

October 4, 2007

The Hon. Harry Reid  
Majority Leader  
United States Senate  
Washington, D.C. 20510

The Hon. Nancy Pelosi  
Speaker  
U.S. House of Representatives  
Washington, DC 20515

The Hon. Patrick Leahy  
Chairman  
Senate Judiciary Committee  
United States Senate  
Washington, D.C. 20510

The Hon. John Conyers  
Chairman  
House Judiciary Committee  
U.S. House of Representatives  
Washington, DC 20515

The Hon. John D. Rockefeller, IV  
Chairman  
Senate Select Committee  
on Intelligence  
United States Senate  
Washington, D.C. 20510

The Hon. Silvestre Reyes  
Chairman  
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on Intelligence  
U.S. House of Representatives  
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The Hon. Mitch McConnell  
Minority Leader  
United States Senate  
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The Hon. John Boehner  
Minority Leader  
U.S. House of Representatives  
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The Hon. Arlen Specter  
Ranking Minority Member  
Senate Judiciary Committee  
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The Hon. Lamar S. Smith  
Ranking Minority Member  
House Judiciary Committee  
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The Hon. Kit S. Bond  
Ranking Minority Member  
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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,

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