



REFORMING THE STATE SECRETS PRIVILEGE

Statement of the Constitution Project's
Liberty and Security Committee &
Coalition to Defend Checks and Balances

May 31, 2007

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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

* 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

* 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 endanger [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 that 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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