

DRAFT

Guide to the Study of Intelligence
The History of the State Secrets Privilege

by Thomas R. Spencer and F.W.Rustmann, Jr.

No nation can function without secrets. It is a fundamental characteristic of sovereignty that information vital to the conduct of a nation's business be kept confidential. The history of civilization is peppered with tales of secret intelligence, codes, covert correspondence and closely held military inventions used to vanquish enemies.¹ The control of these secrets is universally the prerogative of the sovereign leader.

In the United States today, the state secrets² privilege is an almost unassailable privilege of the Executive Branch to refuse to disclose secret information to anyone. Moreover, a lawsuit against the government, which is based on state secrets is almost always dismissed by the courts. The privilege is intertwined with the political history of our country and the contest over the balance of power and liberty.

The American colonists were steeped in the history of civilization and schooled in the prerogatives of the English Crown -- the arbitrary exercise of which spawned economic and political disputes leading to the American Revolution. Crown Privilege, which included the "state secrets privilege" was a self-proclaimed and indisputable power of the Crown beyond the reach of the law. The Crown refused to permit its Courts or Parliament to bridle its unilateral right to withhold information from its subjects. The justification for this royal privilege was the centuries-old belief, binding the social fabric, that the Crown always operated in the interests of its subjects, and that State Secrets served the proper administration of the Crown's responsibilities to the people. Since the Crown was the sole determiner of what was in the public interest, neither a Court nor Parliament could overturn or debate that determination.³

In the discussions and arguments over the construction of America's new form of government -- unknown and untested in history, the drafters were wary of concentration of power. Checks and balances on each Branch of government were demanded as a reaction to the autocratic sovereignty just overthrown. Yet the framers knew that secrecy was fundamental to government. They assumed that the Executive Branch, as the administrative Branch, would house the new nation's secrets privilege and saw no need to specify its existence, its exercise or fashion its limits.⁴ After all, in their view, the Legislative Branch, itself divided into two parts,

¹ See Simon Singh, *The Code Book: The Secret History of Codes and Code Breaking* (Anchor Books, 2000).

² "Secrets" can be facts, inventions, policies, correspondence, procedures, views—anything the government may decide should be secret. At the end of Fiscal Year 2008, there were 4,109 offices of original classification in the federal government. See www.fas.org "Secrecy News."

³ See Weaver and Escontrias, "Origins of the State Secrets Privilege" at the Social Science Research Network, SSRN: <http://ssrn.com/abstract=1079364> (February 10, 2008).

⁴ See Gabriel Schoenfeld, *Necessary Secrets* (Norton, 2010) at Chapter 2 "Secrets of the Founders."

was the premiere, most powerful Branch -- it resided in Article I of the Constitution. The Executive Branch was deemed secondary (hence Article II) and the Judicial Branch the weakest (Article III).

Bitter political arguments over the power of the new government festered in the elections following the adoption of the new Constitution in 1787. Partisan feuds smoldered in a second political revolution, bursting into the election of 1800 -- Thomas Jefferson versus then President John Adams. Jefferson⁵ barely won the nasty election, and John Adams paid him back by packing the courts and commissions, prior to the end of his term. This led to the 1803 case of *Marbury v. Madison*⁶ in which Justice John Marshall declared that the Constitution, despite the absence of specific language, implied that the Courts had the final power to review actions of the Executive Branch for legality. It was a bold and gigantic grasp of political power. But so delicate and incendiary was the political balance at the time, that neither Jefferson nor Congress challenged Marshall's opinion.

In a second Constitutional crisis in 1807, President Jefferson charged Aaron Burr with treason concerning Burr's activities in the Louisiana Territory, a territory Burr allegedly tried to grab for himself. The judge who assigned himself to the treason case was Jefferson's cousin but political enemy, Justice Marshall. Burr requested to subpoena secret documents from President Jefferson. Marshall issued the subpoena. President Jefferson, still burning from the *Marbury* decision, refused to comply with the subpoena as a matter of principle, raising, in effect, the state secrets privilege,⁷ which he said was implied as a necessary component of the Executive Branch functions. Justice Marshall was wary of pushing the issue. Moreover, Jefferson avoided the crisis by producing some of the requested documents voluntarily "for the justice of the situation." Marshall exonerated Burr thereby avoiding a collision with Jefferson and the state secrets privilege.

Almost 70 years after the trial of Aaron Burr, President Lincoln personally retained the services of a spy during the Civil War. He promised the spy compensation for information on certain Confederate military operations. After Lincoln was assassinated and the spy had died, his family made a claim for compensation, which the government denied. The family sued and the case, *Totten v. United States*, made its way to the Supreme Court in 1875.⁸ The Court turned down the claim, deciding that any claim in court which relies on the disclosure of state secrets, may not be maintained and must be dismissed. This precedent is still the law today.⁹

In 1953, the state secrets privilege faced its third challenge. An Air Force B-29 aircraft crashed in Georgia killing the entire crew. The families of the crew sued the government, claiming negligence in the maintenance of the aircraft. The Air Force refused to produce any of its records or recovered materials, even after a court order required it, claiming that the

⁵ Thomas Jefferson was intrigued with intrigue and secrecy. In fact, he invented and frequently used a Secret Code machine, the Wheel Cipher, still admired today. See David Kahn, *The Story of Secret Writing*. (Scribner, 1966).

⁶ 5 U.S. (1 Cranch) 137 (1803). See Sloan and McKean, *The Great Decision: Jefferson, Adams and Marshall, the Battle for the Supreme Court* (Public Affairs, 2009).

⁷ See Hoffer, *The Treason Trials of Aaron Burr* (University Press of Kansas, 2008). See *United States v. Burr*, 25 Fed Cas.30 (D.C.D.Va.1807).

⁸ *Totten v. United States*, 92 U.S. 105 (1875).

⁹ See *Tenet v. Doe*, 544 U.S. 1 (2005).

Executive Branch could refuse even the courts based on the state secrets privilege. The Supreme Court sustained the government and its privilege in *Reynolds v. United States*,¹⁰ holding that the privilege must be raised in court and that a judge has the right only to determine whether the privilege has been properly raised. The Court ruled that courts should not force disclosure to review the propriety of the privilege; else the purpose of secrecy would be lost. This decision has never been modified or vitiated by any court.

Today, the President categorizes secret information, classifying it into a hierarchy of the damage to the nation if disclosed. “Confidential information” is the lowest category of State Secrets and “Top Secret” is the highest (see Figure 1). In reality, there are many levels within the “Top Secret” category; but those levels and who has access are frequently considered state secrets themselves!

State Secretes are classified by the President based on the level of possible harm to the nation’s security:

Top Secret: “Disclosure would cause *exceptionally* grave danger to national security.”

Secret: “ Disclosure would cause grave damage to national security.”

Confidential: “ Disclosure would cause damage or prejudice to national security.”

Figure 1. Definitions of categories of classified information¹¹

The state secrets privilege frequently collides with other concepts, which are equally important to American values. Personal liberties and freedom of the press are just two collision points frequently debated and sometimes litigated. Citizens, media, politicians and courts historically have been concerned over the validity of the use of the privilege.¹² After all, the privilege could easily be used to cover up crimes, unethical or corrupt conduct.

Lawsuits are filed often against the President seeking disclosure of secret information. Congress has attempted many times, especially in recent years, to legislate limitations and procedures on the President in his use of the privilege. Thus far, all attempts have failed.¹³

¹⁰ 345 U.S. 1 (1953). Recently, all of the classified information and the facts were inadvertently spilled out on the Internet. The facts showed absolute negligence in maintenance of the aircraft. But in *Herring v. United States*, 424 F.3d 384 (3rd Cir. 2005), the Circuit Court held that the government was right in withholding the evidence, due the fact that secret equipment was onboard.

¹¹ See Executive Order 13526, Classified National Security Information. Available at www.fas.org.

¹² See the Pentagon Papers Case, *New York Times Co. v. United States*, 403 U.S. 713 (1971).

¹³ The 111th Congress attempted to pass the State Secrets Protection Act, S. Bill 417; H.R. 984, without success.

However, the Department of Justice has recently announced a new policy of only withholding secret information in cases if the disclosure would “significantly harm” national security, such as intelligence information. Now, the Attorney General personally will make the final decision on the use of the privilege in court. Recent court decisions demonstrate that the sanctity of the privilege, first used by Thomas Jefferson in 1807, is very much intact today. The courts are extremely reluctant to force disclosure when the President has decided that the nation’s security could be compromised.¹⁴

Readings for Instructors

For an exhaustive study of the origins of the State Secrets Privilege, read “Origins of the State Secrets Privilege,” by William G. Weaver and Danielle Escontrias, available at the Social Science Research Network, SSRN: <http://ssrn.com/abstract=1079364> (February 10, 2008). Also see 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).

For an understanding of the importance of the trial of Aaron Burr, see Peter Charles Hoffer, *The Treason Trials of Aaron Burr* (University Press of Kansas, 2008); and Buckner F. Melton, Jr., *Conspiracy to Treason* (John Wiley& Sons, Inc., 2002).

The original letters of Thomas Jefferson concerning the Burr subpoena are contained in Doug Linder, “The Treason Trial of Aaron Burr “(2001) available at www.law.umkc.edu/faculty/projects/f.trials/burr/burr.

For an analysis of *Reynolds vs. United States* and its present implications, see Louis Fischer, *In the name of National Security: Unchecked Presidential Power and the Reynolds Case* (University Press of Kansas 2006). See also, Barry Siegel, *Claim of Privilege: A Mysterious Plane Crash, a Landmark Supreme Court Case, and the Rise of State Secrets* (Harper Perennial, 2009).

The Federation of American Scientists collects information on state secrets law and policy. See, www.fas.org “Secrecy News.”

For the impact of the state secrets privilege on the media, see Gabriel Schoenfeld, *Necessary Secrets—National Security, the Media and the Rule of Law* (Norton, 2010). Also worth reading is Abram N. Shulsky and Gary J. Schmitt, *Silent Warfare, Understanding the World of Intelligence* (Potomac Books, Third Edition, 2002).

For an excellent review of the law in the context of the War on Terror, it is recommended that review of the case of Mohamed et al. v. Jeppesen Dataplan, Inc., decided by the 9th Circuit Court of Appeals on September 8, 2010 would be extremely helpful. In a 6-5 *en banc* ruling, the Court

¹⁴ See Mohammed v. Jeppesen DataPlan, The en banc opinion of the 9th Circuit Court of Appeals is reported at 614 F.3d 1070 (9thCir. 2010). An appeal to the Supreme Court was denied on May 15, 2011.

narrowly dismissed a suit based on the state secrets privilege. The plaintiffs requested that the Supreme Court review the decision. The Supreme Court refused the appeal on May 15, 2011.

The State Secrets Privilege is the centerpiece of a debate today over the power of the President. 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).

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