



Under Attack

The State Secrets Privilege

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Fred Rustmann spent his career with the Central Intelligence Agency operating under cover, protected by a well-defined veil of secrecy.¹ Without the ability to operate in secrecy, protecting its methods and sources of information, the Intelligence Community would be rendered useless. Today, the inviolability of the secrecy veil is subject to question,² and the rules of engagement are clouding, giving pause to America's Clandestine Service at a time when timidity is an arrow in the quiver of the enemy.

The State Secrets Privilege generally allows the executive branch to refuse to produce documents or give over evidence or testimony to any court, any citizen or any legislator on the grounds that the evidence is secret or may lead to the revelation of secret information that would harm national security or foreign relations interests if disclosed. Moreover, no lawsuit which requires state secret information to maintain it may be brought over the objection of the government. The executive branch regards the State Secrets Privilege as a justiciability bar and the courts almost

always agree.³

Rarely does a court ever order the executive branch to reveal, over its objection, information that is classified "secret" or above. Even when the government has negligently disclosed secret information, courts have not allowed the opposing side access or permission to publish classified information when the government objects.⁴ Even when the basis of the government's objections or position is clearly suspicious, the courts have not required or permitted disclosure of classified material. The State Secrets Privilege almost always has been successful.⁵ Moreover, it is rare that a court will even review classified material *in camera*, almost always relying on the good faith of the government to truthfully mount the privilege and candidly represent the facts.⁶ This unequivocal privilege is now under substantial attack.

History of the State Secrets Privilege

The State Secrets Privilege in the United States is the progeny of the common law.⁷ The power to hold secrets, like the power to conduct affairs of state, was the undisputed right of the British Crown. Since the Crown always operated in the public interest or was always deemed by itself to do so, and since secrets were held only to benefit the realm and its citizens, the Crown's right to protect its secrets was inviolate. With the transfusion in the seventeenth and eighteenth centuries of the common law into the gene pool of the new American legal and political

1. F. W. Rustmann, Jr., *CIA, Inc. Espionage and the Craft of Business Intelligence* (Brassey's, Inc. 2002).

2. *El Masri v. United States*, 479 F.3d 296,303-04 (4th Cir. 2009), cert.denied, 128 S.Ct. 373 (2007); *McDonnell Douglas Corp. v. United States*, 323 F.3d 1006, 1021 (Fed.Cir. 2003).

3. *Tenet v. Doe*, 544 U.S. 1(2005); *Kasza v. Browner*, 133 F.3d 1159 (9th Cir.1998); *Weinberger v. Catholic Action of Hawaii Peace Education Project*, 454 U.S. 139 (1981); *Al-Haramain Islamic Foundation v. Bush*, 507 F.3d 1190 (9th Cir. 2007).

4. *Valerie Plame Wilson, Simon & Schuster, Inc. v. The Central Intelligence Agency, et.al*, Docket 07-4244-cv, (2d Cir. November 12, 2009); *Central Intelligence Agency v. Sims*, 471 U.S. 159, 175 (1985).
5. *W. Weaver and R. Pallito, State Secrets and Executive Power*, 120 *Pol. Sci. Q.* 85, 101-02 (2005); *R. Chesney, State Secrets and the Limits of National Security Litigation*, 75 *Geo.W.L.R.* 1249 (2007); *Amand Frost, The State Secrets Privilege and the Separation of Powers*, 75 *Fordham L. Rev.* 1931(2007).

6. *Kasza v. Browner*, 133 F.3d 1159, 1167(9th Cir. 2003); *Molerio v. Federal Bureau of Investigation*, 749 F.2d 815,825 (D.C. Cir. 1984).

7. For a comprehensive analysis of the history of the state secrets privilege see William G. Weaver and Danielle Escontrias, "Origins of the State Secrets Privilege" available at the Social Science Research Network, SSRN: <http://ssrn.com/abstract=1079364> (February 10, 2008).

systems, it was commonly understood that the State Secrets Privilege was a hereditament of the federal executive branch, as administrator of the government, and the conductor of state affairs. But the country was in its legal and political infancy. Many of the political struggles of the Constitutional Convention and the subsequent debates and elections setting the default balance of power were yet to play out.

The political contest between the Jeffersonian Republicans and the Federalists, which resulted in the creation of the implied power of judicial review announced by Justice John Marshall in 1803 in *Marbury vs. Madison*, 5 U.S. (1 Cranch) 137 (1803) was to be pivotal in fashioning the terms of sole custody of the State Secrets Privilege by the executive branch over the next two centuries. *Marbury, supra*, presented to the young Supreme Court a constitutional contest over the legality of the appointment of federal judges and commissioners. The court determined that its role in government was to provide judicial review of such contests and to be the sole and final arbiter of legal issues presented to it in appropriate cases. It was a gigantic grasp of power and responsibility which the court vested in itself by finding that the Constitution, while not literally giving it such authority, could not be construed otherwise. The doctrine is at the heart of a burgeoning constitutional crisis brewing today.⁸

It has often been said that the trial of Aaron Burr in 1807⁹ for treason solidified the State Secrets Privilege in the newly erected executive branch. While that characterization is not legally accurate, the trial is indicative of the early common understanding of the issue. Having been charged by the government, Aaron Burr sought to subpoena from President Thomas Jefferson letters to the president from former Burr confidant General Wilkinson which Burr said would shed light on his defense. Burr petitioned the judge, who happened to be Justice John Marshall.

At real issue was the collision between the judiciary and the president. Marshall indicated that he had no choice but to issue the requested subpoena to the president, even if the documents might not be publicly

disclosed.¹⁰ If the president ignored the subpoena and defied Marshall, a major constitutional crisis would have ensued. On the other hand, if the president succumbed to the subpoena and produced what could be considered secrets of the executive, the judiciary could be used forever as a foil to uncover and disclose in any relevant case, state secrets – obliterating the concept, emasculating the president and dooming the nation's security. Indeed, in the first known case of “gray-mail,” Aaron Burr counted on the intra-branch dispute to free him.¹¹

Still burning from the impact of *Marbury vs. Madison, supra*, and with great enmity toward his despised distant cousin, John Marshall – who was an ally of Federalist, former President John Adams – Jefferson stated his position in a letter to United States Attorney George Hay:

“The leading feature of our Constitution is the independence of the Legislative, Executive and Judiciary of each other, and none are more jealous of this than the Judiciary. But would the Executive be independent of the Judiciary if he were subject to the commands of the latter, and to imprisonment for disobedience; if the smaller courts could bandy him from pillar to post, keep him constantly trudging from north to south and east to west, and withdraw him entirely from his executive duties?”¹²

Jefferson avoided the conflict by agreeing to voluntarily produce, without responding to subpoena, for the benefit of the justice of the situation, most but not all, of the documents sought. For his part, Marshall deftly avoided a collision with the president, letting the matter drop, but noting that even a president was required to respond to the judicial process, if the evidence was relevant to the rights of the accused. In his response to the issue, Jefferson laid out the principle of the Executive and State Secrets Privilege Doctrine, stating that the president reserved the right, “independent of all other authority” to determine what papers, coming into the care, custody and control of the president, the public interest permits to be disclosed and to whom. This first expression of the State Secrets Privilege Doctrine

8. Cliff Sloan and David McKean, *The Great Decision: Jefferson, Adams and Marshall, The Battle for the Supreme Court* (Public Affairs, 2009).

9. *United States v. Burr*, 25 Fed. Cas. 30 (D.C.D. Va. 1807); 25 Fed.Cas.187 (D.C.D. Va.1807); see *In Re: United States*, 872 F.2d. 472, 474-75(D.C. Cir. 1989).

10. Famous American Trials, “The Aaron Burr Trial 1807,” a collection of primary trial documents available at www.law.umkc.edu/faculty/projects/ftrials/burr/burr.

11. Peter Charles Hoffer, *The Treason Trials of Aaron Burr* (University Press of Kansas 2008); Buckner F. Melton, Jr. *Aaron Burr: Conspiracy To Treason* (John Wiley & Sons, Inc. 2002).

12. See the original Jefferson letter contained in Doug Linder, “The Treason Trial of Aaron Burr” (2001) available at www.law.umkc.edu/faculty/projects/ftrials/burr/burr.

consisted of the following elements:

1. The privilege is designed to serve the public interest.
2. The president determines the public interest.
3. The president reserves for himself the right to make this determination without interference by any other branch.
4. The president determines what secrets will be disclosed and to whom.

Interestingly, this formulation is precisely the description of the Crown Privilege Doctrine of more than 200 years before.¹³ Moreover, it is also the doctrine underlying the “Unitary Executive President” hotly debated today, over 200 years later.¹⁴ It is a doctrine formulated by the interpretation by the executive branch of its own implied Article II powers.

Five decades after *Burr*, *supra*, and soon after the Civil War, with the Union in shatters and the federal government rapidly gaining power, the Supreme Court was presented with a small case of monumental future importance. In *Totten v. United States*, 92 U.S. 105 (1875), the court was squarely faced with a conflict between normal jurisprudence and the exceptional concepts implicated in a case involving state secrets. *Totten*, *supra*, involved a compensation claim for espionage services. A personal representative of William A. Lloyd’s estate claimed that President Abraham Lincoln had retained Lloyd to spy for the Union and that the government then failed to pay him the agreed compensation. The court rejected the claim, holding that alleged contracts based on secret agreements are unenforceable. The court held that if the agreements are made in secret, the very disclosure of the secrecy would be a breach, barring suit. And for good measure, the court laid out the principle, followed ever since, that “public policy” forbids the maintenance of an action in any court, the prosecution of which would inevitably involve the disclosure of state secrets.¹⁵

13. *Duncan v. Cammel Laird*, A.C. 624(1942); *Anderson v. Hamilton*, 2 B.&B. 156; *Hennessy v. Wright*, 31 Q.B.509, 518-519 (1888); *Wigmore On Evidence*, Volume 8, s.2175, 3rd Edition (1940).

14. Yoo, Christopher, “The Unitary Executive in the Modern Era, 1945-2004,” *Iowa Law Review* 90, No.2, p.601 (2005).

15. The use of *Totten v. United States*, 92 U.S. 105 (1875) as a justiciability bar where state secrets are involved is often disputed by litigants. *Mohamed v. Jeppensen Data Plan, Inc. and United States*, 539 F.Supp.2d 1128(N.D.Cal.2008), *reversed*, 563 F.3d 992 (9th Cir.2009), *en banc review granted*, 586 F.3d 1108 (9th Cir. 2009).

Modern applications of the State Secrets Privilege

In the early twentieth century, the United States ascended in international influence and became more engaged. Practical exigencies of politics, industrial growth and matters of state fertilized the executive branch, which grew exponentially in power and size. Moreover, the Civil War, World War I, the passage of the Internal Revenue Amendment to the Constitution in 1913, the Great Depression, and World War II transformed the central federal government into a growing, mostly unchallenged, monolith of the concentration of power. In matters of national security, the two other branches yielded almost without question to the judgments of the president.¹⁶ For example, during World War II, when the president determined that 110,000 citizens “might” pose a threat – the Court unhesitatingly acceded to the creation of prison camps and the incarceration of these citizens – many of whom were children – without proof of a crime, bail or trial.¹⁷

The Cold War posed the next challenge to the ascendancy of the United States and provided the platform for the growing unitary executive. Since the country faced an awesome, powerful foe with frightening weapon and delivery systems and a talented espionage service, it aggressively focused its intelligence and military arsenal on that enemy. Moreover, a regime of secrets and their custody and care had been carefully constructed through two world wars. The World War II Office of Strategic Services morphed into the Central Intelligence Agency, pursuant to the National Security Act of 1947.¹⁸

When a B-29 war plane crashed in 1948 in Georgia, killing the crew and all occupants, the death benefits lawsuit which ensued was defended by the Air Force with a stonewall. The Air Force refused to produce in court the accident report and details, even after court order, claiming that the aircraft was on a secret mission. Indeed, the Air Force asserted

16. Milkis and Nelson, *The American Presidency: Origins and Development* (CQ Press, 5th Edition 2007); compare, Gary Wills, *Bomb Power: The Modern Presidency and The National Security State*(Penguin Press 2009) with, Steven G. Calabresi, Christopher Yoo, *The Unitary Executive: Presidential Power From Washington To Bush* (Yale University Press, 2008).

17. *Korematsu v. United States*, 323 U.S. 214 (1944).

18. www.intelligence.gov.

the precise formulation of the State Secrets Privilege proclaimed by President Jefferson in 1807, contending that the courts must accept, without question, the determination of the Secretary of the Air Force as to non-disclosure.

The case, *Reynolds vs. United States*, 345 U.S. 1 (1953) made its way to the Supreme Court. The State Secrets Privilege as invoked by the Air Force was squarely recognized and affirmed by the court. Once again the court yielded to the responsibility of the president to conduct war, even a cold one, and to preserve the nation's secrets. The court held that the privilege must be formally raised in any case by the executive and determined by the presiding judge. The court warned the nation's judiciary that such determination must be made "without forcing a disclosure of the very thing the privilege is designed to protect." The court did not, however, sanction a policy of automatic disclosure *in camera* to the presiding judge.

The holding of the court in *Reynolds*, *supra* in 1953 has been the latest direct analysis by the court on the State Secrets Privilege. What is ironic is that the "secrets" withheld in 1949 were ultimately and recently disclosed – on the internet. The accident report concerning the B-29 Stratofortress finally made its way out by disgorgement of massive documents of the era by the government. The report revealed that the cause of the accident had been gross mismanagement of the maintenance of the aircraft. In recent litigation, the Third Circuit held that the withholding of the classified information regarding the flight had been justified.¹⁹

The coming constitutional crisis

No Congress has ever passed a law expressly approving the State Secrets Privilege. Congress has certainly legislated in the area often and recently, codifying certain aspects of the privilege.²⁰ But it has always respected the president's privilege, which is as implicit as is the Doctrine of Judicial Review or the oversight jurisdiction of Congress. Indeed, the provenance of the presidential state secrets doctrine is now as pristine as Spanish land grants are in the chains of title of Florida real estate. It is expressed in various forms, usually by executive order.²¹ Various

classifications of information under the care, custody or control of the executive branch have been specified. Information is either "confidential,"²² "secret"²³ or "top secret."²⁴ In practice, however, there are levels of even "top secret" information, restricting the most sensitive information to a very limited number of trusted individuals – almost none of whom are elected officials. Most classified information is compartmentalized and shared only by "stovepipe" communication to vetted individuals on a "need to know" basis. Publication of this information may be done only with the express written permission of authorized, carefully vetted officers of the government.²⁵ Even publications by former officials are frequently reviewed to insure that classified information is not intentionally or unintentionally published.²⁶ Requests to the government under the Freedom of Information Act are reviewed to insure that secret information is not disclosed.²⁷

America's secrets cover a wide spectrum – sensitive diplomatic communications, covert surveillance, political priorities and views, military secrets, strategically important inventions, results of clandestine collection efforts, analyses, consultations, scientific and criminal investigations, and many other areas.²⁸ Today, America classifies and safeguards much more information, on many more subjects, at the behest of many more government officials than ever before.²⁹ Indeed, so great has been the explosion in classification, that the Federation of American Scientists has decried the direct and collateral effects of overclassification.³⁰ A consensus has emerged that the bureau-

ded in the Constitution, Article II powers of the president. For example, *United States vs. Nixon*, 418 U.S. 683 (1974); *Department of the Navy v. Egan*, 484 U.S. 518, 527(1988); *El-Masri v. United States*, 479 F.3d 296, 303-04 (4th Cir. 2007).

22. "Disclosure would damage or prejudice national security." Operating Manual, National Industrial Security Program ("NISPPON"), Executive Order 12829, January 6, 1993, Defense Directive 5220.22; Executive Order 12958, "Classified National Security Information", April 17, 1995, available at www.fas.org/sgp/library/nispom.htm.

23. "Disclosure would cause grave damage to national security" *Id.*

24. "Disclosure would cause exceptionally grave damage to national security" *Id.*

25. Abram N. Shulsky and Gary J. Schmitt, *Silent Warfare, Understanding The World Of Intelligence* (Potomac Books, Third Edition, 2002).

26. F.W. Rustmann, Jr., *CIA, Inc. op. cit.*

27. Freedom of Information Act, 5 U.S.C., §552 (a)(4)(B).

28. *Pentagon Papers Case, New York Times Co. v. United States*, 403 U.S. 713 (1971).

29. At the end of fiscal year 2008, there were a total of 4,109 offices of original classification in the federal government. See Federation of American Scientists, www.fas.org "Secrecy News."

30. Federation of American Scientists, www.fas.org. President Obama signed an executive order on December 29, 2009,

19. *Herring v. United States*, 424 F.3d 384 (3rd Cir. 2005); Louis Fisher, *In The Name Of National Security: Unchecked Presidential Power and The Reynolds Case* (University Press of Kansas 2006).

20. The Classified Information Protection Act., 18 U.S.C. App. III, §§ 1-16.

21. While the privilege has historical roots in common law history, it has been stated that the privilege is deeply imbed-

cratic instinct to classify, an action which is difficult to undo, is stifling important scientific investigations, public scrutiny, historical research and hurting industry and the nation's economy and innovation.³¹

With the rapid growth of secrets has come the increased invocation of the State Secrets Privilege, as conflicts in various contexts have erupted over the use of the privilege as both a shield and a sword by the government. Various scandalous situations over the intervening years since the court decided *Reynolds*, *supra*, have raised public, and therefore, political hackles – questioning the carte blanche legislative and judicial recognition of the executive State Secrets Privilege.³²

Countless secret transactions, diplomatic communications, risky operations, and espionage missions occur without blemish every day in the Intelligence Community and foreign service and in America's vital interests. However, a few disasters percolate yearly out of the stovepipes and into the public realm. Sometimes, they result in real or theatrical legislative outrage. Since the Watergate scandal and the Pentagon Papers case, Congress has demanded more oversight over the Intelligence Community. For example, the House Permanent Select Committee on Intelligence has increasingly used Congress' checkbook as an implicit right of oversight to poke into the intentionally dark corners of the Intelligence Community.³³ The Foreign Intelligence Surveillance Court was created to supervise electronic eavesdropping in a political concession.³⁴ The Office of National Intel-

ligence, a huge reorganization designed to diminish the Central Intelligence Agency, grew out of a recent political backlash.³⁵

In the present era, faced with the reality of dozens of scandals and abuses of the State Secrets Privilege, the judiciary has increasingly questioned its subsidiary, submissive role in the state secrets area.³⁶ While recognizing that it simply does not have the expertise nor the personnel, budget or experience to review securely the evidence relevant to a normally justiciable case, it has nevertheless begun to aggressively assert itself in its traditional judicial review role.³⁷

Just as importantly, courts are more reluctant each year to deny access to the courthouse to litigants who present *prima facie* bona fide claims arising out of what appear to be suspicious fact patterns.³⁸ Furthermore, the courts are increasingly being used by organizational litigants to score political or policy points, affect the direction of foreign policy, military and Intelligence Community operations and, of course, drag legitimate state secrets out to the media.³⁹

Thus far, President Thomas Jefferson and President Barack Obama are joined at the hip in the courts on the issue of state secrets. Jefferson warned that the right to disclose state secrets was an incontestable, exclusive privilege of the executive branch. This was clearly the view of President George W. Bush. To the surprise of many observers, President Obama took the Jeffersonian/Bush view in *Mohamed v. Jeppensen Dataplan, Inc.* Docket No. 08- 15693 9th Circuit Court of Appeals, filing briefs on the state secrets justiciability

requiring all federal departments to review classification procedures and to limit classifications "to the minimum necessary." Executive Order 13526, Federal Register, Volume 75, Number 2 (January 5, 2010).

31. Erwin N. Griswold, "Secrets Not Worth Keeping; The Courts and Classified information," *Washington Post*, February 15, 1989 at A.25; Garry Wills, "Why The Government Can Legally Lie," *56 New York Review of Books* 32,33 (2009).

32. Barry Siegel, *Claim of Privilege: A Mysterious Plane Crash, a Landmark Supreme Court Case, and the Rise of State Secrets* (Harper Perennial 2009)

33. www.intelligence.house.gov.

34. 50 U.S.C. § 1801, *et seq.* See also the compilation at www.epic.org.

www.epic.org.

35. www.dni.gov.

36. *Wilson vs. Libby*, 535 F.3rd 697, 710 (D.C. Cir.2008); *ACLU v. National Security Agency*, 493 F.3d 644, 650 n.2 (6th Cir.2007).

37. *Mohamed v. Jeppensen Data Plan, Inc. and United States*, 539 F.Supp.2d 1128(N.D.Cal.2008), *reversed*, 563 F.3d 992 (9th Cir.2009), *en banc review granted*, 586 F.3d 1108 (9th Cir. 2009).

38. *Terkel v. AT&T Corp.*, 441 F. Supp.2d 899, 907 (N.D. ILL. 2006).

39. American Civil Liberties Union, www.aclu.org/national-security; Center for Constitutional Rights, www.ccrjustice.org; National Security Archives, at www.nat.sec.archives.com.

issue identical to those filed by the Bush Administration. The initial panel of 9th Circuit Court of Appeals judges pushed back, holding that the state secrets doctrine was not inviolate and that the judiciary will play an important judicial review role in cases where secrets are alleged to be pivotal to the fair disposition of the cases. Presently, the entire 9th Circuit has decided to rehear *Jeppensen, supra*, which has now been argued and submitted to it.

The issue is now clearly joined from Langley, Virginia, to Capitol Hill to every federal appellate circuit in the land. As this democracy searches for a fair and effective way to operate in secret, the branches are on a constitutional collision course.

How can the burgeoning Intelligence Community, law enforcement or the military perform what is expected with the media, lawyers, judges, and politicians in every black bag? How can a president fight wars or conduct delicate, secret operations and risky covert strategies and tactics if every disgruntled operative, combatant or public interest group can launch an action in court? What penetration

opportunities are presented to our very talented, well-financed and determined adversaries when secrets and secret operatives are the subject of court filings?

On the other hand, our system of government is different than all others. The “government” is not just the executive branch. Power and responsibility are shared in our system for good historical reason. Who says that an executive branch bureaucrat or official is more trustworthy than one from the judiciary or Congress? After all, hundreds of carefully vetted and trusted executive branch officials and employees have been caught, tried, and imprisoned for stealing and disclosing classified information to foreign services. To date, no judge or staff member has been arrested spilling the beans. Not one senator or representative has been caught committing treason or handing over secrets, ensnared by a “honey-trap” espionage operation or blackmailed by the enemy.

But if the federal judiciary, using its now established power of judicial review, accepts the invitation of countless litigants to ratchet up the review of claims based on state secrets, how will it handle the cases? Can it competently decide for itself that the decision of the Intelligence Community to secure or safeguard certain information from the public is wrong or made in bad faith? Should it appoint outside experts to

review the decisions of the Intelligence Community party which is before it? In the real world of the intelligence analysis mosaic, can a judge competently make determinations, contrary to those whose profession it is to sift through and distill actionable intelligence from thousands of other seemingly unconnected pieces of compartmentalized information? Should a judge question the credibility of the representations of a government department when challenged by a litigant? How can it be said that a judge’s decisions on the importance of protecting an alleged state secret are any better than the expertise of an action-experienced intelligence professional?

Rarely have the branches collided so directly that a crisis has resulted. But the stakes in this power struggle are huge. The absolute power of the executive to withhold information relevant to a person’s legitimate remedy or Congress’s trustee role invites, as it has repeatedly in our country, injustice and perhaps criminal activity. Is the failure to provide justice to one individual or a group just the price we must pay to keep the nation secure? Or can we strike the proper balance while protecting the security of our citizens?

The judicial power to grant or deny justiciability without in-depth review or development of secret facts contravenes basic tenets of our concept of liberty and justice – but it also could result in confusion and uncertainty by managers of secret operations and operatives. Legal uncertainty of secrecy undermines the regime of aggressiveness, ingenuity and daring which the co-author, among many other trainers and managers, bred into warriors now operating at great personal and national risk in legally protected shadows. The foreign allies and services with whom we cooperate are not pleased when their participation, their sources, and their methods spill into pleadings or hearings. Just as importantly, we must recruit new generations of officers who may legitimately question exposing themselves to the dangerous arena of litigation with an uncertain shield.

Congress is already at work, debating and attempting to craft a State Secrets Protection Act.⁴⁰ The proposed act, pending in the Senate and the House, sets up a regime for state secrets litigation

How can a president fight wars or conduct delicate, secret operations and risky covert strategies and tactics if every disgruntled operative, combatant or public interest group can launch an action in court?


40. State Secrets Protection Act, S.Bill 417; H.R. 984, 111th Congress.

in the federal courts. The legislation forbids justiciability dismissal of actions solely on the basis of the State Secrets Privilege and provides power to a court to determine for itself the applicability of the State Secrets Privilege, even over objection of the president. It requires the attorney general to report to Congress whenever the State Secrets Privilege is invoked. Bush administration Attorney General Mukasey strongly objected to the State Secrets Protection Act in 2008, claiming that it would emasculate the Intelligence, law enforcement and military communities and put the country at risk.⁴¹

Attorney General Holder announced policies in September 2009 which dramatically change the previous administration's litigation positions on state secrets in the courts.⁴² The Department of Justice will now assert the privilege only on the personal approval of the attorney general after a Department of Justice review committee has approved the use of the privilege in any case. The privilege will only be asserted when deemed by DOJ to be necessary to prevent significant harm to national defense or foreign relations. Further, the Justice Department now says that it will not invoke the privilege to conceal violations of law, inefficiency or error; to prevent embarrassment; or to delay release of information undeserving of the State Secrets Privilege.

Notwithstanding the new policies, however, the Justice Department has recently sought dismissal of the pending suit challenging the government's secret wiretapping program, invoking the State Secrets Privilege in exactly the same context as the Bush administration.⁴³ Significantly, the Justice Department has said that it will defer to the courts as to the proper "balance" with respect to the privilege. This is a huge concession of executive power which no administration in the past has been willing to make.⁴⁴

Clearly, there must be a wide-ranging debate and urgent resolution of this issue. The traditional *ad hoc* decisional regime in the courts may not work in the public interest. Emasculating the executive branch in the midst of a unique and dangerous war now being conducted on our soil is politically explosive. But the continued recognition of peremptory unitary and unquestioned Executive Privilege may no longer be politically feasible, given the few, but dramatic recent excesses of its application.

Overarching this debate must be a wide-spread recognition that robust, aggressive, risky and imaginative intelligence activities are absolutely vital to our national interest and personal security.⁴⁵ Operations, tactics and strategies cannot and will not be conducted in an atmosphere of transparency, trepidation or after-action litigation. An intelligence officer on a mission with a compulsory lawyer in tow electronically or metaphorically is not only a contradiction, but an engraved invitation to our dedicated, ruthless and adaptable enemies. 

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41. Letter of Attorney General Mukasey to Senator Patrick J. Leahy, March 31, 2008, available at www.justice.gov/archive/ola/views-letters/110-2/03-31-08-ag-ltr-re-s2533-state-secrets See also Louis Fisher's reply available at www.fas.org/sgp/jud/statesec/fishero40208.

42. John Schwartz, "Obama Backs Off a Reversal on Secrets," *New York Times*, February 9, 2009, A.12; see also www.salon.com/opinion/greenwald/2009/02/09. see *Shubert v. Obama*, Case No. 07-cv-00693-VRW(N.D. Calif.), in which the Obama Administration invoked the state secrets privilege.

43. The new policies of the Department of Justice with respect to invoking the state secrets privilege are specified at www.justice.gov/opa/pr/2009/september/09-ag-1013.html.

44. Memorandum of Attorney General Holder, September 23, 2009 to all Department of Justice department heads, available at legaltimes.typepad.com/blt/2009/09/holder-unveils-new-policy-on-state-secrets-privilege.html.

45. Philip Bobbitt, *Terror and Consent* (Alfred A. Knopf, New York, 2008); Scott W. Carmichael, *True Believers* (Naval Institute Press 2007).