously included by Chesney prior to 1975, three of the cases concerned unconstitutional wiretaps, while the fourth involved the question of whether or not to compel production of statements in deportation litigation. In none of these cases did the government raise the state secrets privilege, and in only one case, United States v. Ahmad, can it be said that national security was involved. And even in that case the "national security" issue was merely that the president had ordered warrantless surveillance of U.S. citizens: there is no evidence that any classified information was involved. It is true that these cases cite to United States v. Reynolds, but Reynolds is frequently used for support of legal positions that have nothing to do with state secrets.

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[6] United States v. Ahmad, 499 F. 2d 851 (3rd Cir. 1974); Black v. Sheraton, 371 F. Supp. 97 (D.D.C. 1974); Elson v. Bowen, 83 Nev. 515 (1967); Petrowicz v. Holland, 142 F. Supp. 369 (E.D. Pa. 1956).

[7] For example, in the random review of cases discussed in note 4 below, two cases contained language similar in scope and depth to remarks in the four disputed cases that Chesney includes. But Chesney does not include those cases in his table (U.S. v. Winner, 641 F.2d 825, 831-32 (10th Cir. 1981); Denver Policemen's Protective Asso. v. Lichtenstein, 660 F.2d 432, 660 F.2d 432, 437 (10th Cir. 1981)).

[8] See Appendix A.

For example, over 500 federal court opinions have relied on *Reynolds* in some way, yet only 115 of these opinions were in cases where the privilege was asserted. Likewise, 77 state court decisions cite to *Reynolds*.[9] The great majority of these cases have nothing to do with state secrets questions. The four cases cited above and included in Chesney's table simply are not state secrets cases and are clearly outside the state secrets jurisprudence initiated in *Reynolds*. Perhaps the best evidence for this point is found in how the four cases are referred to by other court decisions that do involve state secrets claims. Two of the cases, Elson v. Bowen and Petrowicz v. Holland, are not cited at all in subsequent state secrets litigation. Black v. Sheraton is cited in three state secrets cases, but not in the context of use of the privilege. United States v. Ahmad is cited in five state secrets cases, but only one of those cites could be considered within the scope of use of the privilege. Even this lone instance is rather lukewarm. In Alliance v. Di Leonardi, 1979 U.S. Dist. LEXIS 8167, the court only noted that "Courts called upon to evaluate the claim of state secrets have consistently used this approach. cf. United States v. Ahmad, 499 F.2d 851 (3d Cir. 1974) . . ."[10]

From 1975 to present there have been 110 reported decisions in cases where the state secrets privilege was asserted by the government.[11] In all of those cases only once were any of the four cases included in the Chesney table cited to in support of the privilege. Contrary to Chesney's views, federal courts have not considered the four cases he included in his table prior to 1975 to be informative concerning state secrets jurisprudence.

Sincerely,

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[9] Lexis search. A random selection and review of 25 non-state secrets cases dating back to 1961 in which United States v. Reynolds is cited reveals the variety of uses for which it is used as precedent. For example: Seven of the cases cited *Reynolds* in support of discussions concerning sanctions for failure to produce requested documents; six cases concerned questions about *in camera* inspection of unclassified documents; five cases used the *Reynolds* precedent for matters about the general form a claim of privilege must take; three cases used *Reynolds* as an example of when information may be withheld.

[10] "This approach" mentioned by the court was, "A fortiori, where necessity [of requested documents] is dubious, a formal claim of privilege... will have to prevail."

[11] See Appendix A.

Appendix A

All known reported state secrets cases or cases discussing significant matters concerning the state secrets doctrine.

Cases In Chronological Order.

Citations	Privilege Formally Asserted? X=Yes —— = No F = Foreign S = States	Related Entries	Cat. 1: Secret relationships with govt. put at issue under the SSP or implied in facts?	Cat. 2: Dismissed because "very nature" of case a state secret?	Cat. 3: Question of whether Govt. acknowledges secret activity put at issue or facts in public domain detail the secret program?	Cat. 4: Case dismissed under SSP before discovery?	Cat. 5: Mosaic theory or similar approach discussed or applied?[1]
1. U.S. v. Burr (1807)[7]	25 F. Cas. 30; 25 F. Cas 187 (1807)	—	—	Yes	No	No	No	No
2. Totten v. U.S. (1875)	92 U.S. 105 (1875)	—	—	Yes	Yes	Yes	No	Yes
3. D. of Colum. v. Bakersmith (D.C. Cir. 1901)	18 App. D.C. 574 (D.C. Cir. 1901)	X[2]	—	No	No	No	No	No
4. King v. U.S. (5th Cir. 1902)[7]	112 F. 988 (5th Cir. 1902)	X	—	No	No	No	No	No
5. In re Grove (3rd Cir. 1910)	180 F. 62 (3rd Cir. 1910)	—	—	No	No	No	No	No
6. Firth v. Bethlehem Steel (E.D. Penn. 1912)	199 F. 353 (E.D. Penn 1912)	X	—	No	No	No	No	No
7. Pollen v. Ford (E.D.N.Y. 1939)	26 F. Supp. 583 (1939)	X	—	No	No	No	No	No
8. Cresmer v. U.S. (E.D.N.Y. 1949)	9 F.R.D. 203 (1949)	X	—	No	No	No	No	No
9. Reynolds v. U.S. (3rd Cir. 1951)	192 F.2d 987 (3rd Cir.)	X	10	No	No	No	No	No
10. U.S. v. Reynolds (S.C. 1953)	345 U.S. 1 (1953)	X	9	No	No	No	No	No
11. Tucker v. United States(Ct. Cl. 1954)	127 Ct. Cl. 477 (1954)	—	—	Yes	Yes	No	No	No
12. China v. Nat. Union (D. Md. 1956)	142 F. Supp 551 (D. Md.)	F-Unk[3]	—	No	No	No	No	No
13. Halpern v. U.S. (S.D.N.Y. 1957)	151 F. Supp. 183 (S.D.N.Y.)	X	14	No	No	No	No	No
14. Halpern v. U.S. (2nd Cir. 1958)	258 F.2d 36 (2nd Cir.)	X	13	No	No	No	No	No
15. Heine v. Raus (4th Cir. 1968)	399 F.2d 785 (4th Cir.)	X	—	Yes[4]	No	No	No	No
16. Pan Am v. Aetna (S.D.N.Y. 1973)	368 F. Supp. 1098 (S.D.N.Y. 1973)	X	—	Yes	No	No	No	No
17. Kinoy v. Mitchell (S.D.N.Y. 1975)	67 F.R.D. 1 (S.D.N.Y. 1975)	X	—	No	No	No	No	No
18. Kerr v. U.S. (9th Cir. 1975)[5]	511 F.2d 192 (9th Cir. 1975)	S	19	No	No	No	No	No
19. Kerr v. U.S. (1976)[5]	426 U.S. 394 (1976)	S	18	No	No	No	No	No
20. Halkin v. Helms (D.C. Cir. 1978)	598 F.2d 1 (D.C. Cir. 1978)	X	40	No	No	Yes	No	Yes
21. Spock v. U.S. (S.D.N.Y. 1978)	464 F. Supp. 510 (S.D.N.Y. 1978)	X	—	No	No	Yes	No	No
22. ACLU v. Brown (7th Cir. 1979)	609 F.2d 277 (7th Cir.)	X	23, 28	No	No	No	No	No
23. Jabara v. Kelley (E.D. Mich. 1979)	75 F.R.D. 475 (D. Mich. 1977)	X	—	No	No	No	No	No
24. Clift v. U.S. (2nd Cir. 1979)[6]	597 F.2d 826 (2nd Cir. 1979)	—	69	No	No	No	No	No
25. U.S. v. Felt (D.D.C. 1979)[7]	491 F. Supp. 179 (D.D.C. 1979)	X	29	No	No	No	No	No
26. Alliance v. DiLeonardi (N.D. Il. 1979)	1979 U.S. Dist. LEXIS 8167 (N.D. Ill. 1979)	X	—	No	No	No	No	No
27. ACLU v. Brown (7th Cir 1980)	619 F.2d 1170 (7th Cir.)	X	22, 28	No	No	No	No	No

28. *ACLU v. Brown* (7th Cir. *En banc* 1980)	619 F.2d 1170 (7th Cir. 1980)	X	22, 23	No	No	No	No	No
29. *U.S. v. Fefi* (D.D.C. 1980)[7]	502 F. Supp. 74 (D.D.C. 1980)	X	26	No	No	No	No	No
30. *Sigler v. LeVan* (D. Md. 1980)	485 F. Supp. 185 (D. Md.)	X	—	No	No	No	No	Yes
31. *Farnsworth Can. v. Grimes* (4th Cir. 1980)	1980 U.S. App. LEXIS 11406 (4th Cir. 1980)	X	—	No	Yes	No	Yes	No
32. *Zenith v. U.S* (C.I.T. 1981)	1 C.I.T. 325 (C.I.T. 1981)	X	—	No	No	No	No	No
33. *Nat'l Law. Guild v. Att. G.* (S.D.N.Y. 1982)	96 F.R.D. 390 (S.D.N.Y. 1982)	X	—	No	No	Yes	No	No
34. *U.S. v. The Irish* (D.C. Cir. 1982)	684 F.2d 928 (D.C. Cir. 1982)	X	—	No	No	No	Yes[8]	No
35. *Ceramica, S.A. v. U.S.* (C.I.T. 1982)	4 C.I.T. 168 (C.I.T. 1982)	X	36	No	No	No	No	No
36. *Ceramica, S.A. v. U.S.* (C.I.T. 1982)	4 C.I.T. 267 (C.I.T. 1982)	X	35	No	No	No	No	No
37. *Salisbury v. U.S.* (D.C. Cir. 1982)	690 F.2d 966 (D.C. Cir. 1982)	X	—	No	No	Yes	Yes	No
38. *Republic Steel v. U.S.* (C.I.T. 1982)	3 C.I.T. 117 (C.I.T. 1982)	X	—	No	No	No	No	No
39. *Ganadera, S.A. v. Block* (D.D.C. 1982)	556 F. Supp. 354 (D.D.C. 1982)	X	—	No	No	No	Unk	No
40. *Halkin v. Helms* (D.C. Cir. 1982)	690 F.2d 977 (D.C. Cir. 1982)	X	20	No	No	No	No	Yes
41. *Ellsberg v. Mitchell* (D.C. Cir. 1983)	709 F.2d 51 (D.C. Cir. 1983)	X	—	No	No	No	No	No
42. *AT&T v. U.S.* (Cl. Ct. 1983)	4 Cl. Ct. 157 (Cl. Ct. 1983)	X	—	No	No	No	No	No
43. *U.S. Steel v. U.S.* (C.I.T. 1983)	6 C.I.T. 182 (C.I.T. 1982)	X	—	No	No	No	No	No
44. *In re Agent Orange* (E.D.N.Y. 1983)[9]	97 F.R.D. 427 (E.D.N.Y. 1983)	Unk	45	No	No	No	No	Yes
45. *In re Agent Orange* (E.D.N.Y. 1984)[9]	98 F.R.D. 557 (E.D.N.Y. 1984)	Unk	44	No	No	No	No	No
46. *Comp. Franc. v. Philips* (S.D.N.Y. 1984)[10]	105 F.R.D. 16 (S.D.N.Y. 1984)	F	—	No	No	No	No	No
47. *Hobson v. Wilson* (D.C. Cir. 1984)	737 F.2d 1 (D.C. Cir. 1984)	X	—	No	No	No	No	No
48. *Star-Kist, Inc. v. U.S.* (C.I.T. 1984)	8 C.I.T. 305 (C.I.T. 1984)	X	—	No	No	No	No	No
49. *Northrop v. McD. Doug.* (D.C. Cir. 1984)	751 F.2d 395 (D.C. Cir. 1984)	X	—	No	No	No	No	No
50. *Molerio v. FBI* (D.C. Cir. 1984)	749 F.2d 815 (D.C. Cir. 1984)	X	—	No	No	No	No	No
51. *Fitzgerald v. Penthouse* (4th Cir. 1985)	776 F.2d 1236 (4th Cir. 1985)	X	—	No	No	No	Unk	No
52. *Foster v. U.S.* (Cl. Ct. 1987)	12 Cl. Ct. 492 (Cl. Ct. 1987)	X	—	No	No	No	Yes	No
53. *Xerox v. U.S.* (Cl. Ct. 1987)	12 Cl. Ct. 93 (Cl. Ct. 1987)	X	—	No	No	No	No	No
54. *Kelly v. San Jose* (N.D. Cal. 1987)[11]	114 F.R.D. 653 (N.D. Cal. 1987)	—	—	No	No	No	No	No
55. *Cuong v. U.S.* (Fed. Cir. 1988)	860 F.2d 1063 (Fed Cir. 1988)	X	—	No	No	Yes	Yes	No
56. *Weston v. Lockheed* (9th Cir. 1989)	881 F.2d 814 (9th Cir. 1989)	X	—	No	No	No	Yes	No
57. *In re U.S.* (D.C. Cir. 1989)[12]	872 F.2d 472 (D.C. Cir. 1989)	X	—	No	No	No	No	No
58. *Hudson River v. Navy* (E.D.N.Y. 1989)	U.S. Dist. LEXIS 19034 (E.D.N.Y. 1989)	X	59	No	Yes[13]	No	No	No
59. *Hudson River v. Navy* (2nd Cir. 1989)	891 F.2d 414 (2nd Cir. 1989)	X	58	No	No	No	No	No
60. *Patterson v. U.S.* (D.N.J. 1989)	705 F. Supp. 1033 (D.N.J. 1989)	X	62	No	No	No	No	No
61. *Nejad v. U.S.* (C.D. Cal. 1989)	724 F. Supp. 753 (C.D. Cal. 1989)	X	—	No	No	No	Yes	No
62. *Patterson v. FBI* (3rd Cir. 1990)	893 F.2d 595 (3rd Cir. 1990)	X	60	No	No	No	No	No
63. *Zuckerbraun v. Gen. Dyn.* (D. Conn. 1990)	755 F. Supp. 1134 (D. Conn. 1990)	X	64	No	No	No	Yes	No
64. *Zuckerbraun v. Gen. Dyn.* (2nd Cir. 1991)	935 F.2d 544 (2d Cir. 1991)	X	63	No	No	No	Yes	No
65. *Wilkinson v. FBI* (9th Cir. 1991)	922 F.2d 555 (9th Cir. 1991)	X	—	No	No	No	No	No
66. *In re Under Seal* (4th Cir. 1991)	945 F.2d 1285 (4th Cir. 1991)	X	—	No	No	No	No	No

67 *Bowles v. U.S.* (4th Cir. 1991)	950 F.2d 154, 156 (4th Cir. 1991)	X	—	No	No	No	Yes	No
68 *N.S.N. v. DuFont* (S.D.N.Y. 1991)	140 F.R.D. 275 (S.D.N.Y. 1991)	X	—	No	No	No	No	No
69 *Maxwell v. First Nat. Bank* (D. Md. 1991)	143 F.R.D. 590 (D. Md. 1991)	X	75, 76	Yes	No	No	Yes	Yes
70 *Cliff v. U.S.* (D. Conn. 1991)	808 F. Supp. 101 (D. Conn. 1991)	X	25	No	No	No	Yes	No
71 *Bareford v. Gen. Dyn.* (5th Cir. 1992)	973 F.2d 1138 (5th Cir. 1992)	X	—	No	No	No	Yes	No
72 *Richmark Corp. v. T.F.C.* (9th Cir. 1992)[11]	959 F.2d 1468 (9th Cir. 1992)	—	—	Yes	No	No	No	No
73 *Hyundai v. U.S.* (S.D.N.Y. 1992)	1992 U.S. Dist. LEXIS 9738 (S.D.N.Y. 1992)	X	—	No	No	No	No	No
74 *U.S. v. Koreh* (D.N.J. 1992)	144 F.R.D. 218 (D.N.J. 1992)	X	—	No	No	No	No	No
75 *Maxwell v. First Nat. Bank* (D. Md. 1992)	143 F.R.D. 590 (D. Md. 1992)	X	76, 69	Yes	No	No	Yes	Yes
76 *Maxwell v. First Nat. Bank* (4th Cir. 1993)	998 F.2d 1009 (4th Cir. 1993)	X	75, 69	Yes	No	No	Yes	Yes
77 *In re U.S.* (Fed. Cir. 1993)	1993 U.S. App. LEXIS 14881 (Fed. Cir. 1993)	—	78, 81, 87, 96, 113	No	No	No	N/A	No
78 *In re U.S.* (Fed. Cir. 1993)	1993 U.S. App. LEXIS 14977 (Fed. Cir. 1993)	X	77, 81, 87, 96, 113	No	No	No	Unk	No
79 *Bentzlin v. Hughes Co.* (C.D. Cal. 1993)	833 F. Supp. 1486 (C.D. Cal. 1993)	X	—	No	No	No	Yes	No
80 *In re Smyth* (N.D. Cal. 1993)	826 F. Supp. 316 (N.D. Cal. 1993)	I[12]	—	No	No	No	No	No
81 *McD. Douglas v. U.S.* (Fed. Cl. 1993)	29 Fed. Cl. 791 (Fed. Cl. 1993)	X	77, 78, 87, 96, 113	No	No	No	No	No
82 *Black v. U.S.* (D. Minn. 1994)	900 F. Supp. 1129, 1136 (D. Minn. 1994)	X	85	No	No	No	Yes	No
83 *Kronisch v. U.S.* (S.D.N.Y. 1994)	1994 U.S. Dist. LEXIS 13591 (S.D.N.Y. 1994)	X	—	No	No	No	No	No
84 *Yang v. Reno* (M.D. Penn. 1994)	157 F.R.D. 625 (M.D. Penn. 1994)	X	—	No	No	No	No	No
85 *Black v. U.S.* (8th Cir. 1995)	62 F.3d 1115 (8th Cir. 1995)	X	82	No	No	No	Yes	No
86 *Frost v. Perry* (D. Nev. 1995)	161 F.R.D. 434 (D. Nev 1995)	X	89, 91, 116	No	No	No	No	Yes
87 *McD. Douglas v. U.S.* (Fed Cl. 1996)	37 Fed. Cl. 270 (Fed. Cl. 1996)	X	77, 78, 80, 96, 113	No	No	No	No	No
88 *Monarch. P.L.C. v. U.S.* (Fed. Cl. 1996)	36 Fed. Cl. 324 (Fed. Cl. 1996)	X	90, 103	Yes	No	No	No	No
89 *Frost v. Perry* (D. Nev. 1996)	919 F. Supp. 1459 (D. Nev. 1996)	X	96, 91, 116	No	No	No	No	No
90 *Monarch. P.L.C. v. U.S.* (Fed. Cl. 1998)	42 Fed. Cl. 258 (Fed. Cl. 1998)	X	88, 103	Yes	No	No	No	No
91 *Kasza v. Browner* (9th Cir. 1998)	133 F.3d 1159 (9th Cir. 1998)	X	85, 88, 113	No	No[13]	No	No	Yes
92 *Linder v. Calero* (D.D.C. 1998)	183 F.R.D. 314 (D.D.C. 1998)	X	93	No	No	No	No	No
93 *Linder v. D.O.D.* (D.C. Cir. 1998)	133 F.3d 17 (D.C. Cir. 1998)	X	94	Yes	No	Yes	No	No
94 U.S. v. Klinavicius—Vil. (9th Cir. 1998)[7]	144 F.3d 1249 (9th Cir. 1998)	X	—	No	No	No	No	No
95 *Crater v. Lucent* (E.D. Mo. 1999)	1999 U.S. Dist. LEXIS 22765 (E.D. Mo. 1999)	X	101,121, 124	No	No	No	Yes	No
96 *McDonald D. Corp. v. U.S.* (Fed Cir. 1999)	182 F.3d 1319 (Fed. Cir. 1999)	X	77, 78, 81, 87, 113	No	No	No	No	No
97 *Tilden v. Tenet* (E.D. Va. 2000)	140 F. Supp. 2d 623 (E.D. Va. 2000)	X	98	No	No	No	Yes	No
98 *Tilden v. Tenet* (E.D. Va. 2000)	2000 U.S. Dist. LEXIS 20037	X	97	No	No	No	Yes	No
99 *Barlow v. U.S.* (Fed Cl. 2000)	2000 U.S. Claims LEXIS 156 (Fed. Cl. 2000)	X	—	No	No	No	No	No
100 *Virtual. Inc. v Moldova* (D.D.C. 2000)	2000 U.S. Dist. LEXIS 15872 (D.D.C. 2000)	X	104	No	No	No	No	No
101 *Crater v. Lucent* (Fed. Cir. 2001)	255 F.3d 1361 (Fed. Cir. 2001)	X	94, 121, 124	Yes	No	Yes	No	No
102 *DTM Research v. U.S.* (4th Cir. 2001)	245 F.3d 327 (4th Cir. 2001)	X	—	No	No	No	No	No
103 *Monarch. P.L.C. v. U.S.* (Fed Cir. 2001)	244 F.3d 1356 (Fed. Cir. 2001)	X	88, 90	Yes	No	No	No	No
104 *Virtual Inc. v. Moldova* (D.D.C. 2001)	133 F. Supp. 2d 9 (D.D.C. 2001)	X	100	No	No	No	No	No
105 *U.S. v. T.R.W.* (C.D. Cal. 2002)	211 F.R.D. 388 (C.D. Cal. 2002)	X	127	No	No	No	No	No

106. Global Relief v. O'Neill (N.D. Ill. 2002)	205 F. Supp. 2d 885 (N.D. Ill. 2002)	Unk[74]	—	No	No	No	No	No
107. In re Gr. Jury Sub. (**S.D.N.Y. 2002**)[10]	218 F. Supp. 2d 544 (S.D.N.Y. 2002)	F	—	No	No	No	No	No
108. Ctr. for N.S. Studies v. U.S. (D.D.C. 2002)	215 F. Supp. 2d 94 (D.D.C. 2002)	—	109	No	No	No	No	Yes[40]
109. Ctr. for N.S. Stud. v. U.S. (D.C. Cir. 2003)	331 F.3d 918 (D.C. Cir. 2003)	—	108	No	No	No	No	Yes
110. Stillman v. D.O.D. (D.D.C. 2002)	209 F. Supp. 2d 185 (D.D.C. 2002)	—	—	No	No	No	No	No
111. Doe v. Tenet (9th Cir. 2003)	329 F.3d 1135 (9th Cir. 2002)	X	121, 125	Yes	No	No	No	No
112. Trulock v. Wen Ho Lee (4th Cir. 2003)	66 Fed. Appx. 472 (4th Cir. 2003)	X	—	No	No	No	Yes	No
113. McD. Douglas v. U.S. (Fed. Cir. 2003)	323 F.3d 1006 (Fed. Cir. 2003)	X	77, 78, 81, 87, 96	No	No	No	No	No
114. Edmonds v. F.B.I. (D.D.C. 2003)	272 F. Supp. 2d 35 (D.D.C. 2003)	X	119, 120, 130	No	No	Yes	No	Yes
115. Darby v. U.S. (9th Cir. 2003)	74 Fed. Appx. 813 (9th Cir. 2003)	X	—	Unk	No	Unk	Unk	No
116. Kasza v. Whitman (9th Cir. 2003)	325 F.3d 1178 (9th Cir. 2003)	—	86, 89, 91	No	No	Yes	No	Yes
117. Horn v. Huddle (**D.D.C. 2004**)[21]	Under Seal But Available on the WWW	X	145	No	Yes	No	No	No
118. Tenenbaum v. Simonini (6th Cir. 2004)	372 F.3d 776 (6th Cir. 2004)	X	—	No	No	No	Unk	No
119. Burnett v. Al Baraka (D.D.C. 2004)	323 F. Supp. 2d 82 (D.D.C. 2004)	X	114, 120, 130	No	No	No	No	Yes
120. Edmonds v. DOJ (D.D.C. 2004)	323 F. Supp. 2d 65 (D.D.C. 2004)	X	114, 119, 130	No	No	No	Yes	No
121. Doe v. Tenet (9th Cir. 2004)	353 F.3d 1141 (9th Cir. 2004)	X	111, 125	Yes	No	No	No	No
122. Fountain v. New York (**S.D.N.Y. 2004**)[23]	2004 U.S. Dist. LEXIS 7539 (S.D.N.Y. 2004)	—	—	No	No	No	No	No
123. Citgo v. Petroleos (**S.D.N.Y. 2004**)[25]	2004 U.S. Dist. LEXIS 23581 (S.D.N.Y. 2004)	—	129	No	No	No	No	No
124. Crater v. Lucent (E.D. Mo. 2004)	2004 U.S. Dist. LEXIS 28544 (E.D. Mo. 2004)	X	95, 101, 126	No	No	No	Yes	No
125. Tenet v. Doe (**S.C. 2005**)[32]	544 U.S. 1 (2005)	X	111, 121	Yes	Yes	No	No	No
126. Crater v. Lucent (Fed. Cir. 2005)	423 F.3d 1260 (Fed. Cir. 2005)	X	95, 101, 124	No	No	No	No[75]	No
127. Schwartz v. Raytheon (9th Cir. **2005**)[36]	150 Fed. Appx. 627 (9th Cir. 2005)	X	105	No	No	No	Unk	No
128. Sterling v. Tenet (4th Cir. 2005)	416 F.3d 338 (4th Cir. 2005)	X	—	No	No	No	Yes	No
129. Citgo v. Petroleos (**S.D.N.Y. 2005**)[53]	2005 U.S. Dist. LEXIS 2144 (S.D.N.Y. 2005)	F-Unk	123	No	No	No	No	No
130. Edmonds v. DOJ (D.D.C. 2005)	405 F. Supp. 2d 23 (D.D.C. 2005)	X	114, 119, 120	No	No	Yes	No	Yes
131. Doe v. Gonzales (D. Conn. 2005)	386 F. Supp. 2d 66 (D. Conn. 2005)	—	—	Yes	No	No	No	Yes[57]
132. Arar v. Ashcroft (**E.D.N.Y. 2006**)[58]	414 F. Supp. 2d 250 (E.D.N.Y. 2006)	X	133	Yes	No	Yes	No	No
133. Arar v. Ashcroft (**E.D.N.Y. 2006**)[58]	2006 U.S. Dist. LEXIS 45550	X	132	Yes	No	Yes	No	No
134. El-Masri v. Tenet (E.D. Va. 2006)	437 F. Supp. 2d 530 (E.D. Va. 2006)	X	139	Yes	No[59]	Yes	Yes	No
135. Terkel v. AT&T (N.D. Ill. 2006)	441 F. Supp. 2d 899 (N.D. Ill. 2006)	X	—	Yes	No	Yes	Yes	No
136. Hepting v. AT&T (N.D. Cal. 2006)	439 F. Supp. 2d 974 (N.D. Cal. 2006)	X	—	Yes	No	Yes	No	No
137. Al-Haramain v. Bush (D. Ore. 2006)	451 F. Supp. 2d 1215 (D. Ore. 2006)	X	—	No	No	Yes	No	Yes
138. ACLU v. NSA (E.D. Mich. 2006)	438 F Supp. 2d 754 (E.D. Mich. 2006)	X	144	No	No	Yes	No	No
139. El-Masri v. U.S. (4th Cir. 2007)	479 F.3d 296 (4th Cir. Mar. 2, 2007)	X	134	Yes	No[7]	Yes	Yes	No
140. U.S. v. Adams (D. Maine 2007)	473 F. Supp. 2d 108 (D. Maine 2007)	X	147	Yes	No	Yes	No[48]	No
141. In re NSA Tel. Rec. (**N.D. Cal. 2007**)[71]	444 F. Supp. 2d 1332 (J.P.M.L. 2006)	—	147	No	No	No	No	No
142. Doe v. CIA (S.D.N.Y. 2007)	2007 U.S. Dist. LEXIS 201 (S.D.N.Y. Jan. 4, 2007)	X	—	Yes	No	No	Yes	No
143. NRDC v. England (C.D. Cal. 2007)	2:05-cv-07513-FMC-FMO Document 124	X	—	No	No	No	No	No
144. ACLU v. N.S.A. (6th Cir. 2007)	2007 U.S. App. LEXIS 16149 (6th Cir. 2007)	X	138	No	No	No	Yes	No

145. In re Sealed (D.C. Cir. 2007)	2007 U.S. App. LEXIS 17256 (D.C. Cir. 2007)	X	117	No	No	**Yes**	No	No
146. Wilson v. Libby (D.D.C. 2007)	2007 U.S. Dist. LEXIS 51978 (D.D.C. 2007)	—	—	No	No	No	No	No
147. In re NSA Tel. Rec. **(N.D. Cal.)**[32]	2007 U.S. Dist. LEXIS 53456 (N.D. Cal. 2007)	X	140, 141	**Yes**	No	**Yes**	No	No
148. Berman v. CIA (9th Cir. 2007)	2007 U.S. App. LEXIS 21072 (9th Cir 2007)	—	—	No	No	No	No	**Yes**
149. Mont. v. Etreppid Tech.[33] **(D. Nev. 2007)**	2007 U.S. Dist. LEXIS 79009 (D. Nev. 2007)	X	—	No	No	No	No	No
150. Al-Haramain v. Bush (9th Cir. 2007)	507 F. 3d 1190 (9th Cir. 2007)	X	137	**Yes**	No	**Yes**	No	No
151. Al-Kidd v. Gonzales **(D. of Idaho 2007)**[34]	2007 U.S. Dist. LEXIS 90548 (D. of Idaho 2007)	X	—	No	No	No	No	No
152. Crater v. Lucent (E.D. Mo. 2007)	2007 U.S. Dist. LEXIS 94946 (E.D. Mo. 2007)	—	95, 101, 124, 126	No	No	No	No	No

[1] The government has used the mosaic theory in the following non-state secrets decisions: *Berman v. CIA*, 378 F. Supp. 2d 1209, 1215-1217 (E.D. Cal 2005) (Extended discussion of the "mosaic theory" and its general outlines); *Florida Immigrant Advocacy Center v. NSA*, 380 F. Supp. 2d 1332 (S.D. Fl. 2005), 1342 n.7 (Court accuses plaintiffs of specifically trying to assemble classified information by consciously employing a mosaic collection technique in discovery); *North Jersey Media Group v. Ashcroft*, 308 F.3d 198 (3rd Cir. 2002), 219, 227 ("Lack of expertise" of judges to see the mosaic of national security interests).

[2] Assertion was made in briefs on appeal, but not by an executive body of the District of Columbia.

[3] The court compares the case to *U.S. v. Reynolds*, but gives no indication that the privilege has been asserted by the government. The court simply notes that the plaintiffs "seek also political information of activities which affect the foreign relations and public interest of the people of the United States. When respondents issued their insurance policies they knew, or should have known, that where military secrets and similar matters are at stake, certain information is privileged. . . In the case at bar the only reason for the refusal of the United States to supply the information requested is the determination by the Secretary of State that its disclosure 'would be prejudicial to the foreign relations of the United States and contrary to the public interest'." 142 F. Supp 551, 556 (D. Md. Adm. 1956). It seems doubtful that the United States formally asserted the privilege in this case.

[4] Relationship admitted, but certain details refused.

[5] These cases concern a writ of mandamus sought in federal court to prevent disclosure of personnel files and prisoner files. The state claimed the state secrets privilege, but the claim was denied for lack of proper invocation and there was an implied doubt whether even if appropriately asserted the privilege would be supportable.

[6] Assertion did not meet formal requirements of privilege as established in *Reynolds*, but court made an exception to these requirements since the disclosure of any of the affected material was already criminalized under the Invention Secrecy Act. 35 U.S.C. § 181; 597 F.2d 826, 828-29 (2nd Cir. 1979).

[7] Criminal action.

[8] Civil enforcement action. Dismissal of the case in favor of defendant who sought discovery of government documents.

[9] The government did not formally assert the privilege at this time, but it was in a serious bind since many of the documents requested by plaintiffs were classified. The government's main objection to being forced into assertion of the privilege concerned the procedures for assertion adopted by the special master. See pp.430-433 in the 1983 decision. The "mosaic theory" is alluded to in the 1983 decision, footnote 3 at 438.

[10] Assertion of the privilege by a French Agency that operated a government corporation and a French shipbuilding company. The assertion failed. At 25-26. The court noted in interesting dicta that "Indeed, even if the privilege had been properly invoked, the Court would likely have been inclined to find that [the plaintiff], by instituting this action, waived the privilege." At 25, n. 2.

[11] This case dealt with wholly a state matter, but the court carried on an interesting discussion, and adumbrated rules, for when the state secrets privilege should apply in a state civil matter where no federally held documents are requested.
[12] This case hinged on whether or not the remedy of mandamus was warranted by acts of the district court, but the appellate panel made conclusive observations concerning assertion of the state secrets privilege.
[13] Apparently the government raised the *Totten* Bar without formally asserting the state secrets privilege according to requirements set forth in *Reynolds*.
[14] In this case the state secrets privilege was raised by the government of China to prevent compulsion to answer discovery requests. The state corporation overseeing the Chinese company resisting discovery found that "almost all of its [the company facing discovery] financial information was classified a state secret and could not be disclosed." The Chinese corporation "contends that the state secrecy laws prohibit it from disclosing the information the district court ordered it to provide, that it would be subject to criminal prosecution if it did disclose such information, and that this prohibition necessitates the reversal of the discovery order and the contempt sanctions against it. The district court explicitly accepted Beijing's contention that the PRC's State Secrets Act barred disclosure of the information in question. We do so as well."
[15] Privilege asserted by the United Kingdom.
[16] But court dismissed *Totten* Bar motion without prejudice. 36 Fed. Cl. 324, 326. Plaintiff maintained it was in privity with government; government denied any contractual relationship with plaintiff.
[17] Courts relied on *Totten* in their analyses of the case.
[18] It is unclear if the government asserted the privilege. But it seems likely that it did not assert the privilege, hewing instead to the *Abourezk v. Reagan*, 785 F.2d 1043 (D.C. Cir. 1986), line of law. Nevertheless, the following statement appears in the case: "One such [extraordinary] circumstance recognized by the court is the assertion of the 'state secrets privilege' by the government when 'acute national security concerns' are involved. In that situation, the court held that review of in camera and ex parte submissions was only appropriate when: a) the government demonstrated 'compelling national security concerns;' and b) the government publicly disclosed, prior to any in camera inspection, as much of the material as it could divulge without compromising the privilege. Id. (citing *Molerio v. Federal Bureau of Investigation*, 749 F.2d 815 (D.C. Cir. 1984))." At 887.
In this case, the defendants have acted in accordance with the rationale espoused in Abourezk. On March 27, 2002, the Attorney General of the United States filed a declaration in which he stated that "it would harm the national security of the United States to disclose or have an adversary hearing with respect to materials submitted to the [United States Foreign Intelligence Surveillance Court] in connection with this matter."
[19] This case involves a corruption matter with a "Republic" that "is recognized by the United States and is considered to be an important ally of this country. The Republic is home to vast natural resources that have been the subject of a number of large investments by American companies in joint ventures with Republic-owned companies." The "Republic" asserted the state secrets privilege along with a defendant corporation, but the assertion was rejected. Very thorough discussion of foreign assertion of the privilege, at 559-560.
[20] Effort by government to import "mosaic theory" into Exemption 7A of FOIA, which would wrongfully turn 7A into an "exemption dragnet." At 103. But this holding was reversed, and the "mosaic theory" seemingly accepted for 7A on appeal in entry 107 (*Ctr. for N.S. Studies v. U.S.*, 331 F.3d 918 (D.C. Cir. 2003)).
[21] Opinion under seal either accidentally or purposely leaked to the public.
[22] The court identified the *Reynolds* requirement of personal consideration of withheld materials by head of a department as providing the basis for determining a state law issue. At *10-11.
[23] Defendant state owned oil company argued in objection to a production order that it had no authority to allow persons without security clearances to receive certain requested files. A Venezuelan minister further claimed that the privileged files were "strictly confidential, as they are associated with the public interest and national security of Venezuela." At *9.
[24] *Totten* Bar held to be a distinct privilege from the state secrets privilege. 544 U.S. 1, 10-11.
[25] Reversed the lower court holding, *Crater v. Lucent* (1999), 1999 U.S. Dist. LEXIS 22765, on this point.

[26] Unclear if the government actually asserted the state secrets privilege.
[27] The "mosaic theory" was also noted in a motion to Justice Ginsberg on an emergency application to vacate the stay of a preliminary injunction. 126 S. Ct. 1 (2005). In the 2nd Circuit hearing concerning the stay, Judge Cardamone engaged in a brief but cogent analysis of the "mosaic theory" in a concurring opinion. 449 F. 3d 415, 422-423 (2006).
[28] Court did not reach issue of assertion of the state secrets privilege.
[29] The Government raised *Totten* Bar but the court found the government's position "problematic" ("The Totten bar is quite distinct from the state secrets privilege; it is not a privilege or a rule of evidence; it is instead a rule of non-justiciability that deprives courts of their ability to hear 'suits against the Government based on covert espionage agreements' even in the absence of a formal claim of privilege." 437 F. Supp. 2d 530, 540).
[30] No discovery, but involved an order from a Public Utility Commission to Verizon, Inc., to attend a show cause hearing for contempt for failure to provide requested information.
[31] This case removed and combined all cases to the Northern District of California concerning interception of communications by AT&T on behalf of the federal government. In many of those cases the government had already asserted the state secrets privilege and it was clear that the government would make the privilege the central feature of its defense. See, e.g., entry 138, *In re NSA Tel Rec.*, 2007 U.S. Dist. LEXIS 53456 (N.D. Cal. 2007).
[32] This ruling concerned an effort by the government to dismiss cases brought by five states. The government argued the Supremacy Clause of the Constitution and the state secrets privilege require the cases be dismissed at the pleading stage. The government lost on the Supremacy Clause and the court held in abeyance a ruling on the state secret claim in light of its previous ruling in *Hepting v. AT&T*, entry 124, which was on appeal.
[33] In a decision concerning ancillary and pendent jurisdiction of a fee dispute the court noted that in the present case "maintaining jurisdiction over all aspects of this proceeding is critically important, since this action concerns information subject to the military and state secrets privilege." At 9.
[34] The opinion in this case is quite confused about the state secrets privilege, apparently believing that it is generally a qualified privilege but in certain cases, as in those under facts similar to *Totten*, the privilege becomes absolute. The opinion also concludes that the state secrets privilege is a form of executive privilege.

Statement of William H. Webster
Submitted to the
Senate Judiciary Committee

February 13, 2008

I am submitting this statement to urge you to enact much-needed reforms to the state secrets privilege. My background in the federal judiciary and in the intelligence services leads me to conclude that our courts can, and must, provide critical oversight and independent review of executive branch state secrets claims.

I served as a Judge for the U.S. District Court for the Eastern District of Missouri from 1970 to 1973, and as a Judge of the U.S. Court of Appeals for the Eighth Circuit from 1973 to 1978. Thereafter, I served for nine years as Director of the Federal Bureau of Investigation, and then, from 1987 to 1991, I served as Director of Central Intelligence.

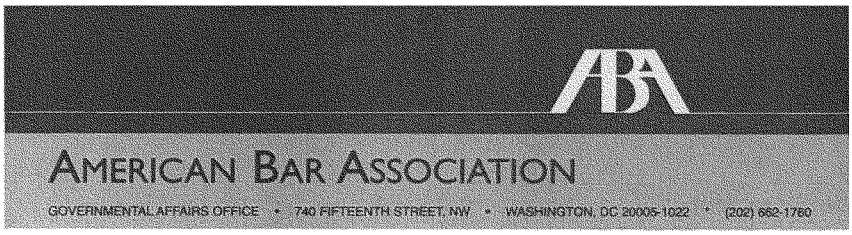
Since the terrorist attacks of September 11, 2001, the executive branch has repeatedly asserted the state secrets privilege in court, in a variety of lawsuits alleging that its national security policies violate Americans' civil liberties. In these cases, the government has informed federal judges that litigation would necessitate disclosure of evidence that would risk damage to national security, and that consequently, the lawsuits must be dismissed. Courts have indeed dismissed lawsuits on this basis.

For example, *El-Masri v. United States* involved a challenge by Khaled El-Masri, a German citizen who, by all accounts, was an innocent victim of the United States' extraordinary rendition program. The district court dismissed the case at the pleadings stage, before any discovery had been conducted, on the basis of the executive branch's assertion of the state secrets privilege. The U.S. Court of Appeals for the Fourth Circuit affirmed the dismissal, and, last fall, the U.S. Supreme Court declined to accept review of the case. Thus, Mr. El-Masri has been denied his day in court even though no judge ever reviewed any evidence purportedly subject to the privilege. Nor did any judge make an independent assessment as to whether enough evidence might be available for Mr. El-Masri to proceed with his lawsuit based upon public accounts of the rendition and an investigation conducted by the German government.

As a former Director of the FBI and Director of the CIA, I fully understand and support our government's need to protect sensitive national security information. However, as a former federal judge, I can also confirm that judges can and should be trusted with sensitive information and that they are fully competent to perform an independent review of executive branch assertions of the state secrets privilege. Judges are well-qualified to review evidence purportedly subject to the privilege and make appropriate decisions as to whether disclosure of such information is likely to harm our national security. Indeed, judges increasingly are called upon to handle such sensitive information under such statutes as the Foreign Intelligence Surveillance Act (FISA) and the Classified Information Procedures Act (CIPA).

In addition, judges are fully competent to assess whether it is possible to craft a non-privileged substitute version of certain evidence, such as by redacting sensitive information. It is judges, more so than executive branch officials, who are best qualified to balance the risks of disclosing evidence with the interests of justice. If there remains concern about judges having the necessary expertise and background in national security matters to make these determinations, a standing panel of judges specially designated could perform this function as under FISA, or judges could refer matters to special masters with appropriate security clearances for assistance.

Granting executive branch officials unchecked discretion to determine whether evidence should be subject to the state secrets privilege provides too great a temptation for abuse. It makes much more sense to require the executive branch to submit such evidence to the courts for an independent assessment of whether the privilege should apply. Courts, not executive branch officials, should be entrusted to make these determinations and thereby preserve our constitutional system of checks and balances.



STATEMENT OF

H. THOMAS WELLS, JR., PRESIDENT-ELECT

submitted on behalf of the

AMERICAN BAR ASSOCIATION

to the

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

COMMITTEE ON THE JUDICIARY

of the

U.S. HOUSE OF REPRESENTATIVES

for the

"Oversight Hearing on Reform of the State Secrets Privilege"

January 29, 2008

Chairman Nadler, Ranking Member Franks and distinguished Members of the Committee:

I am Tommy Wells. I am here today in my capacity as President-elect of the American Bar Association and at the request of our current President, William Neukom. He sends his regrets that he is unable to attend this hearing and deliver the views of the Association in person. I am a partner and founding member of the law firm Maynard, Cooper & Gale, P.C., in Birmingham, Alabama, and will assume the presidency of the ABA in August 2008. We thank the Committee for inviting us to present the views of the Association on matters that are pending before you.

The American Bar Association is the world's largest voluntary professional organization with a membership of more than 413,000 lawyers, judges, and law students worldwide, including a broad cross-section of civil litigators and national security lawyers, prosecutors and judges. As it has done during its 130-year existence, the ABA strives continually to improve the American system of justice and to advance the rule of law throughout the world.

I appear before you to voice the ABA's position with respect to legal claims that may be subject to the state secrets privilege. At the outset, we commend the leadership of the Subcommittee for demonstrating the importance of Congressional oversight on issues that are of such grave importance to the American people and our country.

Clarification of the State Secrets Privilege is Needed

The state secrets privilege is a common law privilege that shields sensitive national security information from disclosure in civil litigation. The roots of the privilege reach back to the beginning of the Republic.[1] However, today most public discussion focuses on the U.S. Supreme Court's modern articulation of the privilege in the seminal decision, *United States v. Reynolds,* 345 U.S. 1 (1953).

During the past several years, the government has asserted the state secrets privilege in a growing number of cases, including those involving fundamental rights and serious allegations of government misconduct, and has sought dismissal at the pleadings stage of the case, arguing that the complaint cannot be answered without confirming or denying facts that would expose a

[1] *See United States v. Burr,* 25 F. Cas. 30, 37 (C.C.D. Va. 1807).

state secret. Courts have been required to evaluate these claims of privilege without the benefit of statutory guidance or clear precedent. This has resulted in the application of inconsistent standards and procedures in determinations regarding the applicability of the privilege.[2]

Several of the lawsuits allegedly involving state secrets raise critical legal issues. Should the government be able to terminate a court case simply by declaring that it would compromise national security without having the court scrutinize that claim? In a number of lawsuits, including those involving electronic surveillance by the government, that is exactly what is happening.

Concerned about these circumstances, the ABA concluded that a measured response was necessary to promote meaningful independent judicial review and protect two core principles at stake: 1) Americans who believe that their rights have been violated by the federal government should have a day in court; and 2) the government's responsibility to protect our national security should not be compromised. Accordingly, in August 2007, the ABA House of Delegates adopted a policy that calls upon Congress to establish procedures and standards designed to ensure that, whenever possible, cases are not dismissed based solely on the state secrets privilege.

The ABA believes that enactment of federal legislation, prescribing procedures and standards for the treatment of information alleged to be subject to the state secrets privilege, as outlined in this statement, would benefit our justice system. Such legislation would affirm the appropriate role of the courts in our system of government by assuring that they have a meaningful role in making decisions about the evidence that is subject to the privilege. More searching judicial review, informed by evidence, would ensure that government assertions of necessity are truly warranted and not simply a means to avoid embarrassment or accountability.

Without such procedural guidance, courts today are at times deferring to the government without first engaging in sufficient inquiry into the veracity of the government's assertion that information is subject to the privilege. As a result, courts may be dismissing meritorious civil litigation claims leading to potentially unjust results. By dismissing civil actions without further consideration, courts also may be abdicating their responsibility under the constitutional system

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[2] *See, e.g., Hepting v. AT&T*, 439 F. Supp. 2d 974 (N.D. Cal. 2006) (appeal pending) and *ACLU v. NSA* __ F.3d __, WL 1952370 (6th Cir. 2007) (warrantless wiretapping in the United States alleged to be both illegal and unconstitutional) and *El-Masri v. U.S.*, 479 F.3d 296 (4th Cir. 2007), *cert. denied*, 2007 U.S. LEXIS 11351 (Oct. 9, 2007) (extraordinary "rendition" of terrorism suspects from the United States to foreign countries alleged to have engaged in torture and other abusive conduct).

of checks and balances to review potential Executive Branch excesses. Federal legislation outlining procedures and substantive standards for consideration of privilege claims would facilitate the ability of the courts to act as a meaningful check on the government's assertion of the privilege.

The codification of such standards also would bring uniformity to the manner in which the courts apply the state secrets privilege, regardless of whether the government is an original party to the litigation or has intervened in the litigation. Uniform standards and procedures will bring greater transparency and predictability to the process and benefit the system as a whole.

Last year, the U.S. Supreme Court declined to address these issues by denying certiorari in the appeal of Khaled el-Masri, a German citizen, from the dismissal of his lawsuit alleging the U.S. government kidnapped and tortured him as a suspected terrorist in what has been described as a case of mistaken identity. In 2005, he sued the former director of the Central Intelligence Agency, three private airlines and 20 individuals. The government intervened to argue that the suit should be dismissed to avoid providing admissions or evidence that would compromise national security. The federal district court concurred, and dismissed the case at the pleadings stage.

By refusing to hear the *el-Masri* case, the United States Supreme Court has declined the opportunity to resolve lingering issues regarding the correct interpretation of *Reynolds* and to clarify the standard to be applied by the courts in cases involving assertion of the privilege. Given the current landscape, we believe that Congress should provide this much-needed clarification by adopting federal legislation, and we hope that our policy recommendations will be beneficial to you in that process.

ABA Recommendations for Legislation to Codify the State Secrets Doctrine

Fundamentally, the ABA believes that courts should vigorously evaluate privilege claims in a manner that protects legitimate national security interests while permitting litigation to proceed with non-privileged evidence, and that cases should not be dismissed based on the state secrets privilege except as a very last resort. To accomplish these objectives, we urge adoption of legislation that includes the following elements.

First, legislation should require a court to make every effort to permit a case to proceed past the pleadings stage while protecting the government's legitimate national security concerns

at the same time. Under our proposal, the government would be permitted to plead the state secrets privilege in response to particular allegations of a complaint, but would not admit or deny those allegations nor face adverse inferences for invoking the privilege.

Second, legislation should require the government to provide a full and complete explanation of the privilege claim and make available for *in camera* review the evidence the government claims is subject to the privilege. *In camera* judicial review is appropriate and necessary in order for the court to fulfill its recognized responsibility to determine whether the privilege applies.[3] The court simply cannot determine whether the government has met its burden in a vacuum: only an *in camera* review of the evidence in question will permit a thorough evaluation of the government's privilege claims.

This requirement challenges the Supreme Court's statement in *Reynolds* that there are some situations in which the privileged evidence is so sensitive that there should be no "examination of the evidence, even by the judge alone, in chambers."[4] Commentators have properly criticized that suggestion as an abdication of judicial responsibility.[5] Courts are charged with applying the law to facts in cases, not taking assertions as a matter of faith. It is as big a mistake for them to rule on the merits in a vacuum as it is for them to assess the need for secrecy without first examining the evidence. We believe that it is essential for courts to evaluate the government's claims *in camera*, away from the public eye, before deciding whether a lawsuit truly threatens the nation's safety.

Years after the court dismissed the *Reynolds* case without questioning the government's assertion of state secrets, the documents alleged to contain state secrets that were needed by the plaintiffs to plead their case were declassified and found NOT to contain any state secrets. Had the court been more diligent in executing its responsibility to ascertain for itself whether the documents contained state secrets, it is virtually certain that the plaintiffs in this case – widows of three of the civilian contractors who died aboard the military plane when it crashed – would

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[3] See *Reynolds*, 345 U.S. at 8; *Ellsberg v. Mitchell*, 709 F.2d 51, 57-59 (D.C. Cir. 1983); *Terkel*, 441 F. Supp. 2d at 908-09.

[4] *Reynolds*, 345 U.S. at 10.

[5] *See* Louis Fisher, *In the Name of National Security: Unchecked Presidential Power and the* Reynolds *Case*, 253-62 (University Press of Kansas) (2006); Scott Shane, *Invoking Secrets Privilege Becomes a More Popular Legal Tactic by U.S.*, N.Y. Times, June 4, 2006, at 32, *available at* 2006 WLNR 9560648. In addition, the federal courts' role in assessing classified information has evolved substantially since *Reynolds. and* numerous courts have followed the practice. *See, e.g.,K asza v. Browner*, 133 F.3d 1159, 1169-70 (9th Cir. 1998); *Ellsberg*, 709 F.2d at 56, 59; *Halkin v. Helms*, 598 F.2d 1, 7-8, 9 (D.C. Cir. 1978).

not have been denied their day in court to adjudicate their claims for monetary damages for the federal government's alleged negligence in the death of their spouses. We can prevent such patently unjust outcomes by requiring a court to conduct its own *in camera* review and by establishing standards for it to apply in assessing the legitimacy of the government's privilege claims regarding potentially sensitive national security information. Such an enactment will improve government accountability and confidence in our system of checks and balances.

Third, legislation should require a court to assess the legitimacy of the government's privilege claims and deem evidence privileged only if the court finds, based on specific facts, that the government agency has reasonably determined that disclosure of the evidence would be significantly detrimental or injurious to the national defense or would cause substantial injury to the diplomatic relations of the United States.[6]

Under this proposed standard, the government agency must make a reasonable determination of "significant injury" to trigger the privilege when national defense secrets are at risk or a reasonable determination of the more exacting "substantial injury" to trigger the privilege when diplomatic relations are at stake. The term, "diplomatic relations" as opposed to "international relations" is intended to limit the circumstances in which the privilege can be claimed, and coupled with the more exacting "substantial injury" requirement, to ensure that the privilege cannot be claimed when disclosure of evidence would do little more than embarrass the government.

This requirement accordingly provides for judicial review of the specific basis upon which the relevant government agency rests its claim that particular information is privileged. The court would not make this determination *de novo*, but rather would decide whether the government had reasonably determined that the standard was met. The standard contemplated by this requirement is intended to give the courts sufficient flexibility to decide what information is subject to the privilege after reviewing the assertions of both the plaintiff and the Executive

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[6] The standard proposed in the policy is a modification of drafts by the Advisory Committee for Federal Rules of Evidence that would have codified the state secrets privilege in a Federal Rule of Evidence 509. Congress ultimately rejected Fed. R. Evid. 509 and other evidentiary privilege rules submitted contemporaneously in favor of Fed. R. Evid. 501, which recognizes common law evidentiary privileges but does not mention the state secrets privilege. The policy also recognizes that since the Supreme Court's decision in *Reynolds*, which established the privilege in cases in which disclosure of military secrets is at risk, subsequent decisions have extended the privilege to cases in which diplomatic secrets are at risk. See, e.g., *United States v. Nixon*, 418 U.S. 683, 706 (1974).

Branch, which has substantial expertise in assessing the potential injury to the national defense or diplomatic relations that could result from disclosure of the information.

Fourth, legislation should allow discovery to proceed under flexible procedures designed to protect the government's legitimate national security interests. To accomplish this, legislation should authorize the courts to permit discovery of non-privileged evidence, to the extent that it can effectively be segregated from privileged evidence, and issue protective orders, require *in camera* hearings and other procedures where necessary, to protect the government's legitimate national security interests. Disentanglement of privileged and non-privileged evidence is the most effective way to protect both the interests of the private party and the government's responsibility to protect national security secrets. The requirement that courts make efforts to separate privileged from non-privileged information is consistent with the Court's determination in *Reynolds* that the case be remanded to the lower court so the plaintiffs could adduce facts essential to their claims that would not touch on military secrets. Courts generally make efforts in state secrets cases to separate privileged from non-privileged information, or they ultimately make a determination that separation is impossible.

Fifth, legislation should require the government, where possible, and without revealing privileged evidence, to produce a non-privileged substitute for privileged evidence that is essential to prove a claim or defense in the litigation. In cases in which it is possible to generate such a substitute, and the government is a party asserting a claim or defense that implicates the privilege, the legislation would require the government to elect between producing the substitute and conceding the claim or defense to which the privileged evidence relates.

The requirement that the government produce where possible a non-privileged substitute for privileged information derives both from the *Reynolds* case and from the Classified Information Procedures Act (CIPA),[7] which governs the treatment of classified information in the criminal context. The *Reynolds* court based its decision upholding the government's privilege claim in part on the availability of alternative evidence in the form of testimony that might give the respondents the evidence they needed without the allegedly privileged documents. To preserve the defendant's constitutional right to confront the evidence in a criminal case, CIPA allows the government to provide a substitute for classified information to be used in a defendant's defense. The recommendation adopts the CIPA structure, but employs a slightly

[7] 18 U.S.C. App. 3.

lower standard for the substituted evidence to meet because the Confrontation Clause, which requires the high CIPA standard, is not applicable in civil cases.[8] To allow for further fairness, the policy also derives from CIPA the notion that the court can order the government to forego a claim or defense when it fails to provide a substitute for privileged information.[9]

Sixth, legislation should provide that a ruling on a motion that would dispose of the case should be deferred until the parties complete discovery of facts relevant to the motion.[10] Dismissal based on the state secrets privilege prior to the completion of discovery of relevant facts would be permissible only when the court finds there is no credible basis for disputing that the state secrets claim inevitably will require dismissal. This is a very high standard, and we anticipate that it would be met only in very limited circumstances.

Seventh, legislation should provide that, after taking the steps described above to permit the use of non-privileged evidence, the case should proceed to trial unless at least one of the parties cannot fairly litigate with non-privileged evidence. Specifically, a court should not dismiss an action based on the state secrets privilege if it finds that the plaintiff is able to prove a *prima facie* case, unless the court also finds, following *in camera* review, that the defendant is substantially impaired in defending against the plaintiff's case with non-privileged evidence (including the non-privileged evidentiary substitutes described above). To state this more plainly, if the plaintiff could prove the essential elements of his claim without privileged information, the case would be allowed proceed as long as the government could fairly defend against the claim without having to use privileged information. However, if the government would have its hands tied behind its back by not being able to invoke essential privileged information in defending against the plaintiff's case, the case would be dismissed. Likewise, if the court determines that a plaintiff cannot prove the essential elements of his claim without the privileged information, the case also would need to be dismissed.

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[8] In *Fitzgerald v. Penthouse Int'l, Ltd.*, 776 F.2d 1236 (4th Cir. 1985), the court referred to CIPA as a possible model for use in the state secrets context.

[9] A similar provision also appeared in legislation proposed in 1973 by the Advisory Committee for Federal Rules of Evidence for a Federal Rule of Evidence 509 that would have codified the state secrets privilege. The proposed Rule of Evidence was never adopted by Congress.

[10] This provision of the policy relies on Rule 12(a)(4)(A) of the Federal Rules of Civil Procedure, which authorizes the court to "postpone[ ] its disposition" of a motion to dismiss "until the trial on the merits" and Rule 56(f) of the Federal Rules of Civil Procedure, which permits a "continuance" for "discovery to be had" in resolving a summary judgment motion.

Finally, our policy supports legislation providing the government with the opportunity for an expedited interlocutory appeal from a district court decision authorizing the disclosure of evidence subject to a claim under the state secrets privilege. Allowing for an expedited appeal before completion of the case recognizes the government's legitimate interests in protecting against disclosure of sensitive national security information that could be compromised if an appeal of such a decision had to await final judgment, given that the disclosure, once made, could not be undone.

What the ABA recommendations would *not* do is as important as what enactment of them would accomplish. The legislation we support would not require disclosure of information subject to the state secrets privilege to the plaintiff or the plaintiff's counsel. Even if counsel has a security clearance and agrees to a stringent protective order, under no circumstances would privileged information be disclosed to anyone except the presiding judge. The legislation we support would not require courts to balance the interests of the plaintiff in accessing particular privileged information against the government's national security interests. No matter how compelling the plaintiff's claim or the plaintiff's need for the privileged information to prove his claim, if disclosure of the information sought is reasonably likely to be significantly detrimental or injurious to the national defense or to cause substantial injury to the diplomatic relations of the United States, the information will be privileged and the legislation for which we call would not require its disclosure. It would also not require the government to choose between disclosing privileged information and foregoing a claim or defense. The government would face such a choice only with respect to the information the court had already determined was not privileged.

The ultimate goal of all of these recommendations and the objective that should underlie any legislative response is the protection of both the private litigant's access to critical evidence, including evidence necessary to obtain redress for constitutional violations and other wrongful conduct, and our critically important national security interests which, if not protected, could put the nation at grave risk.

Congressional Response

Congressional action in this area is entirely appropriate. In fact, many of the ABA recommendations are drawn from the tested and proven procedures established by Congress in CIPA. Under CIPA, federal courts review and analyze classified information in criminal cases.

Congress has also outlined a role for the courts in handling sensitive information with the adoption of the Foreign Intelligence Surveillance Act of 1978 and the 1974 amendments to the Freedom of Information Act. While some have argued that consideration of sensitive information should be left only to the Executive Branch, there is ample precedent demonstrating that courts can and do make measured, careful decisions about classified information in these other contexts. Further, cases in which the state secrets privilege is invoked increasingly involve allegations that the government has violated fundamental, constitutional rights, making federal court involvement especially important.

The ABA's policy respects the roles of all three branches of government in addressing state secrets issues. The policy does not suggest that courts should substitute their judgments on national security matters for those of the executive branch but instead provides that executive branch privilege claims should be subject to judicial review, under a deferential standard that takes into account the executive branch's expertise in national security matters. The ABA believes this is a proper role for the judiciary, because courts routinely perform judicial review of decisions made by expert governmental agencies. In addition, as the *Reynolds* case explained, the state secrets privilege is an evidentiary privilege; the judiciary properly makes the final decisions on privilege claims in cases involving executive branch agencies as litigants. Finally, it is constitutionally permissible and appropriate for Congress to act in this area, to provide greater clarity to the jurisdiction and procedures of the courts. For example, Congress routinely approves the proposed federal rules of civil and criminal procedure as well as considers legislation establishing the federal rules of evidence to ensure fair procedures for the courts. In fact, in 1973 the Congress considered, but ultimately did not adopt, proposed Rule of Evidence 509, which would have codified the state secrets privilege.[11]

The ABA supports S. 2533, the State Secrets Protection Act, recently introduced by Senators Edward Kennedy (D-MA) and Arlen Specter (R-PA). This legislation embodies a number of the principles advocated by the ABA to provide greater clarification to the application of the state secrets privilege. It establishes detailed procedures that ensure that claims of privilege are met with meaningful judicial review. For example, it requires that a court review asserted state secrets evidence in a secure proceeding in order to determine whether disclosure of the evidence would endanger national security or foreign relations. It requires that the

[11] *See* Louis Fisher, *In the Name of National Security: Unchecked Presidential Power and the* Reynolds *Case* (University Press of Kansas) (2006).

Government provide an unclassified or redacted alternative to evidence that the court concludes is protected by the state secrets privilege. It also allows expedited appeals of state secrets decisions. Finally, the legislation requires regular reports to Congressional committees on the use of the state secrets privilege. We hope a similar measure will be introduced soon in the House.

Going forward, robust congressional oversight will strengthen the ability of our government as a whole to ensure that our justice system is properly equipped to balance national security interests with the protection of individual rights and liberties. Additionally, with the adoption of new legislation establishing procedures for the application of the state secrets privilege, close congressional oversight could guard against any unintended consequences in the implementation of new uniform standards.

Conclusion

The ABA believes that now is the time for Congress to step in to ensure that the courts maintain a meaningful role in making decisions about the evidence that is subject to the privilege. It is within the constitutional mandate of Congress to oversee these issues with authority and to offer corrective legislation to allow for an inquiry into the government's assertion that information is subject to the privilege. We believe that our proposal provides ample opportunity for the government to assert the privilege, and to back up its assertion in confidential proceedings. And it entitles the government to a speedy appeal from any court decision that authorizes disclosure of evidence subject to a state secrets claim, or that imposes penalties for nondisclosure or refuses to grant a protective order to prevent disclosure. National security interests would be well protected.

As then-Supreme Court Associate Justice O'Connor observed, "Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake."[12] The American Bar Association urges Congress to assert its proper role and to take action to ensure that the state secrets privilege is applied in a manner that protects the rights and civil liberties of private parties to the fullest extent possible without compromising legitimate national security interests.

On behalf of the American Bar Association, thank you for considering our views on an issue of such consequence to ensuring access to our justice system.

[12] *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 536 (2004) (quoting *Mistretta* v. *United States*, 488 U.S. 361, 380 (1989)).

REVISED REPORT 116A

AMERICAN BAR ASSOCIATION

SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES
ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

RESOLVED, That the American Bar Association supports procedures and standards designed to ensure that whenever possible, federal civil cases are not dismissed based solely on the state secrets privilege; and

FURTHER RESOLVED, That, in furtherance of this objective the American Bar Association urges Congress to enactl egislation governing federal civil cases implicating the state secrets privilege (including cases in which the government is an original party or an intervenor) that:

a. Permits the government to plead the privilege in its answer to particular allegations in the complaint without admitting or denying those allegations, and draw no adverse inferences against the government for doing so;

b. Requires the government to provide a full and complete explanation of its privilege claim and to make available for *in camera* review the evidence the governmentc laims is subject to the privilege;

c. Requires a judicial assessment of the legitimacy of the government's privilege claims and deems privileged only evidence disclosure of which the court finds is reasonably likely to be significantly detrimental or injurious to the national defense or to cause substantial injury to the diplomatic relations of the United States;

d. Permits the discovery of non-privileged evidence that may tend to prove the plaintiff's claim or the defendant's defense, provided that such evidence can be effectively segregated from privileged evidence, and where appropriate, provides for protective orders, *in camera* hearings, special masters to assist (including when the claim of privilege involves voluminous records), or other measures where necessary to protect the government's legitimate national security interests;

e. Requires the government to produce a non-privileged substitute for privileged evidence, consisting of a summary of the privileged evidence, a version of the evidence with privileged information redacted, or a statementa dmitting relevant facts that the privileged evidence would tend to prove, provided that:

(i) The evidence is essential to prove a claim or defense in the case;
(ii) The court finds that it is possible,w ithout revealing privileged evidence, for the governmentt o produce a substitute thatp rovides a substantially equivalent opportunity to litigate the claim or defense as would the privileged evidence; and

(iii) In cases in which the government is a party asserting a claim or defense that implicates the privilege, the governmenti s given the opportunity to elect between producing the non-privileged substitute and conceding the claim or defense to which the privileged evidence pertains;

f. Provides that a ruling on a motion to dismiss, or for summary judgment, based on the state secrets privilege be deferred until the parties complete discovery of facts relevant to the motion and the court resolves any privilege claims asserted as to those facts under the procedures described above;

g. Provides that, after the court takes these steps and reviews evidence proffered by both parties, judgmentf or the defendant based on the state secrets privilege is denied if the courtf inds that the plaintiff is able to prove a *prima facie* case with non-privileged evidence (including non-privileged evidence from sources outside the U.S.g overnment), unless the court also finds, following *in camera* review, that the defendant's ability to defend against the plaintiff's case would be substantially impaired because the defendant is unable to presents pecific privileged evidence; and

h. Entitles the government to take an expedited interlocutory appeal from a district court decision authorizing the disclosure of evidence subject to a claim under the state secrets privilege, imposing sanctions for nondisclosure of such evidence, or refusing a protective order to preventd isclosure of such evidence.

REPORT

I. INTRODUCTION

The state secrets privilege is a common law evidentiary privilege that shields sensitive national security information from disclosure in litigation. The government is the only party that can assert the privilege, and application of the privilege can result in dismissal of civil litigation. For this reason, it is critically important that courts act as an independent check on the government when it asserts the state secrets privilege, and that courts conduct a meaningful review of the evidence that the government claims mustr emain secret because it is subjectt o the privilege. This proposed policy is designed to promote that meaningful, independent review. It seeks to protect both the private litigant's access to critical evidence, including evidence necessary to obtain redress for constitutional violations and other wrongful conduct, and critically important national security interests, which if not protected could put the nation at grave risk.

The proposed policy does this by urging the Congress to enact legislation requiring procedures and standards designed to ensure that whenever possible, federal civil cases are not dismissed baseds olelyo n the state secrets privilege, while nonetheless recognizing that in limited circumstances, the privilege will require dismissal. The proposed policy relates only to civil cases because the government has typically asserted the state secrets privilege only in civil litigation, and because the Congress already has enacted legislation balancing the competing interests concerning disclosure and non-disclosure of classified information in criminal cases. *See* 18 U.S.C. App. III (2006) (Classified Information Procedures Act). The proposed policy borrows concepts and procedures from that legislation but does not address evidentiary issues in criminal cases, which have unique constitutional concerns that do not arise in civil cases. *See infra* section III.B.6.

In addition, the proposed policy focuses on cases brought by private parties alleging wrongful conductb y the government or by private parties acting in concert with the government, because that is the type of litigation in which tension between civil liberties and national security most frequently arises. In such cases, the government is either the defendant or an intervenor that asserts the privilege on the side of a private defendant in a suit between private parties involving sensitive national security information. (As used in the policy, the term "defendant" is intendedt oc over the government inb oth capacities -- as an original defendant anda s an intervenor-defendant). Several provisions of the policy would, however, also apply as well to cases in which the government is the plaintiff, because it is possible that the government could assert the privilege in that procedural posture as well.

There is an important opportunity, through this policy, to bring uniformity to a significant issue on which courts have adopted divergent approaches. Some courts have strictly scrutinized the government's privilege claims, while others have been more deferential to the government. The House ofD elegates should adopt the policy, because the ABA is in a unique position to recommend ways for the Congress to unify the procedures and substantive standards that courts use to adjudicate claims under the state secrets privilege.

II. THE *REYNOLDS* DECISION

Although the state secrets privilege has received significant attention since the terrorist attacks of September 11, 2001, its roots reach back to the beginning of the Republic. *See United States v. Burr*, 25 F. Cas. 30, 37 (C.C.D. Va. 1807) (ruling on Aaron Burr's subpoena for documents overP resident Jefferson's objection that they "contain[ed]m aterial which ought not to be disclosed"). The government rarely invoked the privilege until afterW orld War II. Then in 1953, the Supreme Court issued the seminal decision *United States v. Reynolds*, 345 U.S. 1 (1953), which addressed the scope of the privilege and the procedures for asserting and evaluating privilege claims.

Reynolds was a Federal Tort Claims Act suit arising out of the crash of a B-29 aircraft that was on a mission to test secret electronic equipment. Three civilian passengers died in the crash, and their widows sued the United States for damages. When the plaintiffs attempted to obtain the Air Force's accident investigation report in discovery, the government objected, and the Secretary of the Air Force filed a formal Claim of Privilege, which stated that "the aircraft in question, together with the personnel on board, were engaged in a highly secret mission of the Air Force." *Reynolds*, 345 U.S. at 4. To support its privilege claim, the government filed an affidavit of the Air Force Judge Advocate General, which claimed that the report could not be produced "without seriously hampering national security, flying safety and the development of highly technical and secret military equipment." *Id.* at 5. Suggesting an alternativet o the accident report, the government offered to produce the three surviving crew members for testimony as to all matters except those of a "classified nature." *Id.*

The district court ordered the government to produce the accident report fort he court's review. The government refused to produce the report, and the district court ruled that the facts on the issue ofn egligence would be taken as established in the plaintiffs' favor. The court of appeals affirmed. The Supreme Court then reversed, holding that the privilege claim was valid, and that the government did not need to produce the accident report. *Id.* at5 ,1 2.

A. The Scope of the Privilege

In *Reynolds*, the Supreme Court characterized the privilege underr eview as a "privilege against revealing military secrets, . . . which is well established in the law of evidence." *Id.* at 6-7. The Court stated that the privilege applies if "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." *Id.* at 10. In addition, the Court held that if the privilege applies, no countervailing interests can require disclosure; "even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake." *Id.* at 11.

B. Procedures for Asserting and Evaluating Privilege Claims

Reynolds made clear that "[t]he privilege belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party." *Id.* at 7 (footnotes omitted). The *Reynolds* Court also emphasized that the state secrets privilege "is not to be lightly invoked," specifying procedures that the government must follow to assert the privilege:

the "head of the department which has control over the matter" must file a "formal claim of privilege" based on "actual personal consideration by that officer." *Id.* at 7-8.

In addition, *Reynolds* confirmed that the court has sole authority to determine whether the privilege applies. *Id.* at 8 ("[t]he Court itself must determine whether the circumstances are appropriate for the claim of privilege"). However, the Court also wrestled with how to evaluate privilege claims "without forcing ad isclosure of the very thing the privilege is designed to protect." *Id.* The Court recognized that "[j]udicial control over the evidence in a case cannotb e abdicated to the caprice of executive officers" but would "not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted ina ny case." *Id.* at 9-10. Applying a "formula of compromise," the Court concluded that the private party's "showing of necessity"s hould determine the depth of the court's scrutiny, such that "[w]here there is a strong showing of necessity, the claim of privilege should not be lightly accepted." *Id.* at 9-11. Because it decided that the *Reynolds* plaintiffs made "a dubious showing of necessity," the Court upheld the government's privilege claim without even reviewing the accident report. *Id.* at 11. This approach was consistent with the Court's statement that there are circumstances in which "the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence,e ven by the judge alone, in chambers." *Id.* at 10.

C. Segregation of Privileged and Non-Privileged Evidence

In *Reynolds*, the Court decided that the plaintiffs' showing of "necessity was greatly minimized by an available alternative,w hich might have given respondents the evidence to make out their case without forcing a showdown on the claim of privilege." *Id.* at 11. That alternative was the government's offer to make the surviving crewmen available for examination. Furthermore, in the Court's view, there was nothing to suggest that the secret electronic equipment being tested on the flight had a causal connection to the accident. As a result, the Court concluded "it should be possible for [the plaintiffs] to adduce the essential facts as to causation without resort to material touching upon military secrets." *Id.* The Court remanded the case to allow the plaintiffs to attempt to prove their case without the privileged evidence. *Reynolds* therefore supports the principle that in cases implicating the state secrets privilege, the courts should attempt to segregate privileged from non-privileged evidence, to allow litigation to proceed with non-privileged evidence.

III. CONGRESS SHOULD ADOPT LEGISLATION ENSURING THAT THE STATE SECRETS PRIVILEGE IS APPLIED IN A MANNER THATP ROTECTS THER IGHTS AND CIVILL IBERTIES OF PRIVATE PARTIES TO THE FULLEST EXTENT POSSIBLE WITHOUT COMPROMISING LEGITIMATE NATIONAL SECURITY INTERESTS

A. The Legislation Should Establish Procedures and Standards Designed to Ensure That Whenever Possible, Federal Civil Cases are not Dismissed Based Solely on the State Secrets Privilege

As a general rule, private plaintiffs should be able to seek judicial remedies for injuries caused by unconstitutionala ctions and other government wrongs. However, in a narrow class of

cases, some courts have dismissed civil actions against the government based on the state secrets privilege, on the groundt hat the litigation would inevitablyr equire disclosure of sensitive national security information. *See, e.g., El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007). Such dismissals prejudice the interests of private plaintiffs, denying them any forum to litigate their claims against the government even if egregious government misconduct is involved. By dismissing civil actions on these grounds, courts also may abdicate their responsibility under the constitutional system of checks and balances to review and reverse Executive Branch excesses. The state secrets privilege also can bar private plaintiffs from pursuing claims against private party defendantsl inked to the government through contractual or other relationships. In such cases, the government may intervene as a defendant and assert the state secrets privilege to prevent discovery ofs ensitive government information. Dismissal ofs uch cases based on the state secrets privilege also unfairly denies the plaintiff the opportunity to a day in court. Accordingly, the central premise of this proposed ABA policy is that the Congress should enact legislation under which the courts would act as a meaningful check on the government's assertion of the privilege and make every effort to avoid dismissing a civil action based on the state secrets privilege.

In recent decisions justifying dismissal based on the state secrets privilege, courts have relied on two Supreme Court cases holding that claims for breach of a secret espionage contract must be dismissed at the pleadings stage, because there is simply no way for the case to proceed without divulging the secret espionage relationship. *See Totten v. United States*, 92 U.S. 105, 107 (1875) (affirming dismissal of claim by alleged Civil War spy for breach of espionage agreement, because trial would "inevitably lead to the disclosures of matters which the law itself regards as confidential"); *Tenet v. Doe*, 544 U.S. I (2005) (affirming dismissal of claims by alleged Cold War spies for breach of covert espionage agreements). However, the ground for dismissal in *Totten* and *Tenet* was *justiciability*, not the state secrets evidentiary privilege. As the Court explained in *Tenet*, "lawsuits premised on alleged espionage agreements are altogether forbidden." *Tenet*, 544 U.S. at 9. The Court distinguished this "categorical . . . bar" from "the balancing of the state secrets evidentiary privilege," in which particular pieces of evidence are evaluated in "*in camera* judicial proceedings." *Id.* at 9-11. To emphasize this distinction, the Court noted that lawsuits arising from secrete spionage agreements must be dismissed even if the state secrets privilege does not apply: "[t]he possibility thata suit may proceed and an espionage relationship may be revealed, if the state secrets privilege is found not to apply, is unacceptable." *Id.* at 11.

Although *Totten* and *Tenet* relatet oj usticiability of "the distinct class of cases that depend upon clandestine spy relationships," 544 U.S. at 10, some lower courts have relied on *Totten* and *Tenet* to dismiss other types of cases at the pleadings stage, on the ground that the entire subject mattero f litigation is protected by the state secrets privilege. *See El-Masri*, 479 F.3d at 308, 313; *see also Fitzgerald v. Penthouse Int'l, Ltd.*, 776 F.2d 1236, 1243-44 (4th Cir. 1985). This proposed ABA policy urges that cases should not be dismissed based on the state secrets privilege, except as a very lastr esort, and recommends enactment of a non-exhaustive list of procedures to accomplish that goal. *Fitzgerald*, 776 F.2d at1244 (dismissal atp leadings stage is appropriate "[o]nlyw henn o amount of effort andc are on the part of the court . . . will safeguard privileged material").

B. The Legislation Should Provide That Courts Should Evaluate Privilege Claims in a Manner That Protects Legitimate National Security Interests While Permitting Litigation to Proceed With Non-Privileged Evidence

1. The Government Should be Allowed to Plead the State Secrets Privilege Without Having Adverse Inferences Drawn

To meet the policy's objective of avoiding dismissal, the legislation urged by the policy would require a court to make every effort to permit a case to proceed past the pleadings stage and into the discovery period, when the court can evaluate particular privilegec laims as to specific evidence. In recent cases brought against the government, the government has sought dismissal at the pleadings stage of a case based on the state secrets privilege, arguing that the complaint cannot be answered without confirming or denying facts that would expose state secrets. *See, e.g., El-Masri*, 479 F.3d at30 1. The proposed policy would allow a case to proceed past the pleadings stage and protectt he government's legitimate national security concerns at the same time, by permitting the government to plead the state secrets privilege in its answer, in response to particular allegations of a complaint. The proposed policy further provides that no adverse inferences would be drawn against the government for asserting the privilege in this manner.

This part of the proposed policy derives from current federal practice governing a defendant's invocation of the Fifth Amendment privilege against self-incrimination inc ivil proceedings. When the civil defendant asserts the Fifth Amendment privilege in an answer to a complaint, he neither admits nor denies the allegations in the complaint. *See Nat'l Acceptance Co. of Am. v. Bathalter*, 705 F.2d 924, 931-32 (7th Cir. 1983). The same should be true if the government asserts the state secrets privilege in itsa nswer, under circumstances in which the government claims that confirming or denying facts in the complaint would reveal state secrets. However, the government should not be penalized fora sserting the privilege by having adverse inferences drawn, asc ould be the case when the civil defendant asserts the Fifth Amendment privilege. That is because if the state secrets privilege does apply, the government's interest in nondisclosure is so compelling. *See Reynolds*, 345 U.S. at 11 ("even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake").

2. The Government Should be Required to Justify Any Assertion of the Privilege and Permit *In Camera* Review of Evidence

Under the legislation urged by the proposed policy, the government would be required to provide a full and complete explanation of the privilege claim and make available for *in camera* review the evidence the government claims is subject to the privilege. It is well settled that it is the court's responsibility to determine whether the privilege applies. *Reynolds*, 345 U.S. at 8; *Ellsberg v. Mitchell*, 709 F.2d 51, 57-59 (D.C. Cir. 1983); *Terkel*, 441 F. Supp. 2d at 908-09. In addition, the government has the burden to prove that the privilege applies. *See El-Masri*, 479 F.3d at 305. The court cannot determine whether theg overnment has met its burden in a vacuum – only an *in camera* review of evidence will permit a thoroughe valuationo f the government's privilege claims. The policy accordingly requires the government to make the

evidence available to the court for *in camera* review and further provides that if the evidence is voluminous, a special master may be appointed to assist the courti n its review.

This part of the proposed policy challenges the Supreme Court's statement, in *Reynolds*, that there are some situations in which the privileged evidence is so sensitive that there should be no "examination of the evidence, even by the judge alone, in chambers." *Reynolds*, 345 U.S. at 10. Commentators have properly criticized that suggestion as an abdication of judicial responsibility. *See* Louis Fisher, *In the Name of National Security: Unchecked Presidential Power and the* Reynolds *Case*, 253-62 (University Press of Kansas) (2006); Scott Shane, *Invoking Secrets Privilege Becomes a More Popular Legal Tactic by U.S.*, N.Y. Times, June 4, 2006, at 32, *available at* 2006 WLNR 9560648. In addition, the federal courts' role in assessing classified information has evolved substantially since *Reynolds*. As explained in more detail below, the federal courts review and analyze classified information in criminal cases, undert he Classified Information Procedures Act ("CIPA"), 18 U.S.C. App. III. Furthermore, Congress has provided that any U.S. district court is authorized toh old an *in camera* hearing tor eview challengest o the legality of electronic surveillance, in cases involving classified information. *See* 50 U.S.C. § 1806(f) (2006). Department of Defense regulations also now expressly acknowledge that members of the federal judiciary do not need security clearances and "may be granted access to DoD classified information to the extent necessary to adjudicate cases being heard before these individual courts." 32 C.F.R. § 154.16(d)(5) (2006). And such access has been necessary for proper adjudication. For example, the U.S. Court ofA ppealsf or the D.C. Circuitr ecently required judicial access to all classified information relevantt o the government's determination that various individuals detained at Guantanamo Bay were "enemy combatants," rejecting the government's argument that the court need not review some of the relevant classified information. *Bismullah v. Gates*, No. 06-1197, 2007 U.S. App. LEXIS 17255 (D.C. Cir. July 20, 2007). The federal courts' increasing familiarity with review and evaluation of classifiedi nformation justifies departing from the *Reynolds* Court's reluctance to require *in camera* review in all cases raising the state secrets privilege.

Furthermore, thef acts of the *Reynolds* case itself demonstrate that courts should not uphold a privilege claim without conducting an *in camera* review of the evidence alleged to be privileged. A recent review of the (now declassified) accident report withheld as privileged in *Reynolds* – which the court never reviewed *in camera* – shows that the government's privilege claim was baseless, because the report contained no sensitive national security information. The report's only mention of classified information was a reference about the removal of top-secret equipment from the crash site. Barry Siegel, *The Secreto f the B-29*, L.A. Times, Apr. 19, 2004, at 1, *available at* 2004 WLNR 19772466. In addition, the accident investigation report contained evidence of the government's negligence – an admission that "[t]he aircraft [was] not considered to have been safe for flight" – thatw ould have supported the plaintiffs' claims. Barry Siegel, *The Secret of theB -29*, L.A. Times, Apr. 18, 2004, at 1, *available at* 2004 WLNR 19770961. There is every reason to believe that if the *Reynolds* Court had reviewed the accident report*i n camera*,t he government's privilege claim would have been rejected.

An *in camera* examination of evidence alleged to be privileged enables the court to probe the government's privilege claim and decrease the possibility of abuses, such as the abuse that appears to have occurred in the *Reynolds* case. In addition, numerous courts have followed the

practice. *See, e.g., Kasza v. Browner*, 133 F.3d 1159, 1169-70 (9th Cir. 1998); *Ellsberg*, 709 F.2d at 56, 59; *Halkin v. Helms*, 598 F.2d 1, 7-8, 9 (D.C. Cir. 1978). The proposed policy properly requires the government to make evidence available for *in camera* review in all cases in which ita sserts the state secrets privilege.

3. The Privilege Should be Based on a Reasonable Likelihood that Disclosure Would Harm National Defense or Diplomatic Relations

The legislation urged by the proposed policy would require courts to assess the legitimacy of the government's privilege claims and deem privileged only evidence the disclosure of which the court finds is reasonably likely to be significantly detrimental or injurious to the national defense or reasonably likely to cause substantial injury to the diplomatic relations of the United States. The policy recognizes that since the Supreme Court's decision in *Reynolds*, which established the privilege in cases in which disclosure of military secrets is at risk, subsequent decisions have extended the privilege to cases in which diplomatic secrets are at risk. *See,e .g., United States v. Nixon*, 418 U.S. 683, 706 (1974).

The standard proposed in the policy is a modification of drafts by the Advisory Committee for Federal Rules of Evidence that would have codified the state secrets privilege in a Federal Rule of Evidence 509. (Congress ultimately rejected Fed. R. Evid. 509 and other evidentiary privilege rules submitted contemporaneously in favor offF ed. R. Evid. 501, which recognizes common law evidentiary privileges but does not mention the state secrets privilege.) Under the proposed ABA policy, a reasonable likelihood of "significant injury" must be shown to trigger the privilege when national defense secrets are at risk and a reasonable likelihood of the more exacting "substantial injury" must be shown to trigger the privilege when diplomatic relations are at stake. The reference in the proposed policy to "diplomatic relations" as opposed to "international relations" is intended to further limit the circumstances in which the privilege can be claimed, and with the more exacting "substantial injury" requirement, to ensure that the privilege cannot be claimed when disclosure of evidence would do little more than embarrass the government.

The reasonableness standard is intended to give the courts sufficient flexibility to decide what information is subjectt o the privilege, informed by the arguments of the Executive Branch, which has substantial expertise in the injury to national defense or diplomatic relations that could resultf rom disclosure of the information, and also informed by the arguments of the plaintiff.

4. Discovery of Non-Privileged Evidence Should Proceed Under Flexible Procedures Designed to Protect the Government's Legitimate National Security Interests

Under the legislation urged by the proposed policy, courts would permit discovery of non-privilegede vidence, to the extent that it can effectivelyb e segregatedf rom privileged evidence, and employ protective orders, *in camera* hearings, and other procedures where necessary to protect the government's legitimate national security interests. If the state secrets privilege applies to some evidence in a case, the "court must consider whether and how the case may proceed in light of the privilege." *Fitzgerald*, 776 F.2d at 1243. Disentanglement of privileged and non-privileged evidence is the most effective way to balance the interests of the

private party against the government's interest in protecting national security secrets. And flexible procedures that permit access to non-privileged evidence need not compromise national security – "[o]ften, through creativity and care, [the] unfairness [oft he state secrets privilege] can be minimized through the use of procedures which will protect the privilege and yet allow the merits of the controversy to be decided in some form." *Id.* at 1238 n. 3.

5. The Government Should be Required, Where Possible, to Produce a Non-Privileged Substitute for Privileged Evidence That is Essential to Prove a Claim or Defense

The legislation urged by the proposed policy also would require the government, where possible, and without revealing privileged evidence, to produce a non-privileged substitute for privileged evidence that is essential to prove a claim or defense in the litigation. In cases in which it is possible to generate such a substitute, and the government is a party asserting a claim or defense that implicates the privilege, the legislation would require the government to elect between producing the substitute and conceding the claim or defense to which the privileged evidence relates. The standard the evidentiary substitute would need to meet would bel ess exacting than the standard applicable to criminal cases under CIPA.

In ac riminal case, thed efendant has Fifth and Sixth Amendment rights to have the prosecution's evidence presented at trial. *See Nixon*, 418 U.S. at 711. These rights present difficulties for the government in prosecutions involving classified evidence that the government does not wish to disclose. In many criminal cases, the government produces non-classified substitutesf or classified evidence, so that the prosecution may proceed at a public trial at the same time that the secrecy of the classified information is maintained. *See, e.g., United States v. Libby*, 467 F. Supp. 2d 20, 30-32 (D.D.C. 2006) (government's proposed substitutions of unclassified evidence for classified evidence were sufficient to provide defendant with substantially the same ability to make his defense). CIPA governs production of such evidentiary substitutes, which can be in the form of "a statement admitting relevant facts that the specific classifiedi nformation would tend top rove" (18 U.S.C. App. III § 6(c)(1)(A)) or a "summary of the specific classified information" (*id.* § 6(c)(1)(B)). CIPA also permits introduction ofr edacted documents into evidence to protect classified information. *Id.* § 8(b). Furthermore, under the CIPA procedures, the government is required to elect between producing non-privileged substitutes for classified evidence essential to the defense and having the court dismiss the indictment or make other rulings adverse to the prosecution's case. *Id.* § 6(e)(2).

CIPA (and the Fifth and Sixth Amendment principles underlying CIPA)d o not apply in civil cases and therefore do not require the government to make a similar election when invoking the state secrets privilege to bar production of evidence in a civil case. *See Reynolds*, 345 U.S. at 12 (noting that the government's obligation to produce evidence or lett he criminal defendant" go free" does not apply in a civil case). However, it is apparent from criminal cases that government can, in many circumstances, produce non-classified substitutes for sensitive national security information, thereby permitting litigation to proceed in a public forum while simultaneously protecting national security. In these criminal cases, it is in the government's interest to produce such substitutes, because the alternative would be to dismiss the charges to which the evidence relates. It would be contrary to the interests of justice if the government were *able* to produce analogous substitutes in a civil case without compromising national

security, but did not do so purely as a litigation tactic, to avoid liability for claims asserted by a private plaintiff. *See, e.g.*, Reynolds Holding, *A Double Standard on State Secrets?*, Time, March 19, 2007.

Accordingly, the legislation urged by this proposed policy would require that in cases in which it is possible to produce an adequate non-privileged substitute for evidence subject to the state secrets privilege (withoutr evealing privileged evidence), the government would be required to do so. In cases in which the government is a party asserting a claim or defense implicating the privilege, the government would be required to elect between producing that substitutea nd conceding the claim or defense to which the evidence applies. By requiring that election only when the substitute is "possible," the policy recognizes that there will be some civil cases (just as there are some criminal cases) in which the government will not be able to produce an evidentiary substitute without improperly revealing sensitive national security information; under such circumstances, the policy would not require the government to produce a substitute or risk conceding the claim or defense to which the evidence applies.

The proposed policy also addresses the adequacy of the non-privileged evidentiary substitute, requiring that it must provide a "substantially equivalent opportunity" to litigate a claim ord efense as would the privileged evidence. This standard is intended to be sufficiently exacting to encourage the governmentt o provide substituted evidence that will be as complete as possible and useful to the other party (or parties) to the litigation, but less stringent than the standard imposed under CIPA. CIPA requires that the substitute "will provide the defendant with substantially the same ability tom ake his defense as would disclosure of the specific classified information." 18 U.S.C. App. III § 6(c)(1). The lesser standard incorporated into the proposed policy recognizes that the Fifth and Sixth Amendment interests underlying CIPA do not apply in a civil case.

Finally, the proposed policy follows CIPA in providing that the form oft he substitute would be a summary of the evidence, a redacted versiono f the evidence, or a statement admitting relevant facts that the privileged evidence would tend to prove. *See* 18 U.S.C. App. III §§ 6(c)(1)(A), 6(c)(1)(B), 8(b). This portion of the proposed policy follows the suggestions of some courts that CIPA should serve as guidance in civil cases involving the state secrets privilege. *See Fitzgerald*, 776 F.2d at 1244 (referring to CIPA as possible template for balancing competing interests in civil context).

6. A Ruling on a Dispositive Motion Should be Deferred Until the Parties Complete Discovery of Facts Relevant to the Motion

The proposed policy also seeks to avoid premature dismissals by providing that courts should defer ruling on a motion to dismiss, or for summary judgment, based on the state secrets privilege until the parties complete discovery of facts relevant to the motion and the court resolves any privilege claims asserted as to those facts. This provision of the policy relies on Rule 12(a)(4)(A) of the Federal Rules of Civil Procedure, which authorizes the court to "postpone[ ] its disposition" of a motion to dismiss "until the trial on the merits." Fed. R. Civ. P. 12(a)(4)(A). This provision also relies on Rule 56(f) of the Federal Rules of Civil Procedure, which permits a "continuance"f or "discovery to be had" in resolving a summary judgment motion. Fed. R. Civ. P. 56(f).

This part oft he proposed policy isi ntended to address cases in which the government intervenes to seek dismissal of a case brought by a private party against a private defendant, on the ground that the private defendant cannot answer the complaint without revealing state secrets. *See, e.g., Terkel v. AT&T Corp.*, 441 F. Supp. 2d 899, 920 (N.D. Ill. 2006); *Hepting v. AT&T Corp.*439 F. Supp. 2d 974, 979 (N.D. Cal. 2006). In such a case,t he ruling on the motion to dismiss would be postponed until after the court evaluates particular discovery requests, and permits discovery of non-privileged evidence, relevant to the motion. Under these circumstances, the complaint would not need to be answered until after the court rules on the motion, even if that does not occur until the time of trial. *See* Fed. R. Civ. P. 12(a)(4)(A).

This provision of the policy also recognizes that in many cases involving the state secrets privilege, the plaintiffw ill challenge government actions (or related private party actions) that may be clandestine, so that the plaintiff may not initially have access to the evidence necessary to prove that those actions caused the plaintiff injury. The plaintiff's standing to sue turns in part on establishing that the defendant caused such injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Accordingly, in the interests of fairness, the proposed policy would require that if facts relevant to standing are subject to a claim of privilege, the court should deferr uling on anym otion tod ismiss basedo n standing until the plaintiff has a legitimate opportunity to discover non-privileged evidence necessary to prove standing.

A complaint that meets the minimal pleading standards of the Federal Rules of Civil Procedure should not be dismissed for lacko f standing at the pleadings stage. It is well established that "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice." *Lujan*, 504 U.S. at 561. Accordingly, if the government or related private party defendant wishes to challenge the plaintiff's standing in a case with a properly pleaded complaint, it should do so on summary judgment or at trial. If the defendant moves for summary judgment on standing grounds, the court should follow the procedure set forth in Rule 56(f) of the Federal Rules of Civil Procedure and "order a continuance to permit . . . discovery to be had," so that the plaintiff may seek sufficient evidence to attempt to oppose the motion. Fed. R. Civ. P. 56(f); *see also Anderson v. Liberty Lobby, Inc.*,47 7 U.S. 242, 250 n.5 (1986) (noting summary judgment should be refused where the nonmoving party has not had the opportunity to discover information that is essential to its opposition); *Burlington N. Santa Fe R.R. Co. v. The Assiniboine and Sioux Tribes of the Fort Peck Reservation*, 323 F.3d 767, 773-74 (9th Cir. 2003) ("Where . . . a summary judgment motion is filed so early in the litigation, before a party has had any realistic opportunity to pursue discovery relating to its theory of the case, district courts should grant any Rule 56(f) motion fairly freely. . . . [e]specially where . . . documentation or witness testimony may exist that is dispositive of a pivotal question . . . ."). Then, after discovery as to standing is complete, and any non-privileged evidence pertinent to standing has been produced, the courts hould adjudicate the summary judgment motion. If factual disputes preclude summary judgment, the courts hould resolve standing at trial on the merits. *See Lujan*, 504 U.S. at 561.

7. Cases Should Not be Dismissed Based on the State Secrets Privilege Unless AtL eastO ne of the Parties CannotF airly Litigate With Non-Privileged Evidence

The proposed policy also provides that after taking the steps described above to permit litigation to proceed with non-privileged evidence, and such other steps as the court may deem appropriate to accomplish the same goal, the case should proceed to trial unless at least one of the parties cannot fairly litigate with non-privileged evidence. In particular, a court should not dismiss an action based on the state secrets privilege if it finds that the plaintiff is able to prove a *prima facie* case, unless the court also finds, following *in camera* review, that the defendant is unable toa ssert a validd efense withn on-privileged evidence (including the non-privileged evidentiary substitutes described above). The review envisioned by this policy would involve evidentiary proffers scrutinized by the court. If the court findst hat the plaintiff can prove a *prima facie* case with non-privileged evidence (including that obtained from sources outside the government), and that the defendant's ability to defend against the plaintiff's case would not be substantially impaired because the defendant is unable to present specific, privileged evidence, the case would proceed to a trial on them erits. Following that rule, courts will satisfy the essential premise of the proposed policy, by making every effort to avoid dismissing a civil action based on the state secrets privilege.

8. The Government Should be Entitled to Take an Expedited Interlocutory Appeal From a District Court Decision Authorizing Dislcosure of Evidence Subject to a Privilege Claim

Under the legislation urged by the proposed policy, the government would be entitled to take an expedited interlocutory appeal from a district court decision authorizing the disclosure of evidence subject to a claim under the state secrets privilege. This provision of the proposed policy recognizes that the government'sl egitimate interests in protecting against disclosure of sensitive national security information could be compromised if an appeal of such a decision had to await final judgment, given that the disclosure, once made, could not be taken back. The language of this provision of the policy is based on a provision of CIPA that addresses the same issue. *See* 18 U.S.C. App. III § 7.

IV. CONCLUSION

The ABA House of Delegates should adoptt he proposed policy to encourage meaningful judicial review of assertions of the state secrets privilege. Absent that review, there is a risk that the government would effectively judge its own claim that information necessary to prove a plaintiff's case must be kept secret because disclosure would harm national defense or diplomatic relations of the United States. Adoption of the proposed policy would help ensure that the state secrets privilege is applied in a manner that protects the rights and civil liberties of private parties to the fullest extent possible without compromising legitimate national security interests.

Respectfully submitted,

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Section of Individual Rights and Responsibilities

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