The Constitution Project
CONSTITUTIONAL COMMENTARY

CONGRESS WILL HAVE OPPORTUNITY TO REFORM STATE SECRETS DOCTRINE

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On October 9th 2007, the Supreme Court declined to hear the case of Khaled El-Masri, a German citizen who for four months in 2004 was detained, tortured, and repeatedly interrogated at a CIA prison in Afghanistan. Mr. El-Masri was eventually released after it was discovered that he was not a terrorist, but merely someone who had a similar name to a known terrorist. When Mr. El-Masri filed a lawsuit against former CIA Director George Tenet seeking to hold the U.S. government accountable for this treatment, a federal court dismissed the case. The executive branch asserted the "state secrets privilege," claiming that allowing the suit to proceed would "present a grave risk of injury to national security" and both the district court and the U.S. Court of Appeals for the Fourth Circuit accepted this claim. No judge ever reviewed any of this purportedly secret evidence to independently determine the validity of the claim.

In a Talking Justice post last year, I noted how the Supreme Court had the opportunity to hear the *El-Masri* case and clarify that courts must independently review any claims by the executive branch that evidence should be withheld because it might harm national security. But now that the Supreme Court has refused to accept review, Mr. El-Masri cannot rely on American courts to hold the U.S. government accountable, and we must turn to Congress for the needed reforms.

As I discussed last year, the state secrets privilege was established in its modern form by the 1953 case *United States v. Reynolds,* a suit by the widows of three men employed as private individuals by the Air Force who died in a crash of a B-29. In *Reynolds,* the Supreme Court accepted the Executive's argument that disclosure of an Air Force accident report risked revealing vital national security secrets, and refused to require that the report be produced to the district judge for an independent assessment. Nearly 50 years later it was revealed that the accident report contained not state secrets, but only numerous accounts of negligence that would have seriously harmed the government's case and presumably embarrassed the Air Force. Moreover, since *Reynolds*, the privilege has been expanded not only to bar disclosure of particular items of evidence, but to foreclose litigation of entire cases in which the state secrets privilege is asserted. Cases like Mr. El-Masri's have been dismissed at the *pleadings* stage, before the opportunity for any discovery.

On January 22, Senator Edward Kennedy (D-MA) – joined by Senators Arlen Specter (R-PA), and Patrick Leahy (D-VT) – introduced legislation that would reform the state secrets doctrine to ensure independent judicial review of evidence the Executive asserts is privileged. Similar legislation is expected to be introduced shortly in the House of Representatives. Senator Kennedy's legislation calls for judges to make independent, *in camera* reviews of evidence that the government claims contains state secrets. This would ensure that a judge assesses the validity of a state secrets claim without any risk that the evidence in question might be publicly released. Independent review is the most important feature of any attempted reform of the state secrets doctrine. The Executive cannot be allowed to block all challenges to potentially illegal and unconstitutional government programs simply by claiming, without any independent review, that all the evidence is a state secret.

On January 29,th the House Judiciary Subcommittee on the Constitution, Civil Rights, and Civil Liberties held an oversight hearing on the use of the state secrets doctrine. At the hearing, the main argument of those opposing reform was that judges are not capable of making the determination as to what evidence should be considered a state secret; rather, they urged that "utmost deference" should be given to the executive branch, claiming it knows best what could potentially threaten national security. However, in a statement submitted to the Subcommittee, William Webster, former federal judge and former Director of the FBI and the CIA, wrote that federal judges are "fully competent to perform an independent review of Executive Branch assertions of the state secrets privilege." In addition, Patricia M. Wald, a former Chief Judge of the U.S. Court of Appeals for the D.C. Circuit and a member of the Constitution Project's Liberty and Security Committee, noted that independent judicial review is necessary "if our courts are to continue their best tradition of constitutional guardianship."

It is clear that some evidence must be protected from public exposure for national security reasons. However, the aftermath of the *Reynolds* case demonstrates without a doubt that those in the best position to make this judgment are impartial federal judges, and not members of the executive branch who have a stake in the outcome of a case in which the state secrets privilege is claimed and who may be seeking to avoid accountability and embarrassment. Congress should act now to reform the state secrets privilege to uphold the basic fairness of our justice system and our constitutional system of checks and balances.