AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

STATE SECRETS PROTECTION ACT OF 2008

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

ON

H.R. 5607

JULY 31, 2008

Serial No. 110–155

Printed for the use of the Committee on the Judiciary

Available via the World Wide Web: http://judiciary.house.gov

U.S. GOVERNMENT PRINTING OFFICE

43–832 PDF WASHINGTON : 2009

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2104 Mail: Stop IDCC, Washington, DC 20402–0001

COMMITTEE ON THE JUDICIARY

JOHN CONYERS, JR., Michigan, *Chairman*

HOWARD L. BERMAN, California
RICK BOUCHER, Virginia
JERROLD NADLER, New York
ROBERT C. "BOBBY" SCOTT, Virginia
MELVIN L. WATT, North Carolina
ZOE LOFGREN, California
SHEILA JACKSON LEE, Texas
MAXINE WATERS, California
WILLIAM D. DELAHUNT, Massachusetts
ROBERT WEXLER, Florida
LINDA T. SANCHEZ, California
STEVE COHEN, Tennessee
HANK JOHNSON, Georgia
BETTY SUTTON, Ohio
LUIS V. GUTIERREZ, Illinois
BRAD SHERMAN, California
TAMMY BALDWIN, Wisconsin
ANTHONY D. WEINER, New York
ADAM B. SCHIFF, California
ARTUR DAVIS, Alabama
DEBBIE WASSERMAN SCHULTZ, Florida
KEITH ELLISON, Minnesota

LAMAR SMITH, Texas
F. JAMES SENSENBRENNER, JR., Wisconsin
HOWARD COBLE, North Carolina
ELTON GALLEGLY, California
BOB GOODLATTE, Virginia
STEVE CHABOT, Ohio
DANIEL E. LUNGREN, California
CHRIS CANNON, Utah
RIC KELLER, Florida
DARRELL ISSA, California
MIKE PENCE, Indiana
J. RANDY FORBES, Virginia
STEVE KING, Iowa
TOM FEENEY, Florida
TRENT FRANKS, Arizona
LOUIE GOHMERT, Texas
JIM JORDAN, Ohio

PERRY APELBAUM, *Staff Director and Chief Counsel*
SEAN MCLAUGHLIN, *Minority Chief of Staff and General Counsel*

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

JERROLD NADLER, New York, *Chairman*

ARTUR DAVIS, Alabama
DEBBIE WASSERMAN SCHULTZ, Florida
KEITH ELLISON, Minnesota
JOHN CONYERS, JR., Michigan
ROBERT C. "BOBBY" SCOTT, Virginia
MELVIN L. WATT, North Carolina
STEVE COHEN, Tennessee

TRENT FRANKS, Arizona
MIKE PENCE, Indiana
DARRELL ISSA, California
STEVE KING, Iowa
JIM JORDAN, Ohio

DAVID LACHMANN, *Chief of Staff*
PAUL B. TAYLOR, *Minority Counsel*

CONTENTS

JULY 31, 2008

Page

THE BILL

H.R. 5607, the "State Secrets Protection Act of 2008" 4

OPENING STATEMENTS

The Honorable Jerrold Nadler, a Representative in Congress from the State of New York, and Chairman, Subcommittee on the Constitution, Civil Rights, and Civil Liberties 1
The Honorable Trent Franks, a Representative in Congress from the State of Arizona, and Ranking Member, Subcommittee on the Constitution, Civil Rights, and Civil Liberties 17
The Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, Chairman, Committee on the Judiciary, and Member, Subcommittee on the Constitution, Civil Rights, and Civil Liberties 19

WITNESSES

Ms. Meredith Fuchs, General Counsel, National Security Archives
Oral Testimony 24
Prepared Statement 27
Mr. Steven Shapiro, American Civil Liberties Union
Oral Testimony 37
Prepared Statement 39
Mr. Michael A. Vatis, Partner, Steptoe & Johnson, LLP
Oral Testimony 51
Prepared Statement 53
Mr. Bruce Fein, Chairman, The American Freedom Agenda
Oral Testimony 61
Prepared Statement 63

LETTERS, STATEMENTS, ETC., SUBMITTED FOR THE HEARING

Los Angeles Times article dated May 21, 2006, submitted by the Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, Chairman, Committee on the Judiciary, and Member, Subcommittee on the Constitution, Civil Rights, and Civil Liberties 20
Prepared Statement of the Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, Chairman, Committee on the Judiciary, and Member, Subcommittee on the Constitution, Civil Rights, and Civil Liberties 22

STATE SECRETS PROTECTION ACT OF 2008

THURSDAY, JULY 31, 2008

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS, AND CIVIL LIBERTIES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 12:33 p.m., in room 2141, Rayburn House Office Building, the Honorable Jerrold Nadler (Chairman of the Subcommittee) presiding.

Present: Representatives Conyers, Nadler, Scott, Davis, Wasserman Schultz, and Franks.

Staff present: David Lachmann, Subcommittee Chief of Staff; Burt Wides, Majority Counsel; Heather Sawyer, Majority Counsel; Caroline Mays, Majority Professional Staff Member; Paul Taylor, Minority Counsel; and Charlotte Sellmyer, Minority Professional Staff Member.

Mr. NADLER. This hearing of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties will come to order. Without objection, the Chair is authorized to declare a recess of the hearing.

We will now proceed to Member's opening statements. As has been the practice in this Subcommittee, I will recognize the Chairs and Ranking Members of the Subcommittee and of the full Committee to make opening statements. In the interest of proceeding to our witnesses and mindful of our busy schedules, I would ask that other Members submit their statement for the record. Without objection, all Members will have 5 legislative days to submit opening statements for inclusion in the record.

The Chair now recognizes myself for 5 minutes for an opening statement.

Today, the Subcommittee examines legislation that would codify uniform standards for dealing with claims of a state secrets privilege by the government in civil litigation. In January, we had an oversight hearing on the state secrets privilege. Based on the findings of that hearing and the very insightful testimony we received, I introduced H.R. 5607, the State Secrets Protection Act of 2008, on March 13.

Our hearings over the last 2 years and the Administration's persistent attempts to withhold information from Congress have demonstrated the destructive impact that sweeping claims of privilege and secrecy have had on our Nation. Claims of secrecy have been used to conceal matters from Congress, even though Members have the security clearance necessary to be briefed in an appropriately

secure setting. That has been the case with respect to the use of torture, illegal spying on Americans and other matters of tremendous national importance.

We have a constitutional obligation to conduct oversight, and the facts that have begun to come out certainly demonstrate the consequences of the misuse of state secrets claims. This same pattern of resorting to extravagant claims of state secrets has also been evident in the courts. While this Administration did not invent the use of the state secrets privilege to conceal its wrongdoing, it certainly has perfected the art, whether it is rendition to torture, illegal spying or government malfeasance, the state secrets privilege has been abused by Administrations past and present to protect officials who have behaved illegally or improperly rather than to protect the safety and security of the Nation.

The landmark case in the field, *U.S. v. Reynolds*, is a perfect case in point. The widows of three civilian engineers sued the government for negligence stemming from a fatal air crash. The government refused to produce the accident report, even refusing to provide it to the court to review, claiming it would reveal state secrets. The Supreme Court concurred without ever looking behind the government's unsupported assertion that national security was involved.

A half-century later, the report was found online by the daughter of one of the engineers, and it contained no sensitive information. It did, however, reveal that the crash was caused by government negligence. So, in other words, the government committed a fraud on the court in order to hide embarrassing information and protected itself by misuse of the state secrets doctrine. And this fraud on the court ended up in plaintiffs losing evidence which they clearly should have had.

Protecting the government from embarrassment and liability, not protecting national security, was the only justification for withholding the accident report. Yet these families were denied justice because the Supreme Court never looked behind the government's claim, its wrongful and knowingly deceitful claim, to determine whether it was valid.

It is important to protect national security, and sometimes it is necessary for our courts to balance the need for individual justice with national security considerations. Congress has in the past balanced these important albeit sometimes competing demands. In the criminal context, we enacted the Classified Information Procedures Act to protect classified information without derogating the rights of the accused. In FISA, we set up procedures for the court to examine sensitive materials. Through the Freedom of Information Act, we sought to limit any withholding of information from the public, whom the government is supposed to serve.

We can and should do the same in civil cases. Our system of government and our legal system have never relied on taking assurances at face value. The courts and the Congress both have a duty to look behind what this Administration or any Administration says to determine whether or not those assurances are well-founded.

Presidents and other government officials have been known to lie, especially when it is in their interest to conceal something. The

founders of this Nation assumed that there needed to be checks in each branch of government to prevent such abuses from taking place. Courts have a duty to protect national security secrets, but they also have a duty to make an independent judgment as to whether state secrets claims have merit.

When the government itself is a party, the court cannot allow it to become the final arbiter of its own case. In particular, the courts cannot allow cases to be dismissed on a motion to dismiss on the unsupported allegation that defending the case will necessitate the revelation of state secrets and so the party never even gets a day in court. The purpose of this legislation is to ensure that the correct balance is struck, that litigants have their day in court and that national security is also protected.

I look forward to the testimony of our witnesses.

[The bill, H.R. 5607, follows:]

110TH CONGRESS
2D SESSION

H. R. 5607

To provide safe, fair, and responsible procedures and standards for resolving claims of state secret privilege.

IN THE HOUSE OF REPRESENTATIVES

MARCH 13, 2008

Mr. NADLER (for himself, Mr. PETRI, Mr. CONYERS, and Mr. DELAHUNT) introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To provide safe, fair, and responsible procedures and standards for resolving claims of state secret privilege.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "State Secret Protection Act of 2008".

SEC. 2. STATE SECRET PRIVILEGE.

In any civil action brought in Federal or State court, the Government has a privilege to refuse to give evidence and to prevent any person from giving evidence only if the Government shows that public disclosure of the evi-

1 dence that the Government seeks to protect would be rea-
2 sonably likely to cause significant harm to the national
3 defense or the diplomatic relations of the United States.

4 **SEC. 3. PROTECTION OF SECRETS.**

5 (a) IN GENERAL.—The court shall take steps to pro-
6 tect sensitive information that comes before the court in
7 connection with proceedings under this Act. These steps
8 may include reviewing evidence or pleadings and hearing
9 arguments ex parte, issuing protective orders, requiring
10 security clearance for parties or counsel, placing material
11 under seal, and applying security procedures established
12 under the Classified Information Procedures Act for clas-
13 sified information to protect the sensitive information.

14 (b) IN CAMERA PROCEEDINGS.—All hearings and
15 other proceedings under this Act may be conducted in
16 camera, as needed to protect information or evidence that
17 may be subject to the privilege.

18 (c) PARTICIPATION OF COUNSEL.—Participation of
19 counsel in proceedings under this Act shall not be limited
20 unless the court determines that the limitation is a nec-
21 essary step to protect evidence the Government asserts is
22 protected by the privilege or that supports the claim of
23 privilege and that no less restrictive means of protection
24 suffice. The court shall give a written explanation of its

1 decision to the parties and their counsel, which may be
2 placed under seal.

3 (d) PRODUCTION OF ADEQUATE SUBSTITUTE PEND-
4 ING RESOLUTION OF THE CLAIM OF PRIVILEGE.—If at
5 any point during its consideration of the Government's
6 claim, the court determines that disclosure of information
7 to a party or counsel, or disclosure of information by a
8 party that already possesses it, presents a risk of a harm
9 described in section 2 that cannot be addressed through
10 less restrictive means provided in this section, the court
11 may require the Government to produce an adequate sub-
12 stitute, such as a redacted version, summary of the infor-
13 mation, or stipulation regarding the relevant facts, if the
14 court deems such a substitute feasible. The substitute
15 must be reviewed and approved by the court and must
16 provide counsel with a substantially equivalent opportunity
17 to assess and challenge the Government's claim of privi-
18 lege as would the protected information.

19 **SEC. 4. ASSERTION OF THE PRIVILEGE.**

20 (a) IN GENERAL.—The Government may assert the
21 privilege in connection with any claim in a civil action to
22 which it is a party or may intervene in a civil action to
23 which it is not a party to do so.

24 (b) SUPPORTING AFFIDAVITS.—If the Government
25 asserts the privilege, the Government shall provide the

court with an affidavit signed by the head of the executive branch agency with responsibility for, and control over, the evidence asserted to be subject to the privilege. In the affidavit, the head of the agency shall explain the factual basis for the claim of privilege. The Government shall make public an unclassified version of the affidavit.

SEC. 5. PRELIMINARY PROCEEDINGS.

(a) PRELIMINARY REVIEW BY COURT.—Once the Government has asserted the privilege, and before the Court makes any determinations under section 6, the court shall undertake a preliminary review of the information the Government asserts is protected by the privilege and provide the Government an opportunity to seek protective measures under this Act. After any initial protective measures are in place, the Court shall proceed to the consideration of additional preliminary matters under this section.

(b) CONSIDERATION OF WHETHER TO APPOINT SPECIAL MASTER OR EXPERT WITNESS.—The court shall consider whether the appointment of a special master with appropriate expertise or an expert witness, or both, would facilitate the court's duties under this Act.

(c) INDEX OF MATERIALS.—The court may order the Government to provide a manageable index of evidence the Government asserts is subject to the privilege. The index

must correlate statements made in the affidavit required under this Act with portions of the evidence the Government asserts is subject to the privilege. The index shall be specific enough to afford the court an adequate foundation to review the basis of the assertion of the privilege by the Government.

(d) PREHEARING CONFERENCES.—After the preliminary review the court shall hold one or more conferences with the parties to—

(1) determine any steps needed to protect sensitive information;

(2) define the issues presented by the Government's claim of privilege, including whether it is possible to allow the parties to complete nonprivileged discovery before determining whether the claim of privilege is valid;

(3) order disclosure of evidence to the court needed to assess the claim, including all evidence the Government asserts is protected by the privilege and other evidence related to the Government's claim;

(4) resolve any disputes regarding participation of counsel or parties in proceedings relating to the claim, including access to the Government's evidence and arguments;

(5) set a schedule for completion of discovery related to the Government's claim; and

(6) take other steps as needed, such as ordering counsel or parties to obtain security clearances.

(c) SECURITY CLEARANCES.—If the court orders a party or counsel to obtain a security clearance, the Government shall promptly conduct the necessary review and determine whether or not to provide the clearance. If the necessary clearance is not promptly provided to counsel for a party, the party may propose that alternate or additional counsel be cleared. If within a reasonable time, alternative or additional counsel selected by the party cannot be cleared, then the court, in consultation with that party and that party's counsel, shall appoint another attorney, who can obtain the necessary clearance promptly, to represent the party in proceedings under this Act. When a security clearance for counsel sought under this Act is denied, the court may require the Government to present an ex parte explanation of that denial.

SEC. 6. PROCEDURES AND STANDARD FOR ASSESSING THE PRIVILEGE CLAIM.

(a) HEARING.—The court shall conduct a hearing to determine whether the privilege claim is valid.

(b) BASIS FOR RULING.—

(1) GENERALLY.—The court may not determine that the privilege is valid until the court has reviewed—

(A) except as provided in paragraph (2), all of the evidence that the Government asserts is privileged;

(B) the affidavits, evidence, memoranda and other filings submitted by the parties related to the privilege claim; and

(C) any other evidence that the court determines it needs to rule on the privilege.

(2) SAMPLING IN CERTAIN CASES.—Where the volume of evidence the Government asserts is privileged precludes a timely review of each item of evidence, or the court otherwise determines a review of all of that evidence is not feasible, the court may substitute a sufficient sampling of the evidence if the court determines that there is no reasonable possibility that review of the additional evidence would change the court's determination on the privilege claim and the evidence reviewed is sufficient to enable to court to make the independent assessment required by this section.

(c) STANDARD.—In ruling on the validity of the privilege, the court shall make an independent assessment of

whether the harm identified by the Government, as required by section 2, is reasonably likely to occur should the privilege not be upheld. The court shall weigh testimony from Government experts in the same manner as it does, and along with, any other expert testimony.

(d) BURDEN OF PROOF.—The Government shall have the burden of proof as to the nature of the harm and as to the likelihood of its occurrence.

SEC. 7. EFFECT OF COURT DETERMINATION.

(a) IN GENERAL.—If the court determines that the privilege is not validly asserted as to an item of evidence, the item may be disclosed to a nongovernmental party or admitted at trial, subject to the other rules of evidence. If the court determines that the privilege is validly asserted as to an item, that item shall not be disclosed to a nongovernmental party or the public.

(b) NONPRIVILEGED SUBSTITUTE.—

(1) COURT CONSIDERATION OF SUBSTITUTE.—If the court finds that the privilege is validly asserted as to an item of material evidence and it is possible to craft a nonprivileged substitute, such as those described in section 3(d), for the privileged evidence that would provide the parties a substantially equivalent opportunity to litigate the case, the

1 court shall order the Government to produce the
2 substitute to the satisfaction of the court.
3 (2) REFUSAL TO PROVIDE.—In a civil action
4 brought against the Government, if the court orders
5 the Government to provide a nonprivileged substitute
6 for evidence or information and the Government
7 fails to comply, in addition to any other appropriate
8 sanctions, the court shall find against the Govern-
9 ment on the factual or legal issue to which the privi-
10 leged information is relevant. If the action is not
11 brought against the Government, the court shall
12 weigh the equities and make appropriate orders as
13 provided in subsection (d).
14 (c) OPPORTUNITY TO COMPLETE DISCOVERY.—The
15 court shall not resolve any issue or claim and shall not
16 grant a motion to dismiss or motion for summary judg-
17 ment based on the state secrets privilege and adversely
18 to any party against whom the Government's privilege
19 claim has been upheld until that party has had a full op-
20 portunity to complete discovery of nonprivileged evidence
21 and to litigate the issue or claim to which the privileged
22 evidence is relevant without regard to that privileged infor-
23 mation.
24 (d) APPROPRIATE ORDERS IN THE INTEREST OF
25 JUSTICE.—After reviewing all available evidence, and only

after determining that privileged evidence, for which it is impossible to create a nonprivileged substitute, is necessary to decide a factual or legal issue or claim, the court shall weigh the equities and make appropriate orders in the interest of justice, such as striking the testimony of a witness, finding in favor of or against a party on a factual or legal issue to which the evidence is relevant, or dismissing a claim or counterclaim.

SEC. 8. INTERLOCUTORY APPEAL.

(a) IN GENERAL.—The courts of appeal shall have jurisdiction of an appeal by any party from any interlocutory decision or order of a district court of the United States under this Act.

(b) APPEAL.—

(1) IN GENERAL.—An appeal taken under this section either before or during trial shall be expedited by the court of appeals.

(2) DURING TRIAL.—If an appeal is taken during trial, the district court shall adjourn the trial until the appeal is resolved and the court of appeals—

(A) shall hear argument on appeal as expeditiously as possible after adjournment of the trial by the district court;

(B) may dispense with written briefs other than the supporting materials previously submitted to the trial court;

(C) shall render its decision as expeditiously as possible after argument on appeal; and

(D) may dispense with the issuance of a written opinion in rendering its decision.

SEC. 9. REPORTING.

(a) IN GENERAL.—Consistent with applicable authorities and duties, including those conferred by the Constitution of the United States upon the executive and legislative branches, the Attorney General shall report in writing to the Permanent Select Committee on Intelligence of the House of Representatives, the Select Committee on Intelligence of the Senate, and the chairmen and ranking minority members of the Committees on the Judiciary of the House of Representatives and Senate on any case in which the Government invokes a state secrets privilege, not later than 30 calendar days after the date of such assertion. Each report submitted under this subsection shall include all affidavits filed under this Act by the Government.

(b) OPERATION AND EFFECTIVENESS.—

(1) IN GENERAL.—The Attorney General shall deliver to the committees of Congress described in subsection (a) a report concerning the operation and effectiveness of this Act and including suggested amendments to the Act.

(2) DEADLINE.—The Attorney General shall submit this report not later than 1 year after the date of enactment of this Act, and every year thereafter until the date that is 3 years after that date of enactment. After the date that is 3 years after that date of enactment, the Attorney General shall submit a report under paragraph (1) as necessary.

SEC. 10. RULE OF CONSTRUCTION.

This Act provides the only privilege that may be asserted based on state secrets and the standards and procedures set forth in this Act apply to any assertion of the privilege.

SEC. 11. APPLICATION.

This Act applies to claims pending on or after the date of enactment of this Act. A court also may relieve a party or its legal representative from a final judgment, order, or proceeding that was based, in whole or in part, on the state secrets privilege if—

1 (1) the motion for relief is filed with the ren-
2 dering court within one year of the date of enact-
3 ment of this Act;
4 (2) the underlying judgment, order, or pro-
5 ceeding from which the party seeks relief was en-
6 tered after January 1, 2002; and
7 (3) the claim on which the judgement, order, or
8 proceeding is based is—
9 (A) against the Government; or
10 (B) arises out of conduct by persons acting
11 in the capacity of a Government officer, em-
12 ployee, or agent.

○

Mr. NADLER. I would now recognize our distinguished Ranking minority Member, the gentleman from Arizona, Mr. Franks, for his opening statement.

Mr. FRANKS. Well, thank you, Mr. Chairman. Mr. Chairman, the state secrets privilege is a longstanding legal doctrine that keeps all Americans safe. The Supreme Court most recently described that doctrine in a case called *United States v. Reynolds*.

In that case, the Supreme Court made clear that when a court reviews a case in which the central issues involve sensitive, classified, national security information, the courts have a responsibility to determine whether disclosure of the information at issue would pose a reasonable danger to national security. If the court determined that public disclosure of such information would harm national security, the court is obliged to either dismiss the case or limit the public disclosure of national security information as necessary.

Under this doctrine, people with legitimate claims are not denied access to court review, rather the doctrine allows judges to personally review any sensitive information if necessary. While this doctrine may occasionally disadvantage someone suing in court, it is absolutely necessary to protect our national security and the safety of all Americans.

The roots of the states privilege extend all the way back to the Supreme Court's decisions in *Marbury v. Madison*. And the privilege is grounded in large part in the Constitution's separation of powers principles. In that case, the court ruled that executive branch officials are not obligated or obliged to disclose any information that was communicated to them in confidence. Four years later, the same Chief Justice Marshall who wrote the opinion in Marbury held that the government need not produce any information that would endanger the public safety.

In the modern era, Congress debated the issue of state secrets privilege under Federal law in the 1970's but ultimately chose to maintain the status quo, including elements of the privilege put in place by the Supreme Court in its Reynolds decisions. At approximately the same time, the Supreme Court continued to indicate that the state secrets privilege derives from separation of powers considerations when it handed down its decision in *United States v. Nixon*.

In that case, the court endorsed executive privilege as a "fundamental to the operation of government and inextricably rooted in the separation of powers under the Constitution." It also went out of its way to say that sensitive information should not be disclosed if it involves military, diplomatic or sensitive national security secrets. The Fourth Circuit took exactly the same position in affirming dismissal of a case brought by Khaled el-Masri, in which the court concluded that the state secrets privilege, quote, has a firm foundation in the Constitution, in addition to its basis in the common law of evidence.

Not surprisingly, Mr. Chairman, the state secrets privilege has played a significant role in the Justice Department's response to civil litigation arising out of the counterterrorism policies after 9/11. While political opponents of the president have argued that the Bush administration has employed the state secrets privilege with

unprecedented frequency or in unprecedented contexts in recent years, a recent comprehensive survey of all state secrets cases has determined conclusively that neither of those claims are true.

As Professor Chesney of Wake Forest University law school has concluded, "recent assertions of the privilege are not different in kind from the practice of other Administrations." Professor Chesney elaborated that, quote, the available data to suggest that the privilege has continued to play an important role—rephrase that, Mr. Chairman. He said that, "the available data do suggest that the privilege has continued to play an important role during the Bush administration, but it does not support the conclusion that the Bush administration chooses to resort to the privilege with greater frequency than prior Administrations or in unprecedented substantive context."

Because the state secrets privilege is based in the Constitution separation of powers principles, it is unclear whether Congress could constitutionally amend the state secrets privilege by statute. It is also worth noting that as professor Chesney has pointed that, quote, judges as an institutional matter, are nowhere nearly as well situated as executive branch officials to account for and balance the range of considerations that should inform assessments of dangers to national security.

So far, courts have appropriately restrained themselves and acted to preserve sensitive national security information when absolutely necessary. Of course, no system is perfect, Mr. Chairman, and mistakes will be made. As Secretary of State Condoleezza Rice has stated, "When and if mistakes are made, we work very hard and as quickly as possible to rectify them. Any policy will sometimes have mistakes, and it is our promise to our partners that should that be the case, that we will do everything that we can to rectify those mistakes." I pledge to work with my colleagues to make sure that amends are made and justice is achieved through the executive or legislative branches whenever the executive branch makes a mistake in good faith efforts to keep all Americans safe.

The state secrets doctrine remains strongly supported by today's Supreme Court, even in its Boumediene decision, granting unbelievably habeas litigation rights to terrorists. Justice Kennedy in his majority opinion acknowledged that the government's, quote, legitimate interest in protecting sources and methods of intelligence gathering, and stating we expect that the district court will use its discretion to accommodate this interest to the greatest extent possible while citing the Reynolds state secrets case I mentioned earlier in doing so.

The state secrets privilege is as vital now as it has ever been, Mr. Chairman. And now that 200 terrorists in Guantanamo Bay can litigate their detention in Federal court under the Supreme Court's Boumediene decision, it is remarkable that the Democrat majority decides to hold a hearing on legislation that threatens to disclose vital intelligence information in court right after 200 terrorists are starting to sue their American captors in Federal court. [Laughter.]

You laugh to maintain sanity.

I strongly oppose any efforts, including H.R. 5607, that invite the courts to deviate from the sound procedures they currently follow that protect vital national security information. H.R. 5607 would preclude judges from giving weight to the executive branch's assessment of national security related to its assertion of privilege. It would authorize courts not to use ex parte proceedings in conducting review of privileged claims. And it would prevent courts from being able to dismiss a case when the government cannot defend itself without using privileged information.

Mr. Chairman, innocent Americans can only be protected if sensitive national security information is protected. And I will do whatever I can to keep Americans safe.

And with that I yield back.

Mr. NADLER. Thank you. I just want to clarify that this is a legislative hearing considering a particular bill which does not eliminate the privilege, the state secrets privilege, but seeks to codify it and to regulate it within certain limits, and that is the bill before us.

I will now recognize the distinguished Chairman of the full Committee, Mr. Conyers.

Mr. CONYERS. I regret that the Ranking Member hasn't examined the legislation because in no way does it do what he claims is so ridiculous as to be laughable. I think that is a serious error that should——

Mr. FRANKS. [Off mike]

Mr. CONYERS. Oh, you weren't laughing at the bill; you were laughing at the habeas corpus rule. The bill is a little funny, too? Well, anyway, whatever it was you were laughing about, I think we ought to carefully examine this legislation. This is a very serious hearing. And I am impressed by the fact they are asking some questions that have to be answered about why and whether the state secrets act is overused. To me, that is the question that brings me to this hearing with great concern and interest.

It has been admitted by the Administration representatives that at least 50 percent of the time that the government has overclassified information. I refer and ask that it be put in the record the *Los Angeles Times* record of May 21, 2006.

Mr. NADLER. Without objection.

[The information referred to follows:]

Los Angeles Times | Opinion

Archive for Sunday, May 21, 2006

The lie behind the secrets

By Tom Blanton
May 21, 2006 *in print edition M-1*

GOVERNMENT secrecy in the name of national security has reached record-setting proportions. In case after case, the government has used it as an excuse to thwart lawsuits by whistle-blowers and people with grievances against the United States.

There was, for instance, the FBI linguist who alleged corruption and malfeasance inside her translation unit. There was the African American CIA officer who reported racial discrimination inside the agency, and the Syrian Canadian who was "renditioned" to Syria for a little torture. In two of the cases, the government succeeded in having the case thrown out of court on grounds of secrecy.

The latest example came just last week in the case of Khaled Masri, a German citizen born in Kuwait who was detained while on vacation in 2003, flown to a prison in Afghanistan, held for five months and allegedly beaten, shackled and injected with drugs – only to be released in May 2004 as a case of mistaken identity.

Not surprisingly, Masri is suing the government. But the Justice Department, at the request of the CIA, last week urged the federal judge in the case to dismiss the lawsuit under what is known as the "state secrets privilege," saying that the government would not be able to confirm or deny Masri's claims without the disclosure of information that could be harmful to national security and relations with other countries. On Thursday, U.S. District Judge T.S. Ellis III agreed and threw out the case.

Justice Department lawyers have taken the same position in a lawsuit brought by the Electronic Frontier Foundation on behalf of an AT&T technician who accused his employer of "hoovering" its customers' phone calls into government databases.

When the government claims the "state secrets privilege," the courts tend to look no further, and the cases are dismissed. It was invoked only four times in the first 23 years after the U.S. Supreme Court created the privilege in 1953, but now the government is claiming the privilege to dismiss lawsuits at a rate of more than three a year. The Justice Department describes this tactic as an "absolute privilege" – in effect, a neutron bomb that leaves no plaintiff standing.

But can we trust the government when it tells us that national security is at stake? Should the government's claim of secrecy result in an immediate, no-questions-asked dismissal? Probably not, given the government's track record. When it comes to classified documents, for example, at least half the time the government claims that something is secret for national security reasons, that official line is not the truth. I say "at least" because I believe the number is even bigger – 75% or more – but 50% is what the Bush administration has admitted.

The admission came during a 2004 congressional hearing chaired by Rep. Christopher Shays (R-Conn.), who kept pressing one of Secretary of Defense Donald Rumsfeld's deputies (in this case, the deputy undersecretary for counterintelligence) for her estimate of how much information was classified that did not deserve the secrecy stamp. Finally, she grudgingly admitted that overclassification was a "50-50" problem.

Others who should know say the classified document problem is even worse. The former governor of New Jersey, Tom Kean, after chairing the 9/11 commission that reviewed all of the most recent intelligence on **Osama bin Laden**
and terrorism, told reporters that "three-quarters of what I read that was classified shouldn't have been."

President Reagan's executive secretary at the National Security Council, career Navy officer Rodney McDaniel, told a blue-ribbon commission looking at classification in 1997 that only 10% of the secrecy stamps were for "legitimate protection of secrets."

So we have it on good authority that from 50% to 90% of our government's secret documents should not actually be secret. So why is all this information in the black vaults?

Erwin Griswold, who as U.S.
solicitor general prosecuted the New York Times in the Pentagon Papers case in 1971, once explained the real motivation behind government secrecy – but only years later, when he recanted his prosecutorial passion.

Griswold persuaded three Supreme Court justices to vote for a prior restraint on the Times in the case. But in 1989, he confessed in a Washington Post Op-Ed article that there was no actual national security damage from the publication of the papers.

"It quickly becomes apparent to any person who has considerable experience with classified material that there is massive overclassification and that the principal concern of the classifiers is not with national security, but with governmental embarrassment of one sort or another," he wrote.

Yet the courts still largely defer to government secrecy claims and throw whistle-blowers out. Judges say they lack the competence to assess national security claims and that they are bound by precedent.

The reality, of course, is that judges have many tools at their disposal for inquiring into and testing the government's claims, including document indexes and unclassified summaries that are used in proceedings such as Freedom of Information Act cases, and special masters with expertise and security clearances. But they'd rather not. It's easier to let the government have its way than to do the work and to buck the authority of the U.S. national security bureaucracy.

Here's a final irony: The very "state secrets privilege" that judges have cited for so many years turns out to be based on government dishonesty.

Researchers have in just the last few years unearthed the actual documents at issue in the 1953 Supreme Court decision and the earlier British case that established the "Crown privilege" (cited approvingly by the Supreme Court). None of the documents – neither the crash report on an Air Force plane at issue in the U.S. case nor the construction contract and designs for a Royal Navy submarine that were at the heart of the British case – turn out to have held actual secrets. In both cases, the government was covering up for official negligence that resulted in people's deaths.

But when the families of the U.S.
crash victims tried to refile their 1953 case, a federal court of appeals refused, ruling that "the concept of fraud upon the court challenges the very principle upon which our judicial system is based: the finality of a judgment."

Secrecy watchdog Steven Aftergood commented: "A layman might have supposed that 'the very principle upon which our judicial system is based' is justice, or fairness to the parties, or an accurate record. But a layman would be wrong."

Just like the government is wrong about at least half of the secrets that it claims.

More articles by Tom Blanton
More articles from the Opinion section

California and the world. Get the Times from $1.35 a week

Copyright 2008 Los Angeles Times

Mr. CONYERS. In addition, it should be noted, and I hope that it will be commented on by the distinguished group of witnesses, that President Reagan's executive secretary at the National Security Council told a Blue Ribbon Commission looking at classification in 1997 that only 10 percent of the secrecy stamps were for legitimate protection of secrets.

Erwin Griswold, who prosecuted the Pentagon Papers case said that it becomes apparent to any person who has considerable experience with classified material that there is a massive overclassification and that the principal concern of the classifiers is not with security but with governmental embarrassment of one sort or another. And so we want to examine that.

Maybe these assertions are overstimulated or exaggerated. But I don't think that this hearing needs to be made as some kind of a stunt or political—have some political objective in mind when the Constitution committee in the Congress takes steps to reexamine this. We are the only ones with the authority to deal with this. And for us not to deal with it I think would be a dereliction.

And so I am happy to insert my statement into the record and yield back my time.

[The prepared statement of Chairman Conyers follows:]

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN, CHAIRMAN, COMMITTEE ON THE JUDICIARY, AND MEMBER, SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

Today, we examine H.R. 5607, the "State Secret Protection Act of 2008." This bill would codify the state secret privilege and protect national security by providing safe, fair, and responsible procedures and standards for handling sensitive information in civil cases.

Some might ask, why is there a need for this legislation? It is very much needed because this Administration has aggressively sought to create an Imperial Presidency—an Executive Branch whose decisions remain secret and unchecked by Congress or the courts—that has raised important concerns about how claims of secrecy may impair our constitutional system of checks and balances.

For example, President Bush eavesdropped on American citizens. When the victims challenged this warrantless wiretapping as a violation of FISA and the Fourth Amendment, the Administration raised the state secret privilege to block judicial review of their claims. It similarly has used the privilege to seek dismissal of cases challenging other troubling aspects of its war on terror, including rendition to torture.

Concerned that the Executive was claiming state secrets in order to protect embarrassing facts or unlawful conduct from becoming public, rather than to protect truly secret information, the Constitution Subcommittee held an oversight hearing earlier this year.

Witnesses—including the American Bar Association and former D.C. Court of Appeals Chief Judge Patricia Wald—confirmed the need for legislative reform of the privilege. H.R. 5607 has been crafted to address that need.

I want to highlight three key points about H.R. 5607.

First—contrary to claims that I am certain we will hear today—H.R. 5607 fully protects state secrets. The bill would require courts to take protective measures, such as conducting non-public proceedings and limiting access to documents. Where the court upholds the claim of privilege, the bill prevents harmful disclosure of the protected information.

Second, H.R. 5607 establishes procedures for independent judicial review of secrecy claims. It requires the government to specify how disclosure of the information would be harmful, and specifies that the courts must review the information that the government seeks to withhold and independently determine whether the secrecy claim is valid.

William Webster—who served as a federal appellate judge and as director of both the CIA and FBI—advised the Subcommittee that courts can be trusted to safe-

guard sensitive secrets and are fully competent to assess the validity of privilege claims.

Finally, H.R. 5607 prevents premature dismissal of entire lawsuits based on the mere assertion of the state secret privilege. For example, where the privilege is upheld, H.R. 5607 requires the court to consider whether a non-privileged substitute for the privileged information would allow the litigation to continue.

Our firm commitment to respect for the rule of law requires us to advance legislation that protects and respects the Constitution. H.R. 5607 is one such bill, and I look forward to hearing from our witnesses on this important piece of legislation.

Mr. NADLER. I thank the gentleman.

I now want to welcome our distinguished panel of witnesses today and introduce them.

Meredith Fuchs is the general counsel for the National Security Archives, where she oversees Freedom of Information Act and Federal Records Act litigation. She has supervised six government-wide audits of Federal agency policy and performance under Federal disclosure law, including one relating to the proliferation of sensitive, unclassified document control policies at Federal agencies.

She was a partner at the firm of Wiley Rein & Fielding. Ms. Fuchs clerked for Judge Patricia Wald of the U.S. Court of Appeals for the District of Columbia, who I think was a witness at our last hearing on this subject in January, and Judge Paul Friedman of the U.S. District Court for the District of Columbia. She is a graduate of New York University law school and received her B.S. from the London School of Economics and Political Science.

Steven Shapiro has been the legal director of the American Civil Liberties Union since 1993 and served as the associate legal director from 1987 to 1993. He is an adjunct professor of constitutional law at Columbia Law School. Mr. Shapiro is a graduate of Harvard Law School and clerked for Judge J. Edward Lumbard of the U.S. Court Appeals for the Second Circuit.

Michael Vatis is a partner with the firm of Steptoe & Johnson. From 2003 to 2004, Mr. Vatis was the executive director of the Markle Task Force on National Security in the Information Age. From 1998 to 2001, he served as the director of the National Infrastructure Protection Center. From 1994 to 1998, he served as the Associate Deputy Attorney General and Deputy Director of the Executive Office for National Security in the Department of Justice. From 1993 to 1994, Mr. Vatis served as a law clerk to Justice Thurgood Marshall and to then Judge Ruth Bader Ginsburg. He is a graduate of Princeton University and Harvard Law School.

Bruce Fein is a frequent witness before our hearings and is the founder and chairman of the American Freedom Agenda, which has as its aim the restoration of the Constitution's checks and balances. Mr. Fein served in the Department of Justice under President Reagan. He served as the Assistant Director of the Office of Legal Policy, legal advisor to the Assistant Attorney General for Antitrust and the Associate Deputy Attorney General.

Mr. Fein was then appointed general counsel for the Federal Communications Commission followed by an appointment as the research director for the Joint Congressional Committee on Covert Arms Sales to Iran. Mr. Fein has been an adjunct scholar with the American Enterprise Institute, a resident scholar at the Heritage Foundation, a lecturer at the Brookings Institute and an adjunct

professor at George Washington University. He is a graduate of Harvard Law School.

Before we begin, it is customary for the Committee to swear in its witnesses, if you would please stand and raise your right hands to take the oath.

Do you swear or affirm under penalty of perjury that the testimony you are about to give is true and correct to the best of your knowledge, information and belief?

[Witnesses sworn.]

Mr. NADLER. Let the record reflect that the witnesses answered in the affirmative. You may be seated.

Without objection, your written statements will be made a part of the record in their entirety. We would ask each of you to summarize your testimony in 5 minutes or less. To help you keep time, there is a timing light at your table. When 1 minute remains, the light will switch from green to yellow and then to red when the 5 minutes are up. And I will inform you the Chair is reasonably lax in the 5 minutes but not totally.

Our first witness is Ms. Fuchs, who is recognized for 5 minutes.

TESTIMONY OF MEREDITH FUCHS, GENERAL COUNSEL, NATIONAL SECURITY ARCHIVES

Ms. FUCHS. Thank you, Chairman Nadler, Ranking Member Franks and distinguished Members of the Subcommittee. I appreciate this opportunity to appear before you to comment on the State Secrets Protection Act of 2008.

I submitted a written statement, so I am going to focus my oral statement on the importance of judges conducting meaningful, independent, judicial review into government secrecy claims. For context, I am going to put a few well-established matters on the table which I am happy to discuss later.

First, there is massive unnecessary secrecy within the executive branch. It is not just my view, as Mr. Conyers pointed out, it is the view of many officials throughout the military and the intelligence establishment. And I just want to comment on that for a moment.

Mr. Conyers was for the most part referring to the classification system, which at least is moored in an executive order that is public, that provides standards for security classification and has oversight and reporting requirements by the Information Security Oversight Office. None of that even exists in the state secrets context, which as far as I can tell is the government's free to define as it sees fit.

The second point I want to put on the table is that while secrecy is clearly needed for many reasons, there is no doubt that national security secrecy can and has had the impact of covering up wrongdoing in many instances. This context cannot be forgotten when you are examining how courts should handle civil cases in which the plaintiffs allege government wrongdoing and the government wields the state secrets privilege to end the case before the issues are even joined.

My experience arises primarily in the Freedom of Information Act context, where Congress already has explicitly granted courts the authority to conduct a de novo review of the agency's decision to keep information secret. De novo for lawyers traditionally means

the court doesn't defer to the agency. Instead, the court weighs the facts, the law and the arguments to make its decision.

In the legislative history of FOIA however, the committee report expresses the assumption that courts will grant substantial weight to agency views expressed in affidavits. In practice, these divergent standards have meant that some courts do try to grant de novo review and they test the government assertions, and some courts grant utmost deference and refuse to consider alternative facts and arguments.

In our experience seeking security-classified records, we have seen that when there is an independent, higher-level inquiry made into the government's secrecy claims, the almost invariable result is that more information can be released than the government was prepared to release in the first place. When, on the other hand, there is no countervailing pressure, the agencies have no incentive to seriously consider whether information could cause harm to national security if released. Sometimes when we see documents years later and we find out what the government was protecting, it is clear that the government either was overreaching or it was not taking seriously its obligation to disclose information that is not properly classified.

So in the point of context, courts that have conducted true de novo reviews have used many of the types of tools that the State Secrets Protection Act of 2008 would encourage. In fact, it has become standard fare today for the government to file a Vaughn index, even successive, more detailed Vaughn indexes to itemize their secrecy claims. That forces the government to actually review the documents and explain the withholding. It enables the plaintiff to have some ability to respond and helps the court conduct a review.

The use of a special master in the *Washington Post v. Department of Defense* case is perhaps most illustrative of how courts can employ an expert to achieve better results in the interest of both security and justice. In that case, Kenneth Bass, an attorney who had served as counsel for the intelligence policy at the Department of Justice and who held appropriate clearances, acted as a special master. The result was that the government secrecy claim went down from 14,000 pages to 2,000 or 3,000 pages.

So, this gets at the central issue and controversy, I believe, related to this bill, whether and to what extent the courts should become enmeshed in the question of what actually merits state secrets protection. Given that courts are getting involved in that sort of issue in FOIA and in the CIPA context, there doesn't seem to me to be a strong constitutional argument against judicial involvement.

In light of the substantial interests asserted by plaintiffs claming government wrongdoing, there is also a strong reason for courts to get involved as a matter of justice. And in my view, many of the procedures in the State Secrets Protection Act of 2008 will have an impact on the government's own assertion for secrecy without the court ever having to choose between one side or the other. I am particularly hopeful about the use of special masters or technical experts to resolve over-broad secrecy claims.

In addition, courts must consider the evidence propounded by the plaintiffs in these cases. Under FOIA, some courts have refused to consider declarations from nongovernmental experts, even when those experts were former intelligence agency staff who saw the information before they left the agency—senators, former ambassadors, retired government officials and the like. This doesn't make any sense to me.

Certainly a retired, high-level official will have something useful to tell a court in some of these cases. And so a categorical rule that would exclude them and what they have to say doesn't make sense. Moreover, there are instances when the government's claims are simply not factually or logically consistent. The very purpose of this bill will be frustrated if the court's hands are tied and the court cannot consider arguments on these sorts of issues.

On a final note, I offer a precaution to you if you decide to change the standard of judicial review in this bill. In the FOIA context, where the law explicitly says de novo review, de novo standard of review, the courts have moved from de novo review to substantial weight consideration of evidence to a substantial weight standard of review to great deference.

And finally, recently courts have expanded that deference concept way beyond the security classification area to other areas of sensitivity. This is not what Congress intended. Given the very substantial interest at stake here, any adjustment of the standard should be done with a full understanding of the possibility that careful drafting is necessary in order to avoid nullifying the good purposes of this bill.

I thank you for seeking my input, and I would be happy to respond to any questions.

[The prepared statement of Ms. Fuchs follows:]

PREPARED STATEMENT OF MEREDITH FUCHS

Hearing on
H.R. 5607, State Secrets Protection Act of 2008

United States House of Representatives
Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights and Civil Liberties

Statement of Meredith Fuchs
General Counsel, National Security Archive

Thursday, July 31, 2008

Chairman Nadler, Ranking Member Franks, and distinguished members of the Subcommittee, thank you for this opportunity to appear before you to comment on the "State Secrets Protection Act of 2008" (H.R. 5607). The bill includes procedures and standards that will ensure the protection of information that could pose significant harm to national security or diplomatic relations while at the same time rebalancing the adversarial process to protect the rights of individuals to seek relief in the courts when they believe their rights have been violated by the federal government. My testimony will focus on the importance of judges conducting meaningful, independent judicial review into government secrecy claims.

I represent the National Security Archive (the "Archive"), a non-profit research institute located at George Washington University. The Archive's analysts frequently seek access to records concerning national security, intelligence, military and foreign relations matters. Our experience seeking security classified records has shown that when independent, higher-level inquiry is made into the government's secrecy claims, the almost invariable result is that more information can be released than the government was prepared to release. When, on the other hand, there is no countervailing pressure, agencies have no incentive to seriously consider whether information could cause harm to national security if released and unnecessary secrecy grows.[1] This dynamic both demonstrates the excessive secrecy that pervades the national security arena and suggests the role that courts can play in reducing unnecessary secrecy that interferes with the proper resolution of cases.

There is no debate among commentators that the executive has the authority to keep certain secrets. As commander in chief, the president plays a central operational role in protecting the nation's security. Protection of sources is necessary to facilitate intelligence gathering. The ability to negotiate in confidence is critical to effective diplomatic relations. The assertion that secrecy is necessary in the intelligence, military and diplomatic arenas is a compelling one.

Secrecy and Accountability

The controversy about the executive branch's invocation of the state secrets privilege, particularly as it has evolved from a common law evidentiary rule to a shield against civil lawsuits, arises in the context of a surge of official secrecy throughout the executive branch of our government over the last seven years.[2] Military and intelligence officials have admitted that

---

[1] The reclassification effort at the National Archives and Records Administration that my organization and historian Matthew Aid uncovered in 2006 illustrates this point. *See* Scott Shane, *U.S. Reclassifies Many Documents in Secret Review*, New York Times, Feb. 21, 2006. When the agencies were able to operate without any limits, they reclassified more than 25,000 25 to 50 year old records over a 6 year period. The Information Security Oversight Office (ISOO) concluded that 1 out of 3 of those classification decisions was improper, and two-thirds of the remaining decisions were made without sufficient judgment. In the more than 2 years since the program was exposed and the ISOO established controls, only 7 documents have been reclassified.

[2] *See, e.g.*, Information Security Oversight Office, *2007 Report to the President* (May 2008) (cataloguing growth in classification decisionmaking), http://www.archives.gov/isoo/reports/2007-annual-report.pdf; OpenTheGovernment.org, *Secrecy Report Card 2007* (Sept. 2007) (statistics on growth of secrecy according to numerous measures), http://www.openthegovernment.org/otg/SRC2007.pdf.

much of the security classification activity is unnecessary.[3] The reasons for the increase in secrecy range from the legitimate to the illegitimate, but there are few internal checks to limit the expansion of government secrets.[4]

As a consequence, in almost any case involving an intelligence, law enforcement or military agency, there is likely to be some secret information. In these circumstances, the state secrets privilege has become a potent weapon for zealous defense of cases involving the activities of those agencies. When secrecy can be wielded as a weapon to dismiss lawsuits, without an independent determination of the necessity for the secret to be considered in the suit and the potential harm to national security, there is a risk that the government will overreach to protect as "secret" policies that otherwise would have been considered unthinkable, unlawful, or unconstitutional.[5]

I know this committee has heard views on both sides about whether there were any state secrets at issue in *United States v. Reynolds*,[6] the Supreme Court case that established the evidentiary privilege, so I will not revisit that debate. But, *Reynolds* is far from the only case in which later-disclosed facts suggest that secrecy may have protected the government from much-needed scrutiny. That is certainly what happened in *Korematsu v. United States*.[7] *Korematsu* concerned an order that directed the exclusion from the West Coast of all persons of Japanese ancestry. That order was held constitutional.

In that case, the Court's finding of "military necessity" was based on the representation of government lawyers that Japanese Americans were committing espionage and sabotage by

---

[3] *See, e.g.*, Secretary of Defense Donald Rumsfeld, *War of the Worlds*, Wall St. J., July 18, 2005, at A12 ("I have long believed that too much material is classified across the federal government as a general rule ...."); *Too Many Secrets: Overclassification as a Barrier to Critical Information Sharing: Hearing Before the Subcomm. on Nat'l Sec., Emerging Threats and Int'l Relations of the H. Comm. on Gov't Reform*, 108th Cong. 82 (testimony of Carol A. Haave, Deputy Under Secretary of Defense) (acknowledging that more than 50 percent of classification decisions are overclassification) (2004), http://www.fas.org/sgp/congress/2004/082404transcript.pdf; *id.*, (statement of J. William Leonard, Director of the Information Oversight Office) ("It is my view that the government classifies too much information."); 9/11 Commission Hearing, Testimony of Chair of the House Permanent Select Committee on Intelligence Porter Goss (2003) ("[W]e overclassify very badly. There's a lot of gratuitous classification going on, and there are a variety of reasons for them."), http://www.9-11commission.gov/archive/hearing2/9-11Commission_Hearing_2003-05-22.htm#panel_two.

[4] *See generally* Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 Admin. L. Rev. 13, 147-156 (2006) and the references cited therein.

[5] Secrecy is a central tool used by government to insulate its activities from scrutiny. There is a long list of abuses and improprieties conducted in secret by the government under the mantle of national security that were only terminated after exposure and scandal. For example, my organization requested a document under the Freedom of Information Act (FOIA) from the Central Intelligence Agency (CIA) that is referred to as the "Family Jewels." When finally released 15 years after we first requested it, the document revealed that the CIA violated its charter for 25 years until revelations of illegal wiretapping, domestic surveillance, assassination plots and human experimentation led to official investigations and reform in the 1970s.

[6] 345 U.S. 1 (1953).

[7] 323 U.S. 214 (1944).

signaling enemy ships from shore. Documents later released under the Freedom of Information Act revealed that government attorneys had suppressed key evidence and authoritative reports from the Office of Naval Intelligence, the Federal Bureau of Investigation, the Federal Communications Commission, and Army intelligence that flatly contradicted the government claim that Japanese Americans were a threat to security.[8] Had the court required an explanation of the evidence to support the central rationale for interning thousands of Japanese Americans, it would have learned that there was no evidence.

The same seems true of the National Security Agency's program to conduct warrantless surveillance of United States citizens without regard to the strictures of the Foreign Intelligence Surveillance Act which – according to publicly available information – apparently was operated illegally. According to testimony provided by James Comey, former Deputy Attorney General of the United States, the Attorney General determined in 2004 that the Department of Justice could not certify the surveillance program and informed the White House of that decision. Thereafter, the President reauthorized the program anyway, without regard to the Department of Justice's refusal to certify the program.[9] Yet, resolution of the constitutional issues associated with the program has been impossible because the government asserts near blanket secrecy over the legal justifications and details of the program.

There is a long line of cases involving invocation of state secrets privilege to shut down prosecution of claims against the United States,[10] including claims of illegal rendition and torture of foreign citizens,[11] alleged racial and sexual discrimination claims by government employees working in law enforcement or intelligence agencies,[12] and allegations of mismanagement or misdeeds within federal agencies.[13] Each of these cases involved troubling allegations but was dismissed because the government claimed the dispute could not be resolved without exposing a secret.

---

8 *Korematsu v. United States*, 584 F. Supp. 1406, 1416-19 (N.D. CA 1984).

9 *See Hearing before the Sen. Judiciary Comm. On Preserving Prosecutorial Independence: Is the Dep't of Justice Politicizing the Hiring and Firing of U.S. Attorneys?* 110th Cong. 21-22, 28 (2007) (testimony of James B. Comey, Former Deputy Attorney General).

10 *See generally* William G. Weaver & Robert M. Pallitto, *State Secrets and Executive Power*, 120 Pol. Sci. Q. 85, 90-92 (2005); Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 Fordham L. Rev. 1931 (2007).

11 *See, e.g., El-Masri v. United States*, 437 F. Supp. 2d 530 (E.D. Va. 2006), aff'd 479 F.3d 296 (4th Cir. 2007), *cert. denied* 128 S. Ct. 373 (2007).

12 *See, e.g., Sterling v. Tenet*, Civil Action No. 01-CIV-8073 (S.D.N.Y. 2002); *Tilden v. Tenet*, 140 F. Supp. 2d 623 (E.D. Va. 2000).

13 *See, e.g., Edmonds v. Dep't. of Justice*, 323 F. Supp. 2d 65 (D.D.C. 2004), *aff'd*, 161 Fed. Appx. 6, 2005 U.S. App. LEXIS 8116, 04-39 (D.C. Cir. May 6, 2005) (allegations of improper influences and criminal acts in FBI translation unit); *Barlow v. United States*, No. 98-887X, 2000 U.S. Claims LEXIS 156 (Fed. Cl. July 18, 2000) (allegations of intelligence agency deception of Congress).

Litigation in Secrecy Cases

Currently, when a private party brings a civil action against the government that may touch on a claimed secret, the adversarial system is tilted overwhelmingly toward the government. Not only does the government have access to the relevant information, but the government has the powerful argument that the information cannot be shared in discovery or during the litigation process. The information that is claimed to be secret is strictly controlled by a system in which there is a strong incentive to keep it from the public, especially if the government is overreaching or has engaged in some misconduct. The courts are reluctant to question executive branch assertions because of concerns that only the agency has sufficient knowledge and expertise to understand the significance of the secret information. Moreover, because a security clearance granted by the executive branch is needed to review the records, the court typically has no access to alternate views to aid in consideration of the matter.

Congress has attempted to address these challenges in at least two categories of cases that demonstrate that courts are competent to address national security secrecy.

Under the FOIA, members of the public may exercise a right to records without any showing of need. In that area, to counter excessive government secrecy that could interfere with public accountability, Congress directed courts to conduct *de novo* review of national security claims and empowered courts to conduct *in camera* review of classified materials. By directing *de novo* review, Congress signaled that it wanted a new review of the facts and law that did not rely on the agency's administrative decision to deny requested records. Thus, Congress plainly intended that the courts would review procedural and substantive issues and would permit a full airing of the factual and legal issues. Indeed courts in FOIA cases have used many of the tools that are included in the State Secrets Protection Act of 2008, including indices of allegedly secret records,[14] special masters,[15] and *in camera* review.[16] There even have been instances of courts

---

[14] A central tool that courts have employed in FOIA litigation is the "Vaughn Index." In *Vaughn v. Rosen*, 484 F.2d 820 (1973), the court noted the classic problem faced by a FOIA requester: "In a very real sense, only one side to the controversy (the side opposing disclosure) is in a position confidently to make statements categorizing information . . . ." *Id.* at 823-24. The *Vaughn* court recognized that "existing customary procedures foster inefficiency and create a situation in which the Government need only carry its burden of proof against a party that is effectively helpless and a court system that is never designed to act in an adversary capacity." *Id.* at 826. In order to better satisfy its responsibility to conduct a *de novo* review and to push the government to justify its denial, the court fashioned procedures to ensure "adequate adversary testing" by providing opposing counsel access to the information included in the agency's detailed and indexed justification and by *in camera* inspection, guided by the detailed affidavit and using special masters appointed by the court whenever the burden proved to be especially onerous. *Id.* at 828. The legislative history of the 1974 amendments indicates that Congress "supports this approach. . . ." S. Rep. No. 93-854, 93d Cong., 2d Sess. 15 (1974).

[15] In *Washington Post v. Dep't of Defense*, 766 F. Supp. 1 (1991), a case involving a request under the FOIA for documents from the Department of Defense ("DOD") regarding American efforts to rescue hostages in Iran, DOD claimed partial or entire exemption for 2000 documents totaling approximately 14,000 pages. Over the government's objection (and after already reviewing detailed government affidavits), the District Court appointed a special master skilled in the classification of national security documents to compile a meaningful sample of these documents for the court to review. The parties submitted comments, including 4 volumes of evidence by the plaintiff concerning information in the withheld records already in the public domain. After a number of conferences and hearings, the Department of Defense requested that it be permitted to re-review the records in light of the special master's comments and the materials submitted by the plaintiff to determine whether it could release

directing agencies to orally describe the characteristics of withheld records in a proceeding involving opposing counsel, a so-called "oral Vaughn index."

At the other end of the spectrum, in instances when the government is using the full force of its power to criminally prosecute someone with the intent of depriving that person of their liberty, Congress has empowered courts under the Classified Information Procedures Act (CIPA), 18 U.S.C. App. 3, to craft special procedures to determine whether and to what extent classified information may be used in a defense. Section 4 of CIPA explicitly provides for courts to deny government requests to delete classified information or to substitute summaries or stipulations of fact for the classified materials.

In the case of civil actions where the government asserts the state secrets privilege as a basis for dismissal, however, courts rarely use any of these methods to scrutinize the government's claims. The American Bar Association has found that courts have utilized "inconsistent standards and procedures in determinations regarding the applicability of the privilege."[17] Courts' unwillingness to consistently probe government secrecy claims in these cases is striking when the plaintiffs are alleging specific government wrongdoing, which in many instances is a far more compelling interest than in the typical FOIA case. Although the plaintiff's interest may not be as compelling as that of a criminal defendant, there are instances, such as in the rendition and torture cases, where it comes quite close. Further, when the plaintiffs allege widespread government illegality and violation of fundamental constitutional rights, such as in the warrantless surveillance cases, the interest is also quite high. Courts' superficial review in these cases is even more remarkable given that the assertion of the state secrets privilege is not constrained by an executive order and can shift and adjust along with the executive's desire for secrecy; in FOIA cases, a withholding of records on the grounds of

---

additional materials. In the end approximately 85 percent of the records that had been denied as secret were released to the FOIA requester. Among these was an after action report asking the military not to include milk in the box lunches for the helicopters because it spoiled. Thus, a critical impact of the procedure was to press the government into conducting a better review of the records to determine what could be released. Appointment of the special master was upheld by the D.C. Circuit on mandamus. *In re United states Dep't of Defense*, 848 F.2d 232 (D.C. Cir. 1988) (denying writ of mandamus and finding district judge acted within his discretion in appointing a special master).

[16] FOIA explicitly provides for *in camera* inspection and the Conference Report for the 1974 amendments to the law states clearly that "[w]hile in camera examination need not be automatic, *in many situations* it will plainly be necessary and appropriate." S. Rep. No. 93-1200, 93d Cong., 2d Sess. 9 (1974) (emphasis added). As the D.C. Circuit recognized upon extensive review of the legislative history to the 1974 Amendments to FOIA, "[*i*]*n camera* inspection does not depend on a finding or even a tentative finding of bad faith. A judge has discretion to order *in camera* inspection on the basis of an uneasiness, on a doubt he wants satisfied before he takes responsibility for a de novo determination." *Ray v. Turner*, 587 F.2d 1187, 1195 (D.C. Cir. 1978) (per curiam). The cases show that *in camera* review often can result in greater disclosure of information. *See, e.g., Public Citizen v. Department of State*, 276 F.3d 634 (D.C. Cir. 2002) (District Court reviewed records *in camera* to determine applicability of Exemption 1; found some information meaningful and segregable).

[17] *Oversight Hearing on Reform of the State Secrets Privilege: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. (Jan. 29, 2008) (statement of H. Thomas Wells, J., President-Elect, American Bar Association), http://judiciary.house.gov/hearings/pdf/Wells080129.pdf.

national security must at least be grounded in the provisions of Executive Order 12958, as amended

One common argument against greater judicial scrutiny is its impact on separation of powers concerns. In fact, the framers of the Constitution designed a system of government intended to bring power and accountability into balance. The Executive's power to keep information secret is derived from the Article II powers vested in the President as commander-in-chief and as maker of treaties (with the advice and consent of the Senate). U.S. Const. art. II, § 2. These significant presidential powers are balanced by congressional authority to "provide for the common Defence," *id.* art. I, § 8, cl. 1; "declare War . . . and make Rules concerning Captures on Land and Water," *id.* cl. 11; "make Rules for the Government and Regulation of the land and naval Forces," *id.* cl. 14; advise in and consent to the making of treaties, *id.* art. II, § 2, cl. 2; "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by th[e] Constitution in the Government of the United States," *id.* art. I, § 8, cl. 18; and insist that "[n]o money shall be drawn from the Treasury, but in consequence of Appropriations made by Law." *Id.* § 9, cl. 7. Thus, significant powers with regard to the protection of national security are vested in Congress as well.

Congress, in turn, may provide the judiciary a role in policing executive claims of secrecy; the constitutional system of checks and balances does not permit the executive branch to act beyond the accountability of the judiciary.[18] The judiciary is empowered by Article III of the Constitution to resolve disputes.[19] Congress already has legislatively instructed courts to assess government secrecy claims in the FOIA and the CIPA contexts. It has the authority to do so with respect to civil cases involving claimed secrets as well. Indeed, the Supreme Court recognized in *Reynolds*, that courts are not prohibited from considering the legitimacy of state secrets claims.[20]

Although the executive branch is not vested with constitutional exclusivity over national security information, there always has been a judicial reluctance to probe in cases arising in the military and foreign affairs arenas out of concern that the judiciary does not have the expertise to reach appropriate decisions in these areas.

The concern about lack of expertise is particularly odd given that courts are experienced at examining facts for the sorts of warning signs of overreaching that are sometimes present in secrecy cases and that should trigger additional inquiry into the government's conduct. Judges have had no problem in other contexts recognizing when a matter may involve improper

---

[18] Indeed, the Supreme Court has recognized that Congress has the power to control the breadth of judicial deference in the realm of national security. *See Dep't of Navy v. Egan*, 484 U.S. 518, 530 (1988) ("*[U]nless Congress specifically has provided otherwise*, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.") (emphasis added).

[19] As the Supreme Court reminded the executive branch when it mandated due process for enemy combatants, even "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens." *Hamdi v. Rumsfeld*, 542 U.S. 507, 603 (2004) (O'Connor, J., plurality opinion).

[20] *Reynolds*, 345 U.S. at 9-10 ("[J]udicial control over the evidence in a case cannot be abdicated to the caprice of executive of executive officers."); *see also In re United States*, 872 F.2d 472, 475 (D.C. Cir. 1989) ("[A] court must not merely unthinkingly ratify the executive's assertion of absolute privilege, lest it inappropriately abandon its important judicial role.").

targeting of groups or infringement on constitutional rights. The federal courts hear a wide range of cases involving alleged violation of law by government personnel and private individuals. Judges are familiar with the motivations behind such conduct. Moreover, judges often are asked to rule in cases that involve technical or scientific information with which they may have no familiarity. In all instances outside the national security area, judges use well established tools to help them reach decisions. The State Secrets Protection Act of 2008 would ensure judges use these tools in cases in which the executive branch asserts the state secrets privilege as well.

Existing cases suggest that concerns about judges substituting their own judgment for that of the executive also are overstated. Indeed, even with the direction to conduct *de novo* review in FOIA cases, courts typically grant agencies substantial deference. For example, if the government was an ordinary litigant, its past practices or admissions might cause a court to consider secrecy claims with some level of skepticism, but the government's assertions are always received with a presumption of good faith.[21] As Congress recognized when it amended FOIA in 1974, judges are not likely to order release of records against executive demands for secrecy.[22] Yet, by taking the time to review the claims, courts pose at least some threat to agencies; for even the necessity of having to explain oneself to a federal judge has some salutary effect and may stem the expansion of unnecessary secrecy.

The State Secrets Protection Act of 2008

The State Secrets Protection Act of 2008 would lead to more careful assertions of secrecy by the government and protect against government overreaching. The provision of the bill that requires an affidavit signed by the head of the executive branch agency with responsibility over the evidence asserted to be subject to the privilege (Sec. 4) will ensure that some judgment was exercised in the decision to assert the privilege and not merely because it is an available defense to a lawsuit. We find in FOIA cases involving national security information, that higher level testing of secrecy claims invariably results in more information being released, such as when we file administrative appeals of agency decisions to an independent appeal panel such as at the Department of State or appeals of mandatory declassification review requests to the Interagency Security Classification Appeals Panel (ISCAP).

---

[21] For example, in a case brought by my organization involving a FOIA request for the biographies of nine former Communist leaders of Eastern European countries, William McNair, a CIA information officer swore under oath that only one line in one of the requested histories could be declassified and that the CIA could never confirm nor deny the existence of biographical sketches of Soviet bloc leaders. We argued that McNair's testimony was "facially incredible," not least because the CIA had already released biographical information on some of the same Eastern European Communists that were the subject of the request. *See* http://www.gwu.edu/~nsarchiv/NSAEBB/ciacase/index.html. When the falsity of the CIA declaration was made known to the court, it was struck, but the agency was permitted to file a new declaration from another official. There was no consequence for the filing of an inaccurate declaration. Ultimately the court held the CIA could withhold the biographies.

[22] The legislative history, S. Rep. No. 93-1200, at 9 (1974), recognizes that in granting *de novo* review powers to judges, it was anticipated that judges would "naturally be impressed by any special knowledge, experience and reasoning demonstrated by agencies with expertise and experience in matters of defense and foreign policy." *Ray*, 587 F.2d at 1213 (D.C. Cir. 1978 (Wright, J., concurring).

Section 3 of the bill provides substantial protection to the government's interest in maintaining secrecy. It provides for *ex parte* and *in camera* proceedings, protective orders, security clearance requirements, sealing of materials, and other proven security procedures to ensure that sensitive information is not released. These methods are used regularly and successfully to protect information in many other types of cases. Moreover, the provision for an interlocutory appeal in Section 8 will ensure appellate oversight and testing of trial court decisions.

The index requirement (Sec. 5(c)) will force agencies to review each withheld piece of evidence and specifically justify why it must be kept secret. The format will make it possible for judges to review agency claims in an organized way, without being overwhelmed by generalities. It also will make it possible for the plaintiff to make specific arguments against the state secrets invocation based on the requester's knowledge of surrounding facts and circumstances, which may be a distinct advantage over *in camera* review.

The provisions that permit the appointment of a special master or expert witness (Sec. 5(b)) will enable courts to overcome their reluctance to question agencies about secrecy claims. Current law already would permit the use of masters and experts, but courts have not generally employed this tool.[23]

Importantly, the provisions of Section 6 of the bill, which would require courts to consider all of the relevant evidence, will guard against the inclination of judges to grant utmost deference regardless of logical and factual inconsistencies in the government's position.

Section 7 of the bill generally follows the example of the CIPA, by providing methods that will permit cases to proceed in instances when the state secrets privilege is validly asserted. These procedures have worked well in the criminal CIPA context to ensure that the government's interest is protected.

The combined impact of these procedures will lead to the executive branch doing a better job articulating the need for secrets and thereby protecting them from any possible disclosure. Judges, who have been cautious and deferential in secrecy cases, will be equipped to exert the needed countervailing pressure against unnecessary secrecy. Individuals with important claims against the government will no longer be shut out of the judicial system.

I thank you for seeking my input and I am happy to respond to any questions.

---

[23] *See* Meredith Fuchs and Greg Webb, *Greasing the Wheels of Justice: Independent Experts in National Security Cases*, 28 Nat'l Sec. L. Rep. 1 (2006).

Meredith Fuchs serves as the General Counsel to the non-governmental National Security Archive at George Washington University. At the Archive, she oversees Freedom of Information Act and Federal Records Act litigation, advocates for open government, and frequently lectures on access to government information. She has supervised six government-wide audits of federal agency policy and performance under federal disclosure laws, including one relating to the proliferation of "sensitive but unclassified" document control policies at federal agencies. She is the Secretary of the Board of Directors of the American Society of Access Professionals (ASAP), a private professional association of FOIA personnel who serve throughout the federal government. Ms. Fuchs is a member and former co-chair of the D.C. Bar Administrative Law and Agency Practice Section. She is the author of "Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy," 58 Admin. L. Rev. 131 (2006); and "Greasing the Wheels of Justice: Independent Experts in National Security Cases," 28 Nat'l Sec. L. Rep. 1 (2006).

Previously she was a Partner at the Washington, D.C. law firm Wiley Rein & Fielding LLP. Ms. Fuchs served as a law clerk to the Honorable Patricia M. Wald, U.S. Court of Appeals for the District of Columbia Circuit, and to the Honorable Paul L. Friedman, U. S. District Court for the District of Columbia. She received her J.D. from the New York University School of Law and her B.Sc. from the London School of Economics and Political Science.

Mr. NADLER. I thank the witness.

Mr. Shapiro is recognized for 5 minutes.

TESTIMONY OF STEVEN SHAPIRO, AMERICAN CIVIL LIBERTIES UNION

Mr. SHAPIRO. Thank you Chairman Nadler, Ranking Member Franks and distinguished Members of the Subcommittee. I appreciate this opportunity to explain the ACLU's interest in reform of the state secrets privilege, an issue of critical importance to all Americans concerned about the unchecked abuse of executive power.

I also want to commend Chairman Nadler for crafting the State Secrets Protection Act, H.R. 5607. If enacted, it would place reasonable checks and balances on the executive branch, re-empower courts to exercise independent judgment in cases of national importance and protect the rights of those seeking redress through our court system.

Over the years, we have seen the state secrets privilege mutate from a common law evidentiary rule designed to protect genuine national security secrets into an alternative form of immunity that is used more and more often to shield the government and its agents from accountability for systemic violations of the Constitution and this Nation's laws. The ACLU has been involved in a series of high-profile cases in which the government has invoked the state secrets privilege in response to allegations of serious government misconduct, not simply to block access to specific information that is alleged to be secret but to dismiss the lawsuits in their entirety.

This has happened in cases involving rendition and torture, warrantless surveillance and national security whistleblowers among others. The dismissal of these suits does more than harm the individual litigants who are denied any opportunity for redress. It deprives the American public of the judicial determination regarding the legality of the government's actions.

This Subcommittee, I know, is familiar with Khaled el-Masri, who Representative Franks referred to in his opening remarks. Mr. el-Masri is an ACLU client who was detained incommunicado for 5 months and subject to coercive interrogation under the CIA's rendition program because he was confused with somebody else in a tragic case of mistaken identity. Mr. el-Masri's ordeal received prominent coverage throughout the world, including on the front pages of this Nation's leading newspapers.

German and European authorities began official investigations of Mr. el-Masri's allegations. And on numerous occasions, U.S. government officials publicly confirmed the existence of the rendition program. Nevertheless, Mr. el-Masri's lawsuit was dismissed based on the government's claim that the state secrets privilege barred any judicial review of what had happened to him. In effect, Mr. el-Masri was told that the one place where there could be no discussion of his mistreatment by the U.S. government was in a U.S. court of law.

H.R. 5607 takes great strides toward restoring essential constitutional checks on executive power. By codifying the state secrets

privilege, H.R. 5607 will bring needed clarity and balance to an area of the law that is now desperately in need of both.

Given limited time, I will highlight just a few important aspects of the bill. First, H.R. 5607 requires judges to look at the evidence that the government is seeking to shield by invoking the state secrets privilege, unless the evidence is too voluminous, in which case the court can review a representative sample. This will address the too frequent practice of relying exclusively on the government's affidavits in ruling on the state secrets privilege. The bill also places the burden of proof on the government that is trying to keep the evidence secret which is where it belongs.

Second, H.R. 5607 recognizes that judges can and should give due deference to the expert opinion of government officials without deferring entirely or abdicating their responsibility to make an independent assessment of the evidence. In order to assure that the court's decision is properly informed, the bill encourages the maximum participation possible by opposing counsel and gives courts the authority to appoint an independent expert to advise the court in appropriate circumstances.

Third, as a direct response to the increasing tendency to dismiss cases at the outset of litigation based on the government's broad and aggressive assertion of the state secrets privilege, H.R. 5607 restores the state secrets privilege to its proper evidentiary role by providing that a case shall not be dismissed until the opposing party has had a full opportunity to complete discovery of non-privileged evidence and to litigate the claim based on that evidence.

Courts have long experience in handling national security information responsibly and assessing its appropriate role in the judicial process. As Chairman Nadler noted, Congress has recognized the value of judicial involvement in these crucial decisions under the Classified Information Protection Act, the Freedom of Information Act and the Foreign Intelligence Surveillance Act. If history is any guide, there is no reason to believe that courts will likely disagree with the government's assessment of national security risks.

But the Supreme Court's ruling in the Pentagon Papers case provides a vivid illustration of the importance of maintaining an independent judicial role in national security cases as a constitutional safety valve against excessive secrecy. The ACLU therefore supports H.R. 5607 and urges its enactment as soon as possible. I would be happy to answer any questions the Committee might have.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Shapiro follows:]

PREPARED STATEMENT OF STEVEN SHAPIRO

WASHINGTON
LEGISLATIVE OFFICE

Testimony of Steven R. Shapiro, Legal Director

American Civil Liberties Union

Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights, and Civil Liberties

AMERICAN CIVIL LIBERTIES UNION
WASHINGTON
LEGISLATIVE OFFICE
915 15th STREET, NW, 6TH FL
WASHINGTON, DC 20005
T/202.544.1681
F/202.546.0738
WWW.ACLU.ORG

Caroline Fredrickson
DIRECTOR

NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2500

OFFICERS AND DIRECTORS
NADINE STROSSEN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

RICHARD ZACKS
TREASURER

July 31, 2008

Chairman Nadler, Ranking Member Franks, and Members of the Subcommittee:

I am pleased to testify on behalf of the American Civil Liberties Union, its 53 affiliates and more than 500,000 members nationwide, to explain the ACLU's concern about an issue of critical importance to us, to this Subcommittee of the Committee on the Judiciary, and to all Americans concerned about the unchecked abuse of executive power: reform of the state secrets privilege. In doing so, we also take this opportunity to commend Chairman Nadler for crafting H.R. 5607, the State Secrets Protection Act, a bill that would put reasonable checks and balances on the executive branch, re-empower courts to exercise independent judgment in cases of national importance, and protect the rights of those seeking redress through our court system.

Over the years we have seen the state secrets privilege mutate from a common-law evidentiary rule that permits the government "to block discovery in a lawsuit of any information that, if disclosed, would adversely affect national security,"[1] into an alternative form of immunity that is used more and more often to shield the government and its agents from accountability for systemic violations of the Constitution and core human rights principles. Since September 11, 2001, the Bush administration has altered fundamentally the manner in which the state secrets privilege is used, to the detriment of the rights of private litigants harmed by serious government misconduct, and the trust and confidence of the American people in our judicial system.

ACLU litigators challenging the Bush administration's illegal policies of warrantless surveillance, extraordinary rendition, and torture have been confronted by government assertions of the state secrets privilege at the initial phase of litigation, even before any evidence is produced or requested. Too often in these and other cases, courts have accepted government claims that the litigation must be dismissed on national security grounds without independently scrutinizing the evidence or allowing plaintiffs an opportunity to establish the truth of their allegations based on non-privileged information.

The untimely dismissal of these important lawsuits has undermined our constitutional system of checks and balances and weakened our national interest in having a government that is held accountable for its constitutional violations. The aggressive and expanding assertion of the privilege by the executive branch, coupled with the failure of the courts to exercise independent scrutiny over privilege claims, has allowed serious, ongoing abuses of executive power to go unchecked. Congress has the power and the duty to restore these checks and balances. We therefore urge you to pass H.R. 5607.

HISTORY OF THE PRIVILEGE

It has been more than half a century since the Supreme Court formally recognized the common-law state secrets privilege in *United States v. Reynolds*, a case that both establishes the legal framework for accepting a state secrets claim and serves as a cautionary tale for those judges inclined to accept the government's assertions as valid on their face.[ii] In *Reynolds*, family members of three civilians who died in the crash of a military plane in Georgia sued for damages. In response to a discovery request for the accident report, the government asserted the state secrets privilege, arguing that the report contained information about secret military equipment that was being tested aboard the aircraft during the fatal flight.

Although the Supreme Court had not previously articulated rules governing the privilege, it emphasized that the privilege was "well established in the law of evidence,"[iii] and cited treatises, including John Henry Wigmore's *Evidence in Trials at Common Law*, as authority. Wigmore acknowledged that there "must be a privilege for *secrets of state*, *i.e.* matters whose disclosure would endanger the Nation's governmental requirements or its relations of friendship and profit with other nations."[iv] Yet he cautioned that the privilege "has been so often improperly invoked and so loosely misapplied that a strict definition of its legitimate limits must be made."[v] Such limits included, at a minimum, requiring the trial judge to scrutinize closely the evidence over which the government claimed the privilege:

> Shall every subordinate in the department have access to the secret, and not the presiding officer of justice? Cannot the constitutionally coordinate 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.[vi]

Noting that the government's privilege to resist discovery of "military and state secrets" was "not to be lightly invoked," the *Reynolds* Court required "a formal claim of privilege, lodged by the head of the department which had control over the matter, after actual personal consideration by that officer."[vii] Further, the Court suggested a balancing of interests, in which the greater the necessity for the allegedly privileged information in presenting the case, the more "a court should probe in satisfying itself that the occasion for invoking the privilege is appropriate."[viii] Like Wigmore, the *Reynolds* Court cautioned against ceding too much authority in the face of a claim of privilege: "[J]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers."[ix]

Despite these cautions, the *Reynolds* Court sustained the government's claim of privilege over the accident report without ever looking at it. It did not, however, dismiss the lawsuit. Instead, the Court allowed the suit to proceed using alternative non-classified information (testimony from the crash survivors) as a substitute for the accident report, and the case eventually settled. The declassification of the accident report many decades later highlighted the importance of independent judicial review. There were no national security or military secrets; there was, on the other hand, compelling evidence of the government's negligence.[x]

The Supreme Court has not directly addressed the scope or application of the privilege since *Reynolds*. In the intervening years, the privilege has slipped loose from its evidentiary moorings. No longer is the privilege invoked solely with respect to discrete and allegedly secret evidence; rather, the government now routinely invokes the privilege at the pleading stage, before any evidentiary disputes have arisen. *Reynolds*' instruction that courts are to weigh a plaintiff's showing of need for particular evidence in determining how deeply to probe the government's claim of privilege is rendered wholly meaningless when the privilege is invoked before any request for evidence has been made. Moreover, the government has invoked the privilege with greater frequency;[xi] in cases of greater national significance;[xii] and in a manner that seeks to transform it from an evidentiary privilege into an immunity doctrine, thereby "neutraliz[ing] constitutional constraints on executive powers."[xiii]

Since September 11, 2001, the government has invoked the privilege frequently in cases that present serious and plausible allegations of grave executive misconduct. It sought to foreclose judicial review of the National Security Agency's warrantless surveillance of United States citizens in contravention of the Foreign Intelligence Surveillance Act, the NSA's warrantless data mining of calls and e-mails, and various telecommunication companies' participation in the NSA's surveillance activities.[xiv] It has invoked the privilege to terminate a whistleblower suit brought by a former FBI translator who was fired after reporting serious security breaches and possible espionage within the Bureau.[xv] And, it has invoked the privilege to seek dismissal of suits challenging the government's seizure, transfer, and torture of innocent foreign citizens.[xvi]

In *Tenet v. Doe*, the Supreme Court clarified the distinction between the evidentiary state secrets privilege, which may be invoked to prevent disclosure of specific evidence during discovery, and the so-called *Totten* rule, which requires outright dismissal at the pleading stage of cases involving unacknowledged espionage agreements.[xvii] As the Court explained, the *Totten* rule is a "unique and categorical . . . bar – a rule designed not merely to defeat the asserted claims, but to preclude judicial inquiry."[xviii] By contrast, the Court noted, the state secrets privilege deals with evidence, not justiciability.[xix] Nevertheless, some courts have permitted the government to invoke the evidentiary state secrets privilege to terminate litigation even before there is any evidence at issue.

There is substantial confusion in the lower courts regarding both *when* the privilege properly may be invoked, and *what* precisely the privilege may be invoked to

protect. The *Reynolds* Court considered whether the privilege had been properly invoked during discovery, at a stage of the litigation when *actual evidence* was at issue.[xx] Consistent with *Reynolds*, some lower courts have properly rejected pre-discovery, categorical assertions of the privilege, holding that the privilege must be asserted on an item-by-item basis with respect to particular disputed evidence.[xxi] Other courts, however, have permitted the government to invoke the privilege at the pleading stage, with respect to entire *categories* of information – or even the entire subject matter of the action – before evidentiary disputes arose.[xxii]

There is also a wide divergence among the lower courts regarding how deeply a court must probe the government's claim of privilege, and what, exactly, the court must examine in assessing a privilege claim and its consequences. Some courts have held that the government's state secrets claim must be afforded the most extreme form of deference.[xxiii] Other courts properly have scrutinized the government's privilege claim with more rigor – insisting on a meaningful judicial role in assessing the reasonable risk of harm to national security should purported state secrets be disclosed.[xxiv]

This confusion as to the proper judicial role has particularly dire consequences when a successful claim of privilege results in dismissal of the entire lawsuit. Some courts correctly have held that where dismissal might result from a successful invocation of the privilege, the court must examine the *actual* evidence as to which the government has invoked the privilege before making any determination about the applicability of the privilege or dismissal.[xxv] Other courts have refused or declined to examine the allegedly privileged evidence, relying solely on secret affidavits submitted by the government.[xxvi]

Legislative action to narrow the scope of the state secrets privilege and standardize the judicial process for evaluating privilege claims is needed to resolve this confusion in the courts and to bring uniformity to a too often flawed process that is increasingly denying justice to private litigants in cases of significant national interest.

THE ACLU CASES

The ACLU has been involved in a series of high-profile cases in recent years in which the government has invoked the state secrets privilege in response to allegations of serious government misconduct. These cases serve more than just the narrow personal interests of the litigants; they serve the national interest by seeking a judicial determination that the government has acted unlawfully. Since *Marbury v. Madison* in 1803, it has been the role of the courts to determine what the law is. The misuse of the privilege to dismiss these cases at the pleading stage does damage to the body politic as a whole, and not just to the rights of the litigants.

EXTRAORDINARY RENDITION, TORTURE

Khaled El-Masri, a German citizen of Lebanese descent, was forcibly abducted while on holiday in Macedonia in late 2003. After being detained incommunicado by Macedonian authorities for 23 days, he was handed over to United States agents, then beaten, drugged, and transported to a secret CIA-run prison in Afghanistan. While in

Afghanistan he was subjected to inhumane conditions and coercive interrogation and was detained without charge or public disclosure for several months. Five months after his abduction, Mr. El-Masri was deposited at night, without explanation, on a hill in Albania. Mr. El-Masri suffered this abuse and imprisonment at the hands of U.S. government agents due to a simple case of mistaken identity.

Mr. El-Masri's ordeal received prominent coverage throughout the world and was reported on the front pages of the United States' leading newspapers and on its leading news programs. German and European authorities began official investigations of Mr. El-Masri's allegations. Moreover, on numerous occasions and in varied settings, U.S. government officials have publicly confirmed the existence of the rendition program and described its parameters. For example,
the government has acknowledged that the CIA is the lead agency in conducting renditions for the United States in public testimony before the 9/11 Commission of Inquiry. Christopher Kojm, who served as Deputy Assistant Secretary for Intelligence Policy and Coordination in the State Department's Bureau of Intelligence and Research from 1998 until February 2003, described the CIA's role in coordinating with foreign government intelligence agencies to effect renditions, stating that the agency "plays an active role, sometimes calling upon the support of other agencies for logistical or transportation assistance" but remaining the "main player" in the process.[xxvii] Similarly, former CIA Director George Tenet, in his own written testimony to the 9/11 Joint Inquiry Committee, described the CIA's role in some seventy pre-9/11 renditions and elaborated on a number of specific examples of CIA involvement in renditions.[xxviii] Even President Bush has publicly confirmed the widely known fact that the CIA has operated detention and interrogation facilities in other nations, as well as the identities of fourteen specific individuals who have been held in CIA custody.[xxix]

On December 6, 2005, Mr. El-Masri filed suit against former Director of Central Intelligence George Tenet, three private aviation companies, and several unnamed defendants, seeking compensatory and punitive damages for his unlawful abduction, arbitrary detention, and torture by agents of the United States.[xxx] Mr. El-Masri alleged violations of the Fifth Amendment to the U.S. Constitution as well as customary international law prohibiting prolonged arbitrary detention; cruel, inhuman, or degrading treatment; and torture, which are enforceable in U.S. courts pursuant to the Alien Tort Statute.[xxxi] Although not named as a defendant, the United States government intervened before the named defendants had answered the complaint, and before discovery had commenced, for the purpose of seeking dismissal of the suit pursuant to the evidentiary state secrets privilege. In a public affidavit submitted with the motion, then-CIA director Porter Goss maintained that "[w]hen there are allegations that the CIA is involved in clandestine activities, the United States can neither confirm nor deny those allegations," and accordingly Mr. El-Masri's suit must be dismissed.[xxxii]

The district court held oral argument on the United States' motion on May 12, 2006, and despite the wealth of evidence already in the public record, the United States' motion to dismiss was granted that same day.[xxxiii] Mr. El-Masri thereafter appealed to the U.S. Court of the Appeals for the Fourth Circuit. On March 2, 2007, the court of appeals

upheld the dismissal of Mr. El-Masri's suit, holding that state secrets were "central" both to Mr. El-Masri's claims and to the defendants' likely defenses, and thus that the case could not be litigated without disclosure of state secrets.[xxxiv]

The district court concluded that "El-Masri's private interests must give way to the national interest in preserving state secrets." But, there is no national security interest served in having U.S. government agents kidnap, render, torture, abuse, and illegally detain the wrong person. To the contrary, the allegations questioned our government's commitment to core legal values. In an amicus brief filed in support of El-Masri's appeal to the Fourth Circuit, ten former U.S. diplomats warned that denial of a forum for El-Masri would undermine U.S. standing in the world community and the ability to obtain foreign government cooperation essential to combating terrorism, and thereby undermine our national security.[xxxv] On January 31, 2007 a German court issued arrest warrants for 13 unnamed CIA agents believed to have participated in the El-Masri abduction and rendition.[xxxvi]

The ACLU recently filed another federal lawsuit on behalf of five victims of the U.S. government's unlawful extraordinary rendition program. The lawsuit charges that Jeppesen Dataplan, Inc., a subsidiary of the Boeing Company, knowingly provided direct flight services to the CIA that enabled the clandestine transportation of Binyam Mohamed, Abou Elkassim Britel, Ahmed Agiza, Mohamed Farag Ahmad Bashmilah, and Bisher al-Rawi to secret overseas locations where they were subjected to torture and other forms of cruel, inhuman and degrading treatment.[xxxvii] Jeppesen's involvement in the transfer of the plaintiffs and other terrorism suspects to countries where they faced brutal torture is a matter of public record, confirmed by documentary evidence and eyewitness testimony, including a sworn declaration by a former Jeppesen employee who was told by a senior company official of the profits derived from the CIA's "torture flights." Nevertheless, on October 19, 2007 the government moved to intervene and filed a motion to dismiss based on CIA Director Michael Hayden's formal invocation of the state secrets privilege as grounds for dismissal. On February 13, 2008, the case was dismissed.[xxxviii] Plaintiffs' appeal is now pending before the U.S. Court of Appeals for the Ninth Circuit.

NATIONAL SECURITY AGENCY WARRANTLESS SURVEILLANCE

In December of 2005 the *New York Times* revealed that shortly after the 9/11 attacks the NSA began conducting warrantless domestic eavesdropping in violation of the Foreign Intelligence Surveillance Act (FISA).[xxxix] The Bush administration acknowledged approving this surveillance as part of a program it called the Terrorist Surveillance Program (TSP). Subsequent articles in the *Times* and *USA Today* alleged that major telecommunications companies "working under contract to the NSA" were also providing the domestic call data of millions of Americans to the government for "social network analysis."[xl]

The ACLU sued the NSA on behalf of a group of journalists, academics, attorneys and non-profit organizations, alleging that their routine communication with

individuals in the Middle East made them likely victims of the NSA's warrantless wiretapping program.[xli] The plaintiffs alleged the NSA program violated the Fourth Amendment, FISA, and other federal laws. They also alleged that they suffered real injury as a result of the NSA's warrantless surveillance program because the program forced them to make other, more costly arrangements to communicate with clients, sources, and colleagues in order to maintain confidentiality. The government filed a motion to dismiss prior to discovery, arguing the matter could not be explored in litigation because evidence supporting the NSA program qualifies for the state secrets privilege. U.S. District Judge Anna Diggs Taylor found that the ACLU's challenge to the program could proceed based solely on the government's public acknowledgement of the warrantless wiretapping program, and ruled the NSA program unconstitutional.

In July 2007, the U.S. Court of Appeals for the Sixth Circuit dismissed the case, ruling that the state secrets privilege made it impossible for plaintiffs to know for certain whether they had been wiretapped by the NSA, and that the existence of that uncertainty deprived them of standing to sue.[xlii] It is a classic Catch-22 that enabled the government to avoid accountability for its illegal program by labeling it a secret. The state secrets privilege was not designed to give the executive a blank check to violate the law.

NATIONAL SECURITY WHISTLEBLOWER

Sibel Edmonds, a 32-year-old Turkish-American, was hired as a translator by the FBI shortly after the terrorist attacks of September 11, 2001 because of her knowledge of Middle Eastern languages. She was fired less than a year later in March 2002 in retaliation for reporting to her supervisors about shoddy work and security breaches that could have had serious implications for our national security. Edmonds sued to contest her firing in July 2002. Rather than deny the truth of Edmonds' assertions, the government invoked the state secrets privilege in arguing that her case raised such sensitive issues that the court was required to dismiss it without even considering whether the claims had merit. On July 6, 2004, Judge Reggie Walton in the U.S. District Court for the District of Columbia dismissed Edmonds' case, citing the government's state secrets privilege. The ACLU represented Edmonds in her appeal of that ruling.[xliii]

A few days before the appeals court heard Edmonds' case, the Inspector General published an unclassified summary of its investigation of her claims.[xliv] The summary vindicated Edmonds. It stated that "many of [Edmonds'] allegations were supported, that the FBI did not take them seriously enough, and that her allegations were, in fact, the most significant factor in the FBI's decision to terminate her services."[xlv] The Inspector General urged the FBI to conduct a thorough investigation of Edmonds' allegations. It stated that "the FBI did not, and still has not, conducted such an investigation."[xlvi] It is difficult to see how ignoring and suppressing a whistleblower's complaint about security breaches within the FBI protects the national security.

In the appeals court, the government continued to argue that the state secrets privilege deprived the judiciary of the right to hear Edmonds' claims. In fact, the appeals court closed the arguments to the press and general public.[xlvii] Even Edmonds and her

attorneys were forbidden from hearing the government present part of its argument. In a one-line opinion containing no explanation for its decision, the appeals court agreed with the government and dismissed Edmonds' case. Edmonds asked the Supreme Court to review her case, but it declined.[xlviii]

THE STATE SECRET PROTECTION ACT (H.R. 5607)

The State Secret Protection Act (H.R. 5607) takes great strides toward restoring essential constitutional checks on executive power. H.R. 5607 restores the states secrets privilege to its common law origin as an evidentiary privilege by prohibiting the dismissal of cases prior to discovery. H.R. 5607 also ensures independent judicial review of government state secrets claims by requiring courts to examine the evidence for which the privilege is claimed and make their own assessments of whether disclosure of the information would reasonably pose a significant risk to national security.

Courts have long experience in handling national security information responsibly and assessing its appropriate use in the judicial process. If history is any guide, there is no reason to believe that courts will lightly disagree with the government's assessment of national security risks. But the Supreme Court's historic decision to allow publication of the Pentagon Papers provides a vivid illustration of the importance of maintaining a vital and independent judicial role in national security cases as a constitutional safety valve against over-classification and excessive secrecy.[xlix]

Congress has recognized as much in the Classified Information Protection Act,[l] the Freedom of Information Act,[li] and the Foreign Intelligence Surveillance Act.[lii] Under each of these statutes, courts are charged with the responsibility of weighing the government's national security claims in a specific litigation context – whether it is a defendant's claim under CIPA that national security evidence is critical to his or her criminal defense, the government's claim under FOIA that the release of government documents will jeopardize national security, or the claim of an aggrieved individual suing to redress an alleged violation of FISA.

Like these other statutes, H.R. 5607 concerns a quintessential judicial determination – the admissibility of evidence – and is designed to ensure that those decisions are made by judges, not executive branch officials. By codifying the state secrets privilege, H.R. 5607 will bring needed clarity and balance to an area of the law that is now desperately in need of both. It will accomplish this in several critical ways.

First, H.R. 5607 requires judges to look at the evidence that the government is seeking to shield by invoking the state secrets privilege, unless the evidence is too voluminous, in which case the court can review a representative sample. This will address the too-frequent practice of relying exclusively on the government's affidavits in ruling on the state secrets privilege. The bill also places the burden of proof on the government that is trying to keep evidence secret, which is where it belongs.

Second, H.R.5607 recognizes that judges can and should give due deference to the expert opinion of government officials without deferring entirely or abdicating their role as judges to make an independent assessment of the evidence. In order to assure that the court's decision is an informed one, the bill encourages the maximum participation possible by opposing counsel, and gives courts the authority to appoint a special master or independent expert to advise the court in appropriate circumstances.

Third, as a direct response to the increasing tendency of the government to seek, and courts to grant, motions to dismiss at the outset of litigation based on the state secrets privilege, H.R. 5607 restores the state secrets privilege to its proper evidentiary role by providing that a case shall not be dismissed until the opposing party has had "a full opportunity" to complete discovery of non-privileged evidence and to litigate his or her claims based on that evidence.

Fourth, borrowing from CIPA, H.R. 5607 empowers courts to order the production of a non-privileged substitute, if feasible, for the withheld evidence in cases where the privilege is upheld. If a non-privileged substitute is not feasible under the circumstances, the bill allows courts to "make appropriate orders in the interest of justice," including finding for or against a party on a factual or legal issue.

CONCLUSION

Time and again, the government has sought dismissal at the pleading stage based on the state secrets privilege, and the privilege as asserted by the government and as construed by the courts has often permitted dismissal of these suits on the basis of a government affidavit alone – without any judicial examination of the purportedly privileged evidence and sometimes only after ex parte hearings. Accordingly, a broad range of executive misconduct has been shielded from judicial review. Employed as it has been in these cases, the privilege permits the executive to render a case non-justiciable – without producing specific privileged evidence, without having to justify its claims by reference to those specific facts that will be necessary and relevant to adjudicate the case, and without having to submit its claims to even modified adversarial testing. These qualitative and quantitative shifts in the government's use – and the courts' acceptance – of the state secrets privilege warrant legislative action to correct this imbalance of power and rein in unconstitutional executive practices that are antithetical to the values of a democratic society. The ACLU therefore supports H.R. 5607, and urges its enactment as soon as possible.

[i] Ellsberg v. Mitchell, 709 F.2d 51, 56 (D.C. Cir. 1983); *See also*, United States v. Reynolds, 345 U.S. 1, 10 (1953); Tenenbaum v. Simonini, 372 F.3d 776, 777 (6th Cir. 2004).
[ii] Reynolds, 345 U.S. 1 (1953).
[iii] *Id*, at 6-7.
[iv] 8 John Henry Wigmore, EVIDENCE IN TRIALS AT COMMON LAW §2212a (3d e. 1940)(emphasis in original).
[v] *Id*.
[vi] Id, at § 2379.
[vii] Reynolds, 345 U.S. 1, 7-8.
[viii] *Id*, at 11.
[ix] *Id*, at 9-10.
[x] *See*, Herring v. United States, Civil Action No. 03-5500 (LDD) (E.D. Pa. Sept. 10, 2004).
[xi] Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 FORDHAM L. REV. 1931, 1939 (2007) ("The Bush Administration has raised the privilege in twenty-eight percent more cases per year than in the previous decade, and has sought dismissal in ninety-two percent more cases per year than in the previous decade.")
[xii] Editorial, Too Many Secrets, N.Y. Times, Mar. 10, 2007, at A12, available at: http://www.nytimes.com/2007/03/10/opinion/10sat2.html?ex=1331182800&en=023b94ac28666f34&ei=5090&partner=rssuserland&emc=rss ("It is a challenge to keep track of all the ways the Bush administration is eroding constitutional protections, but one that should get more attention is its abuse of the state secrets doctrine.").
[xiii] Note, *The Military and State Secrets Privilege: Protection for the National Security or Immunity for the Executive?*, 91 YALE L.J. 570, 581 (1982).
[xiv] *See*, Hepting v. AT&T Corp., 439 F.Supp. 2d 974 (N.D. Cal. 2006), *appeal docketed*, No. 06-17137 (9th Cir. Nov. 9, 2006); Al-Haramain Islamic Found., Inc. v. Bush, 451 F. Supp. 2d 1215 (D. Or. 2006), *rev'd* 507 F.3d 1190 (9th Cir. 2007); ACLU v. NSA, 438 F. Supp. 2d 754 (E.D. Mich. 2006), *vacated* 493 F.3d 644 (6th Cir. 2007), *cert. denied*, 128 S.Ct. 1334 (2008); Terkel v. AT&T Corp., 441 F. Supp. 2d 899 (N.D. Ill. 2006).
[xv] Edmonds v. U.S. Dep't of Justice, 323 F. Supp. 2d 65 (D.D.C. 2004), 161 Fed.Appx. 6 (D.C.Cir. 2005), *cert. denied*, 546 U.S. 1031 (2005).
[xvi] *See*, El-Masri, 437 F.Supp.2d 530 (E.D.Va. 2006), *aff'd*, 479 F.3d 296 (4th Cir. 2007), *cert. denied*, 128 S.Ct. 373 (2007); Arar v. Ashcroft, 414 F. Supp. 2d 250 (E.D.N.Y. 2006) (dismissed on other grounds); Mohamed v. Jeppesen Dataplan, Inc., 539 F.Supp.2d 1128 (N.D.Ca. 2008), *appeal docketed*, No. 08-15693 (9th Cir).
[xvii] Tenet v. Doe, 544 U.S. 1 (2005).
[xviii] *Id*, at 6.
[xix] *Id*, at 9, 10.
[xx] Reynolds, 345 U.S. at 3.
[xxi] *See, e.g.*, In re United States, 872 F.2d 472, 478 (D.C. Cir. 1989) (rejecting categorical, prediscovery privilege claim because "an item-by-item determination of privilege [would] amply accommodate the Government's concerns"); Hepting, 439 F. Supp. 2d at 994 (N.D. Cal. 2006) (refusing to assess effect of pleading stage, categorical assertion of the privilege in suit challenging phone company's involvement in warrantless surveillance, preferring to assess the privilege "in light of the facts."); Nat'l Lawyers Guild v. Att'y General, 96 F.R.D. 390, 403 (S.D.N.Y. 1982) (holding privilege must be asserted on document-by-document basis).
[xxii] *See, e.g.*, Zuckerbraun v. General Dynamics Corp., 935 F.2d 544, 546 (2d Cir. 1991) (finding privilege properly asserted at pleading stage over all information pertaining to ship's defense system and rules of engagement); Sterling v. Tenet, 416 F.3d 338, 345-46 (4th Cir. 2005) (upholding pre-answer invocation of privilege over categories of information related to plaintiff's employment as well as alleged discrimination by CIA); Black v. United States, 62 F.3d 1115, 1117, 1119 (8th Cir. 1995); Terkel, 441 F. Supp. 2d at 918.

[xxiii] *See, e.g.*, Zuckerbraun, 935 F.2d at 547; Sterling, 416 F.3d at 349 (accepting government's pleading-stage claim that state secrets would be revealed if plaintiff's suit were allowed to proceed, holding that court was "neither authorized nor qualified to inquire further"); Kasza, 133 F.3d at 1166 (holding that government's privilege claim is owed "utmost deference").

[xxiv] *See, e.g.*, In re United States, 872 F.2d at 475 ("[A] court must not merely unthinkingly ratify the Executive's assertion of absolute privilege, lest it inappropriately abandon its important judicial role."); Ellsberg, 709 F.2d at 60 (rejecting claim of privilege over name of Attorney General who authorized unlawful wiretapping, explaining that no "disruption of diplomatic relations or undesirable education of hostile intelligence analysts would result from naming the responsible officials"); Hepting, 439 F. Supp. 2d at 995 (holding that "to defer to a blanket assertion of secrecy" would be "to abdicate" judicial duty, where "the very subject matter of [the] litigation ha[d] been so publicly aired"); Al-Haramain, 451 F. Supp. 2d at 1224 (rejecting government's overbroad secrecy argument, stating that "no harm to the national security would occur if plaintiffs are able to prove the general point that they were subject to surveillance . . . without publicly disclosing any other information").

[xxv] *See, e.g.*, Ellsberg, 709 F.2d at 59 n.37 (when litigant must lose if privilege claim is upheld, "careful *in camera* examination of the material is not only appropriate . . . but obligatory"); ACLU v. Brown, 619 F.2d 1170, 1173 (7th Cir. 1980).

[xxvi] *See, e.g.*, Sterling, 416 F.3d at 344 (finding "affidavits or declarations" from government were sufficient to assess privilege claim even where asserted to sustain dismissal, and holding that in camera review of allegedly privileged evidence not required); Black, 62 F.3d at 1119 (examining only government declarations); Kasza, 133 F.3d at 1170 (same).

[xxvii] *Intelligence Policy and National Policy Coordination: Hearing of the National Commission on Terrorist Attacks Upon the United States*, Mar. 24, 2004, *available at* http://govinfo.library.unt.edu/911/archive/hearing8/9-11Commission_Hearing_2004-03-24.htm

[xxviii] *Written Statement for the Record of the Director of Central Intelligence Before the Joint Inquiry Committee*, Oct. 17, 2002, *available at http://www.intelcenter.com/resource/2002/tenet-17-Oct-02.pdf*

[xxix] Statement of President George W. Bush, President Discusses Creation of Military Commissions to Try Suspected Terrorists, Office of the White House Press Secretary, (Sept. 6, 2006) at: http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html

[xxx] El-Masri v. Tenet, 437 F.Supp.2d 530 (E.D.Va. 2006).

[xxxi] 28 U.S.C. § 1350.

[xxxii] See Petition for a Writ of Certiorari at 9, 2007 WL 1624819, (Appellate Petition, Motion and Filing), El-Masri v. U.S., 128 S. Ct. 373 (U.S. 2007) (No. 06-1613), *available at* http://www.fas.org/sgp/jud/statesec/elmasri-cert.pdf

[xxxiii] El-Masri v. Tenet, 437 F.Supp.2d 530, 532-34 (E.D.Va. May 12, 2006).

[xxxiv] El-Masri v. U.S., 479 F.3d 296, 313 (4th Cir. 2007) *cert. denied*, 128 S. Ct. 373 (U.S. 2007).

[xxxv] Brief Amicus Curiae of Former United States Diplomats Supporting Plaintiff-Appellant and Reversal, El-Masri v. Tenet, 437 F.Supp.2d 530, 532-34 (E.D.Va. May 12, 2006), (No. 06-1667) *available at*: http://www.aclu.org/safefree/rendition/asset_upload_file638_26287.pdf

[xxxvi] Mark Landler, *German Court Seeks Arrests of 13 CIA Agents*, N.Y. TIMES, Jan. 31, 2007, *available at*: http://www.nytimes.com/2007/01/31/world/europe/31cnd-germany.html?ref=europe

[xxxvii] Mohamed et al, v. Jeppesen Dataplan, Inc., Civil Action No. 5:07-cv-02798-JW, (United States District Court for the Northern District of California), (May 30, 2007).

[xxxviii] Mohamed v. Jeppesen Dataplan, Inc., 539 F.Supp.2d 1128 (N.D.Ca. 2008), *appeal docketed*,, No. 08-15693 (9th Cir.).

[xxxix] James Risen and Eric Lichtblau, *Bush lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1, *available at* http://www.nytimes.com/2005/12/16/politics/16program.html?ei=5090&en=c32072d786623ac1&ex=1292389200.

[xl] Leslie Cauley, *NSA has Massive Database of Americans' Phone Calls*, USATODAY, May 11, 2006, at 1A, *available at* http://www.usatoday.com/news/washington/2006-05-10-nsa_x.htm. See also, James Risen and Eric Lichtblau, *Spy Agency Mined Vast Data Trove, Officials Report*, N.Y. Times, Dec. 24, 2005.

[xli] ACLU v. NSA, 438 F. Supp. 2d 754 (E.D. Mich. 2006).

[xlii] ACLU v. NSA, 467 F.3d 590, 591 (6th Cir. 2006).
[xliii] *See* Edmonds v. U.S. Dept. of Justice, 323 F.Supp.2d 65, (D.D.C. Jul 06, 2004), *aff'd* 161 Fed.Appx. 6, (D.C.Cir. May 06, 2005) (NO. 04-5286); Reply Brief for the Plaintiff-Appellant, 2005 WL 622960, (Appellate Brief), (C.A.D.C. Mar. 10, 2005) (NO. 04-5286).
[xliv] U.S. DEPARTMENT OF JUSTICE OFFICE OF INSPECTOR GENERAL, A REVIEW OF THE FBI'S ACTIONS IN CONNECTION WITH THE ALLEGATIONS RAISED BY CONTRACT LINGUIST SIBEL EDMONDS, (Unclassified Summary, January 2005).
[xlv] *Id*, at 31.
[xlvi] *Id*, at 34.
[xlvii] Petition for a Writ of Certiorari, 2005 WL 1902125, (Appellate Petition, Motion and Filing), Edmonds v. U.S. Dept. of Justice, 546 U.S. 1031, 126 S.Ct. 734, (U.S. Nov 28, 2005) (NO. 05-190), *available at* http://www.justacitizen.com/articles_documents/edmonds%20cert|11.%20petition.pdf
[xlviii] Edmonds v. U.S. Dept. of Justice, 546 U.S. 1031, 126 S.Ct. 734, (U.S. Nov 28, 2005) (NO. 05-190) .
[xlix] New York Times Co. v. United States, 403 U.S. 713 (1971).
[l] Classified Information Procedures Act, 18 U.S.C. app.
[li] Freedom of Information Act, 5 U.S.C. § 552.
[lii] Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801, et. seq.

Mr. NADLER. Thank you.

Mr. Vatis, you are recognized for 5 minutes.

TESTIMONY OF MICHAEL A. VATIS, PARTNER, STEPTOE & JOHNSON, LLP

Mr. VATIS. Thank you, Mr. Chairman. Mr. Chairman, Mr. Franks and distinguished Members of the Committee, thank you for inviting me here today to talk about this extremely important subject.

I agree entirely with my fellow witnesses about both the need for and the propriety of Congress's regulating the state secrets privilege. It is perfectly appropriate for Congress to determine what role courts should play and what the standard of review should be for court decision-making in cases in which the government asserts the state secrets privilege.

Even if one views that privilege as founded on or at least derived from constitutional principles, as I do, there is still an appropriate role for Congress to play. Congress has authorities in the areas of war and national defense and it has authorities in the area of diplomatic relations, which give it ample authority to make laws that affect both of those realms, as H.R. 5607 would do.

I would like to spend just a moment, though, on the one area where I might have a slightly different perspective and that is on whether and how much deference should be accorded to the government's judgment about whether disclosure of a state secret would cause harm to either national defense or to diplomatic relations. My one concern with the bill as it is written today is with Section 6, which I believe could be read as directing courts to give no deference whatsoever to the executive branch's judgment about potential harm to national defense or diplomatic relation, but rather that the courts should treat the government's judgment as no different from other witnesses that might appear on the other side.

I believe that reading the statute this way would cause tremendous harm potentially. The executive naturally has greater expertise from its day-to-day experience and from its access to intelligence in the areas of defense and diplomacy. It also has constitutional responsibilities for these areas that should be acknowledged and respected in any law that is passed in this area. So, deference to the executive branch on this sole issue of whether harm would result from disclosure should be required.

Now, I want to be clear and not misunderstood on what I mean by deference. This doesn't mean that courts should not engage in independent review of the propriety of the privilege. It doesn't mean courts should not engage in their own judgment about whether harm truly would be caused. Courts will still look at all of the evidence. They would still consider opposing witnesses from the government. And they would still exercise judgment, but they would give at least substantial weight to the government's assertion of harm.

Other protections would still exist to protect against government overreaching. The government would still retain the burden of proof in asserting the privilege. It would still have to prove that disclosure is reasonably likely to cause significant harm to national

defense or diplomatic relations. And they must make those assertions in writing.

And courts can insist on specificity so that the government can't just rely on the say-so of a senior executive official. They would have to explain the rationale and the supporting evidence. And I think these are sufficient and adequate to protect against abuse. To go further, though, and have courts simply give the same weight to government judgment in this area as to other witnesses I think would go too far and would be a mistake.

Finally, I don't think that Congress should be ambiguous in this area and leave it up to the courts to determine how much deference should be accorded. I think that would just replicate the situation we have today, where some courts accord a lot of deference, some courts accord a little deference and some courts potentially none at all.

I think it is Congress' responsibility to be clear on this, to have consistency in the way courts review these issues, which I think is the objective of the legislation. And I think being clearer about the level of deference that should apply would be the one fix that I would recommend in the legislation as it stands.

To sum up, I don't think it is fair for people to complain about activist judges if legislation virtually invites activism by not being clear on dispositive issues such as this. And so I would urge the court to take up this issue and be specific—urge this Committee to take up this issue and be specific on the level of deference that courts should apply.

Thank you.

[The prepared statement of Mr. Vatis follows:]

PREPARED STATEMENT OF MICHAEL A. VATIS

Testimony of Michael A. Vatis
Partner, Steptoe & Johnson LLP

Hearing before the
United States House of Representatives, Committee on the Judiciary, Subcommittee on the Constitution, Civil Rights, and Civil Liberties

on

H.R. 5607, the "State Secrets Protection Act of 2008"

Thursday, July 31, 2008

Chairman Nadler, Representative Franks, and Members of the Subcommittee: Thank you for inviting me to testify today concerning the state secrets privilege and H.R. 5607, the "State Secrets Protection Act of 2008." My fellow panelists have testified with great knowledge and insight concerning the history of the state secrets privilege, recent applications of it, and the need for statutory reform. I will seek to avoid retreading the same ground as my colleagues and instead devote my remarks to the issues of government secrecy in general and how judicial oversight should be crafted to preserve the Executive Branch's discretion and authority in national security matters while advancing the significant interests in government openness and accountability.

I start from two bedrock principles, both of which may be considered truisms, but which also happen to lie in great tension with each other. First, secrecy in government can be absolutely necessary to the protection of our national security. This is especially so today, when secret intelligence sources and methods are vital to our ability to learn about, penetrate and disrupt terrorist groups and other non-state actors that, because of their access to advanced technology and weapons of mass destruction, pose grave threats to our security. Many sources and methods of gathering intelligence on such groups, as

well as on nations that would do us harm now or in the future, must remain secret if they are to remain effective. Similarly, the details of advanced weapons systems must be remain secret if we are to maintain our battlefield advantage over our present and potential adversaries. And our ability to work effectively with other nations, and to engage in sensitive negotiations with friendly or hostile governments, often requires that the details of diplomacy not be revealed publicly.

At the same time, the second principle is equally true, and no less important: secrecy in government is antithetical to democratic governance. Too much secrecy shields officials from oversight and inevitably breeds abuse and misconduct; it thus can fatally weaken the system of checks and balances that defines our system of government. At rock bottom, government "by the people" becomes impossible if the people do not know what their government is doing.

Add to these two principles a corollary derived less from theory than from observation: there are "secrets," and then there are *secrets*. What I mean by this is that just because a government official calls something "secret" does not mean that its disclosure would actually cause harm to our national security. Too often, information deemed classified by the Executive Branch merely echoes what was in last week's newspapers, or in yesterday's blogs. At other times, information the Executive Branch deems "Top Secret" one day—information that, if disclosed, "reasonably could be expected to cause exceptionally grave damage to the national security"[1]—is leaked by a senior government official the next day, or is declassified for a political purpose. These situations—which occur again and again, across Administrations—tend to undermine

[1] Executive Order 12958, § 1.2(a)(1) (April 17, 1995), as amended by Executive Order 13292 (March 25, 2003).

sweeping, absolutist claims for secrecy, and for unilateral Executive prerogatives to define and determine what remains "secret."

The fundamental question, then, is how to balance these competing principles. In considering this question, it is helpful to recall one of the central insights of the so-called Moynihan Commission (formally known as the Commission on Protecting and Reducing Government Secrecy) just over a decade ago. In his Chairman's Forward to the Commission's Report, Senator Patrick Moynihan, citing Max Weber, observed that

> secrecy is a mode of regulation. In truth, it is the ultimate mode, for the citizen does not even know that he or she is being regulated. Normal regulation concerns how citizens must behave, and so regulations are widely promulgated. Secrecy, by contrast, concerns what citizens may know; and the citizen is not told what may not be known.

Given the lack of transparency of this "regulatory" process of government secrecy, the modern administrative state tends to overregulate, rather than underregulate, information. This tendency is exacerbated by the fact that, in bureaucracies, information is power. Secrecy serves to tighten the bureaucrat's grip on power, and that grip is not easy to dislodge. As Weber, again quoted by the Moynihan Commission, wrote:

> The pure interest of the bureaucracy in power…is efficacious far beyond those areas where purely functional interests make for secrecy. The concept of the "official secret" is the specific invention of bureaucracy, and nothing is so fanatically defended by the bureaucracy as this attitude, which cannot be substantially justified beyond these specifically qualified areas.…Bureaucracy naturally welcomes a poorly informed and hence a powerless parliament—at least in so far as ignorance somehow agrees with the bureaucracy's interests.[2]

[2] Max Weber, *Essays in Sociology*, trans. and ed. H.H. Gerth and C. Wright Mills (New York: Oxford University Press, 1946). 233-34 (quoted in Report of the Commission on Protecting and Reducing Government Secrecy, Appendix A.3.).

Substitute "Congress" – as well as "courts" – for "parliament," and Weber's assessment is no less true in Washington, D.C., today than in Europe a century ago.

As with other forms of regulation, Executive Branch secrecy can and should be subject to legislative and judicial oversight. This is, of course, not an entirely new idea. Congress has seen fit—in legislation such as the Classified Information Procedures Act,[3] the Foreign Intelligence Surveillance Act,[4] and the Freedom of Information Act[5]—to make rules governing the protection and disclosure of national security-related information. What has been lacking is a legislative prescription as to how courts should assess Executive Branch assertions of the state secrets privilege in civil litigation, leading to confusion in the courts about the standards to apply, the procedures to use, and the deference to accord Executive Branch claims.

H.R. 5607 represents a much needed and commendable step toward the necessary legislative role in setting the ground rules for the state secrets privilege. In particular, it recognizes the need to balance and reconcile, where possible, the sometimes competing interests of justice and openness, on the one hand, and national security, on the other, through several procedural mechanisms.

Most notable is the bill's requirement that a court review all evidence that the government asserts is protected from disclosure by the privilege (or at least a sampling thereof if review of voluminous evidence is not feasible). This

[3] 18 U.S.C. App. 3.
[4] 50 U.S.C. § 1801 et seq.
[5] 5 U.S.C. § 552 et seq.

represents a departure from the approach established by the Supreme Court in *Reynolds v. United States*,[6] which specifically declined to require such review:

> [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.[7]

This requirement in the bill seems necessary to ensure that courts do not assess state secrets claims in a vacuum, without fully understanding the nature of the information at issue, the government's reason for wanting to keep it secret, or even whether the secret information is really at issue in the material to which a civil litigant might be seeking access. Requiring judicial consideration of the evidence will improve government accountability, promote justice for individuals who might be harmed by government misconduct or by private parties, and enhance our system of checks and balances. At the same time, the procedural mechanisms afforded by the bill—such as *in camera* hearings, attorneys and special masters with security clearances, the sealing of records, and expedited interlocutory appeals—help ensure that such judicial consideration itself will not pose a threat to security.

One provision in the bill, however, does raise a significant concern about potential infringement on Executive Branch prerogatives and judicial

---

[6] 345 U.S. 1 (1953).
[7] *Id.* at 10.

overreaching. The standard for judicial review set forth in subsection 6(c) of the bill states not only that "the court shall make an independent assessment of whether the harm identified by the Government…is reasonably likely to occur should the privilege not be upheld," but also that "[t]he court shall weigh testimony from Government experts in the same manner as it does, and along with, any other expert testimony." This subsection could be read as directing courts to give no deference whatsoever to a senior Executive official's judgment about how revelation of certain information would harm our national defense or diplomatic relations, but simply to weigh that judgment "in the same manner" as judgments offered by "any other expert." Given the President's constitutional responsibilities under Article II as Commander-in-Chief of the armed forces and the organ of the government in foreign affairs, and the Executive Branch's superior expertise in such matters, courts should be required to give some deference to the Executive Branch's determination that disclosure would be "reasonably likely to cause significant harm to the national defense or the diplomatic relations of the United States."

The mere fact of judicial review of the evidence in dispute should serve to check unreasonable, arbitrary or abusive assertions of the privilege. Courts can also insist that the government provide a *specific* explanation, in writing, of how disclosure would likely cause significant harm to the national defense or diplomatic relations. The government would thus be precluded from relying on its mere "say so" to exclude critical evidence from a case. Courts can also scrutinize carefully – and independently – whether the information that the

government claims is privileged is truly a necessary part of the case. They can also make independent judgments about what effect a valid assertion of the privilege should have on the conduct or outcome of the case. But if courts go further and accord no deference at all to Executive officials' judgments about national security, and regard them as no different from any other expert witness's judgments, it would pay short shrift to the President's constitutional responsibilities and Executive officials' greater expertise in defense and diplomatic relations.

It may be argued that courts will in fact show deference to government assertions of harm regardless of what the statute says about the standard of review. But if the statute does not clearly specify what level of deference should be accorded, then Congress will have simply replicated one of the problems we have today, with different judges applying different degrees of deference. It would be far better for Congress to state clearly what level of deference should be accorded to government claims of harm *and* what conditions the Executive Branch must meet in order to warrant such deference.

It bears emphasizing that deference does not mean that courts must simply accept the government's assertions about harm to national security at face value. Courts can and should evaluate such assertions in light of the evidence, other witnesses' testimony, and common sense. And, as stated earlier, they should insist on specific explanations about the harm. But if the government explains, for example, how revelation of the details of a sensitive negotiation with a foreign official would damage our diplomatic relations, or how revelation of a specific

signals intelligence method would harm our national defense, the court should be required at least to accord that judgment substantial weight if it is reasonable in light of the evidence presented.

In sum, H.R. 5607 is a commendable effort to provide needed guidance to courts on how to assess Executive Branch assertions of the state secrets privilege, and provides valuable mechanisms for balancing and reconciling the sometimes conflicting interests of justice and transparency in government, on the one hand, and protection of national security information, on the other.

Mr. NADLER. Thank you.

I will now recognize Mr. Fein.

TESTIMONY OF BRUCE FEIN, CHAIRMAN, THE AMERICAN FREEDOM AGENDA

Mr. FEIN. Thank you, Mr. Chairman and Members of the Committee. I would like to begin by trying to demonstrate why I think something is rotten in the state of the state secrets doctrine.

And let me begin by quoting a fundamental precept of our jurisprudence announced by Chief Justice John Marshall in Marbury against Madison, which has been celebrated as a feature of all civilized law. He wrote: The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury. The government of the United States has been emphatically termed a government of laws and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right.

And let us go to a hypothetical—it is derived from the el-Masri case—about how the state secrets doctrine applies to deprive someone of a remedy for the violation of a vested legal right. Suppose an American citizen residing in Berlin is kidnapped and tortured by CIA operatives based—excuse me—CIA operatives based abroad. And they are acting on the basis of the president's gut instincts that this American has collaborated with al-Qaida in Iraq. The suspicion proves erroneous and the citizen sues his CIA kidnappers and torturers for deprivation of liberty and torture and violation of the Constitution.

The state secrets privilege is invoked as a defense. It is averred in an affidavit submitted by the director of the CIA that to prove the kidnapping would disclose to the international terrorist enemy a method of capture that would enable a terrorist to train for means of evasion and that to prove the torture would disclose a method of intelligence collection that would alienate allies of the United States and would enable the enemy to train terrorists to resist the type of torture they might anticipate.

The prevailing state secrets doctrine would require dismissal of the citizen's case. I don't think that doctrine then, to quote from Congressman Franks, protects all Americans. That American probably thinks it did a disservice to his rights.

Moreover, I want to underscore that there is no anomaly in the law to requiring the executive to choose between a fair trial, disclosing information necessary for justice in a civil case, when we examine the analogy in the criminal context. And I want to draw on a very vivid snippet from history.

You may recall in the atomic spies case concerning the Rosenbergs, those who had stolen secrets from Los Alamos, there was an individual named David Hall. He was complicit. He was never prosecuted because the FBI, the government, thought that a prosecution would require disclosure of our ability to break the Soviet Venona code. He still today is free; he was never prosecuted. But the government was required to choose between criminally prosecuting an atomic spy or due process, and they decided they would not reveal the information, and he still remains free.

So, when you think about regulating the state secrets doctrine, which at its most disadvantageous posture toward the government, it simply in some cases where the privilege is rejected would require the government to say, all right, we will accept a default judgment or an adverse finding of fact and keep the state secret as was done with regard to David Hall (sic). There is nothing unusual about that. No one has claimed that the doctrine that requires the government to choose in the CIPA context between prosecution and due process has created a danger to the United States.

With regard to the specifics of deference that have been raised, it is certainly true, I think, that Mr. Franks is accurate that the government has a unique expertise with regard to intelligence. They have been in the business a long time. They can see pieces of a puzzle put together that someone on the outside can't. So, that certainly is a strike in their favor in deference, and judges are not superior to the executive branch on that score.

But there is equally true another attribute of the executive branch that looks in the opposite direction. There is a motivation to lie and distort and to prevaricate to cover up wrongdoing to cover up political embarrassment, and that is hardly an exception in the annals of the United States, the Pentagon Papers being one. We all remember Nixon claimed the CIA assets in Mexico would be disclosed if you traced the money to the Watergate burglars and otherwise.

And we can see the use of classified information for political purposes in the Valerie Plame disclosure, where the president unilaterally decided to declassify a document obviously to try to disparage what he viewed as an adversary, Mr. Wilson, in view of the purchase of uranium in Niger by Iraq and otherwise. So, when you take on the one hand the expertise, on the other hand the motivation to perhaps distort the evidence, in my judgment this legislation should just flag for the judge both of those elements to be considered in determining whether the state secrets standard that has been erected in the legislation has been satisfied.

I would like to conclude by making a couple of observations about constitutional qualms. I think any constitutional challenge to this bill would be frivolous. Remember, even assuming that the president enjoys an inherent constitutional right to protect some state secrets, that does not shield it from regulation by Congress. Article I, Section 8, Clause 18 says Congress can regulate the exercise of any power vested by the United States Constitution in any branch or officer thereof.

And here we have a very mild congressional regulation of the president's ability to keep state secrets, establishing certain standards and levels of judicial review that have been shown through the years if we could draw upon the experience under FOIA, the experience under CIPA, the experience under FISA, as well as the rather regular efforts that judges are given in making determinations whether the CIA prepublication review of written books and otherwise have disclosed classified information. In none of these instances has there been shown that this kind of judicial review cripples or handicaps or impairs the president's ability to protect the national security.

In all of these respects, I think the Committee is well advised to move forward on this legislation. Indeed, there is only one structural suggestion I would make—is that at present, the bill does not distinguish between violations of constitutional rights where the public interest in vindication is at its zenith and violation of other rights under the Federal Tort Claims Act. I would argue that when you have a constitutional violation, the government's burden of proof should rise to clear and convincing evidence that you have a state secret involved and not simply a preponderance.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Fein follows:]

PREPARED STATEMENT OF BRUCE FEIN

Dear Mr. Chairman and Members of the Committee:

As Chairman of the American Freedom Agenda, I am pleased to share views on the state secrets privilege generally and legislation that would limit its invocation to frustrate private redress for constitutional or sister violations of law perpetrated or aided and abetted by the government. The American Freedom Agenda seeks legislative reform of the state secrets doctrine as one of its tenets for restoring checks and balances and protections against government abuses. The organization was formed by stalwart conservatives, including Richard Viguerie and former Congressman Bob Barr.

But the state secrets privilege is neither a liberal nor a conservative issue. It addresses a question raised by Chief Justice John Marshall of the United States Supreme Court more than two centuries ago in *Marbury v. Madison* (1803): "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury. . . . The government of the United States has been emphatically termed a government of laws and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."

"If this obloquy is to be cast on the jurisprudence of our country, it must arise from the peculiar character of the case."

The state secrets privilege assaults what Chief Justice Marshall maintained was the essence of civil liberty. It denies a plaintiff injured by constitutional wrongdoing of a remedy if proof of liability would require disclosure of a state secret, i.e., information that might damage the national security. In the words of the great Chief Justice, the doctrine casts "obloquy" on the nation's jurisprudence, and can be justified only by the "peculiar character" of the litigation. The origin of state secrets as a defense to any type of alleged government wrongdoing was thoroughly misconceived by Justice Stephan Field in *Totten v. United States* (1875). There, the Court declared that a contract with the government to spy was not enforceable if proof of the contract would reveal a state secret. As applied to voluntary contracts, the state secrets doctrine was unalarming because if the government habitually dishonored its promises private entities would no longer volunteer. But the gratuitous and expansive language of *Totten* has been interpreted to make state secrets applicable to any litigation where government wrongdoing is alleged.

The state secrets privilege is further dubious because it runs against the grain of the doctrine frowning on evidentiary privileges announced by Justice Byron White in *Branzburg v. Hayes* (1972): the public enjoys a presumptive right to everyman's evidence.

The need for legislative reform of state secrets as the doctrine has evolved in litigation is self-evident. Consider the following hypothetical, fashioned largely from the state secrets case involving the abduction, imprisonment, and interrogation abuse of Khalid El-Masri, a German citizen of Lebanese descent. An American citizen residing in Berlin is kidnapped and tortured by CIA operatives based on President George W. Bush's signature "gut instincts" that the American has collaborated with Al Qaeda in Iraq. The President's suspicion is erroneous, and the citizen sues his CIA kidnappers and torturers for a deprivation of liberty and torture in violation of the Constitution. The state secrets privilege is invoked as a defense. It is averred in an affidavit submitted by the Director of the CIA that to prove the kidnapping would disclose to the international terrorist enemy a method of capture that would enable terrorists to train for means of evasion; and, that to prove the torture would disclose a method of intelligence collection that would alienate allies of the United States and would enable the enemy to train terrorists to resist the type of torture

disclosed. The prevailing state secrets doctrine would require dismissal of the citizen's case resting on kidnapping and torture, despite the obloquy the ruling would cast on the jurisprudence of the United States. Moreover, by denying a remedy for the constitutional wrongdoing the doctrine encourages repetitions of lawlessness. That understanding is what provoked the Supreme Court to fashion an exclusionary rule remedy for Fourth Amendment violations in *Mapp v. Ohio* (1961), plus a civil damages remedy in *Bivens v. Six Unknown Agents* (1971).

I thus applaud the endeavor of H.R. 5607 to constrain abusive applications of the state secrets doctrine. My opening observations lead to several legislative recommendations.

The burden of proving entitlement to the state secrets privilege should be placed on the government for threefold reasons: evidentiary privileges obstruct the search for truth; the state secrets privilege casts aspersion on the nation's system of justice by blocking a remedy for a violation of constitutional or sister legal rights; and, the government holds the information relevant to proving the state secrets privilege. I would also recommend that in cases implicating constitutional as opposed to nonconstitutional wrongdoing, the government should be required to prove state secrets by clear and convincing evidence standard, not simply by a preponderance.

In ruling on state secrets claims, the legislation should also instruct judges to consider both the government's unique expertise in knowing what disclosures might harm national security and the government's institutional incentives to prevaricate or distort the truth over national security to conceal crime, maladministration, or politically embarrassing mistakes. In *Reynolds,* the government lied about secret spying equipment to avoid civil liability for an airplane crash under the Federal Tort Claims Act. In the *Pentagon Papers* case, the government misrepresented the harm that would ensue from publishing the history of the Vietnam War. President Nixon also made bogus national security claims in an effort to obstruct the Watergate investigation. In *United States v. United States District Court* (1972), the Supreme Court rejected the government's claim that judges were too naive in domestic security cases to ascertain probable cause needed for warrants. Justice Lewis Powell explained: "We cannot accept the Government's argument that internal security matters are too subtle and complex for judicial evaluation. . . . If the threat is too subtle or complex for our senior law enforcement officers to convey its significance to a court, one may question whether there is probable cause for surveillance."

While judicial vetting of national security determinations are not daily subjects of litigation, neither are they a novelty. They are made in suits under the Freedom of Information Act. They are made by FISA judges in issuing warrants for the collection of foreign intelligence. And judges review the government's deletions of alleged national security information included in the writings of former CIA officers or otherwise, for example, the decision by the United States Court of Appeals for the Fourth Circuit in *United States v. Marchetti* (1972).

Evenhandedness is a chief feature of civilized law. The state secrets privilege should not skew justice. It should not expose itself to withering criticism reminiscent of Anatole France's observation: "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread." Similarly, the state secrets privilege should empower the judge, after examining in camera all evidence said to be protected by state secrets, to award judgment either in favor of the plaintiff or in favor of the defendant whenever the ends of justice would so require. The privilege should not be a one-way street in favor of the defendant, especially because—in the words of Chief Justice Marshall—its invocation by the defendant casts obloquy on the nation's jurisprudence.

Finally, constitutional doubts raised by detractors of the legislation are frivolous. No Supreme Court decision holds that state secrets in civil litigation is anchored to the Constitution. Further, under the *Gravel* precedent, Members of Congress enjoy authority to disclose classified information in conjunction with their legislative duties. In addition, even if there were no state secrets privilege whatsoever, the President would not be compelled to disclose anything. The government could simply accept a default judgment or an adverse finding of fact and keep all information secret to protect what the President believes is national security. A similar choice is required in criminal prosecutions under the Classified Information Procedures Act of 1980: when a summary of classified information will not satisfy the notice required by due process, the government must drop the prosecution if it wishes to protect the alleged state secrets.

Even assuming the state secrets privilege is an inherent Article II power to protect the national security, Congress is empowered to regulate its exercise under the Necessary and Proper Clause to prevent abuses which cast obloquy on the nation's jurisprudence and to deter constitutional and related legal wrongdoing. In addition, the separation of powers doctrine only prevents Congress from exercising an "over-

riding" influence over an executive power. The proposed legislation does not require the President to reveal anything believed to need secrecy to protect the national security. The maximum sanction under the proposed legislation is the payment of money damages which would be funded from congressional appropriations. And the state secrets standard established by the legislation does not compromise national security but generally echoes what the President through executive orders has decreed justifies secrecy.

In sum, state secrets legislation is clearly constitutional and should not be skewed by concocted fears of unconstitutionality.

Mr. NADLER. Thank you.

We will now go to questioning of the witnesses. As we ask questions of our witnesses, the Chair will recognize Members in the order of their seniority on the Subcommittee, alternating between majority and minority, provided that the Member is present when his or her turn arrives.

Members who are not present when their turn begins will be recognized after the other Members have had the opportunity to have their questions. The Chair reserves the right to accommodate a Member who is unavoidably late or only able to be with us for a short time.

I will begin by recognizing myself for 5 minutes to question the witnesses.

First of all, Mr. Fein, we have heard arguments that the Constitution empowers the president to protect national security and that the state secrets has a grounding in these constitutional claims. Mr. Vatis says that it requires the courts to defer to the government's claim.

It seems that at bottom this is the same argument we have heard over and over in regard to many controversial secret programs, namely that we look only to the president's Article II powers, as if the Congress' Article I powers and the Judiciary's Article II powers did not exist. Could you comment on this briefly because I have got a bunch of other questions?

Mr. FEIN. Yes, the Constitution abhors the idea that any particular power is totally unchecked by any of the other branches. The basic standard is do other branches that are regulating or overseeing exercise a crippling or dominating influence over the executive branch, and this legislation certainly does not meet the standard.

Mr. NADLER. So, it would be constitutional in your view.

Mr. FEIN. Absolutely.

Mr. NADLER. Thank you.

Mr. Vatis, we seem to agree on many points: that Congress must check the tendency of any Administration to overclassify and use secrecy to cover up, that judges must directly examine the evidence and make the ultimate judgment on privilege, as has not often been the case in the state secret cases. I question your view that a court should give deference to the government's judgment on the privilege, as I understand your position.

According to the dictionary, deference—and the bill says that the government's testimony should have the same weight as other expert witnesses. According to the dictionary, deference has two main meanings. It can mean that one shows appropriate, courteous respect to a person perhaps for their knowledge, expertise, experience, et cetera. We expect a judge to show deference in that sense

to any expert witness. And our bill says that the government's expert testimony should be treated in the same manner as other expert testimonies.

However, the primary meaning of deference, according to the dictionary, is submission or yielding to the opinion or judgment of another. If the judge has to submit or to yield to the judgment of the executive, can he meaningfully make the ultimate independent judgment if in the next breath you suggest that the judge has to defer to the executive's assertion, or do you have a different meaning of the word deference?

Mr. VATIS. Mr. Chairman, I definitely do not mean the second definition that you offered of submission. I do mean, though, giving due regard and substantial weight to the government's judgment about the narrow issue of whether——

Mr. NADLER. Shouldn't the court give due regard and substantial weight to any expert witness?

Mr. VATIS. It should give due regard based on the background of those witnesses, but I think going in, there should be at the very least a presumption that the government has a valid basis and that it is——

[Crosstalk.]

Mr. NADLER. I think that is the key. There should be a presumption that the government has a valid basis for its claim of secrecy.

Mr. VATIS. If supported by logic and commonsense and by the evidence that the official relies on——

Mr. NADLER. All right——

Mr. VATIS [continuing]. In the declaration or affidavit.

Mr. NADLER. All right, well, the bill encourages courts to appoint special masters or independent experts to assist the court. If the court were to appoint an independent expert, let us say, who had recently served as the director of the CIA, and on behalf of the government a junior CIA official testifies, why shouldn't the court treat these two witnesses the same and be required to undertake a similar assessment of their expertise and credibility, particularly since the independent expert has no vested interest in the outcome?

Mr. VATIS. Because I think that the—for two reasons: One, this presently serving government official has access to intelligence and knowledge of ongoing programs and ongoing governmental interests that the former government official who might be serving as a special master or witness——

Mr. NADLER. And second?

Mr. VATIS [continuing]. Does not have. Second is the constitutional responsibilities that I think should be accorded some weight. And I think it is important on this issue to think of some concrete examples. If the plaintiff in a civil case is seeking access to notes of a meeting between a high-level U.S. government official and a high-level allied official, for example, in which a key decision was made that affected the plaintiff, and the government says if that information is disclosed, it will cause significant harm to our diplomatic relations with that ally, they will never trust us again, and they offer details, I don't think the court should say, well, the witness——

Mr. NADLER. You don't think the court should substitute its judgment—you don't think the court should substitute its judgment on that question.

Mr. VATIS. On that sort of question.

Mr. NADLER. Okay, Mr. Fein, could you comment on what Mr. Vatis has said?

Mr. FEIN. Well, there is a similar argument that was made by the government in a case in 1972. It was called the Keith case—Mr. Conyers probably remembers that; it is out of his district, Judge Keith—in which the government argued that judges are too naive and simpleminded to decide in domestic security cases whether there is probable cause to believe that some wrongdoing in a security area was underway.

And Justice Powell wrote for a unanimous court, quote, "we cannot accept the government's argument that internal security matters are too subtle and complex for judicial evaluation. If the threat is too subtle or complex for our senior law enforcement officers to convey its significance to a court, one may question whether there is probable cause for surveillance." That certainly was a repudiation of the idea that judges simply are uncomprehending of the nature of security risks and therefore must trust the word of the government branches.

Mr. NADLER. Thank you. My last question—because my time is almost up under lenient interpretation.

Ms. Fuchs, you have litigated a lot of government secrecy claims, and you have written a major article on the proper role of judges in state secret cases. We know there has been abuse of secrecy claims illustrated in cases like Reynolds and through admissions of high-ranking officials of massive overclassification to avoid government embarrassment. In light of that history, what do you think the impact would be of requiring substantial deference or utmost deference of state secret assertions?

Ms. FUCHS. I frankly think that using the word deference at all is going to nullify everything else that is in the bill. I think that it is clear in the FOIA instance where courts are supposed to be conducting de novo review that they will always sort of tend toward deference anyway. And so it is important that any extra weight that is given to the government be very narrowly constrained.

Mr. Vatis talked about due regard being given to the government's view based on their background. And indeed, you know, the expertise of someone who is currently operating within an intelligence agency would be given regard by a judge. That is what judges do all the time. But if the word deference is used for some sort of weight, then the impact is basically going to be that courts are going to tend toward a sort of chevron deference. And if that is the case, there is not going to be any real check on the secrecy.

Mr. NADLER. I thank the witnesses.

Now recognized for 5 minutes, the distinguished Ranking Member, Mr. Franks.

Mr. FRANKS. Well, thank you, Mr. Chairman.

You know, Mr. Chairman, one of the privileges I have in this Congress is also to serve on the Armed Services Committee and the Subcommittee on Strategic Forces. And of course the Strategic

Forces Committee has to do with the nuclear profile of this country. And I was struck by Mr. Fein's comment relating to the Rosenbergs. And you know, it occurs to me that sometimes we need to understand the significance of our state secrets.

I am convinced historically that had we been able to control our state secrets that there never would have been a Cold War. And as we discuss some of the challenges that we face with other Nations even today—China is a perfect example. Much of the technologies that they have received—and this is all open-source information—that they have received—at least the reports or the comments that I am making are—that much of the information that they have received from our government, either clandestinely—they have either stolen it or it was given to them otherwise—has given them great advances in the area of aiming technologies, missile aiming technologies, that are, for instance, part of the reason that they have been able to advance their ASAT capability, shooting down their own satellites.

And I am afraid that some of that information was lost accidentally by the United States. Some of it was transferred openly by the Clinton administration. But the reality is that we probably are on some type of collision course at some point with China in what I don't know how will completely play out.

The challenges of state secrets are not small ones. I am convinced, being on the Armed Services Committee, that the greatest compromise to American military superiority is the loss of our secrets. Nothing empowers our opponents more than them gaining our technologies and either leapfrogging on it or building on it to be able to surpass where they would have been otherwise.

I just wanted to throw that out, Mr. Chairman.

Mr. Chairman, the state secrets doctrine remains strongly supported by today's Supreme Court, even in its Boumediene decision, granting habeas corpus litigation rights to terrorists. And by the way, Mr. Chairman, that was the part that I found laughable, not the bill—was the——

Mr. NADLER. I think that was clear.

Mr. FRANKS [continuing]. That the court—I just wanted to make—in deference to my good friend, Chairman Conyers.

Granting habeas litigation rights to terrorists, I think, is also something else that is on a collision course with reality. Justice Kennedy in his major opinion acknowledged the government's, quote, legitimate interest in protecting sources and methods of intelligence gathering and stating we expect that the district court will use its discretion to accommodate this interest to the greatest extent possible, while citing its Reynolds decision in doing so.

And so, Mr. Vatis, my question to you is what does that tell you about the Supreme Court's continued interest in protecting the state secrets privilege as understood today?

Mr. VATIS. I think the Supreme Court in the Boumediene decision and in other previous decisions—Reynolds and even earlier as you have alluded to—have articulated a privilege that has substantial force. And I think if left unregulated by a statute, the Supreme Court and lower courts will continue to do so. As I said in my opening statement, I don't think that precludes this body of government from getting involved and regulating judicial review of assertions

of the state secrets privilege. I think it is a perfectly appropriate endeavor.

I do think, though, that the regard for executive judgment and executive prerogatives under the Constitution should be part of this statute. And I think the place where that should be reflected is in the standard review, as I have alluded to.

And again, I don't want my position to be misunderstood or mischaracterized. I agree with the provisions in the bill calling for independent judgment, independent review of all of the evidence by the judge. It is merely a question of whether government witnesses should be given deference.

The word deference does not need to be used. Words like substantial weight, words like if it is supported by the evidence or if a determination is reasonable, things like that. There are many ways that this body of government has required deference. There are many articulations of it and many levels of it. I think utmost deference would be the wrong standard.

Mr. FRANKS. I understand.

Mr. VATIS. But——

Mr. FRANKS. Thank you, Mr. Vatis.

Mr. VATIS. But I think there should be some level of deference——

Mr. FRANKS. Thank you, sir.

Mr. Chairman, I guess, you know, I have made this point before. This, again, is another hearing that seems to point toward doing what we can to give terrorists or the enemies of American national security greater rights, greater opportunities to avoid justice here.

And I understand that part of our constitutional system is to make sure that those accused have the rights of being able to either extol or demonstrate their innocence. I understand that, and I believe in part of it. But we have not had one hearing yet on doing what we can in this Committee, which is our primary charge, to protect the constitutional rights of the people, to protect their lives and their constitutional rights, their lives being their first constitutional right——

Mr. NADLER. Would the gentleman yield?

Mr. FRANKS. Yes, sir, Mr. Chairman.

Mr. NADLER. Well, I just point out that the bill we are considering has nothing to do with the rights of people accused of anything. The question of how to handle secrets in the context of a criminal trial was determined by this Congress 30 years ago, 20 years ago, in the—what do you call it—the Classified Information Procedures Act. What this bill deals with and what this hearing deals with is how to deal with civil litigation if someone is suing the government claiming his rights are violated and the government asserts a state secret.

Mr. FRANKS. I understand that, Mr. Chairman.

Mr. NADLER. I yield back.

Mr. FRANKS. I am reclaiming my time.

The challenge is that some—you know, the terrorist organizations are not so acquainted with the subtleties that you mention, and they are already suing our government. So, it is astonishing to me. I mean, in my opening testimony, I talked about Guanta-

namo detainees that will be suing our government pretty soon under the new habeas rights that the Supreme Court gave them.

So, the bottom line here is—what concerns me is it seems like most of the impulse of the Committee has been to try and embarrass the Administration, hurt the Administration, rather than try to do what we can to protect the Constitution and the American people. And I just point to the Robert Chesney of Wake Forest University law school, the study that he did showing—and I will just read these two quotes and I am done.

He concluded that recent assertions of privilege are not different in kind from the practice of other Administrations. And he also concluded that the available data, while they do suggest privileges continue to play an important role in the Bush administration, it does not support the conclusion that the Bush administration chooses to resort to the privilege with greater frequency than prior Administrations or unprecedented substantive context.

And I just feel like we are once again focusing on things that are not to the greatest extent important to the American people and to the Constitution of the United States. And I think that is a failing of the Committee here.

And I yield back.

Mr. NADLER. I thank the gentleman.

I would simply like to comment briefly that this is not an attempt to embarrass this or any other Administration. I believe, and we differ obviously, that for future Administrations—because if we pass this bill, by the time it is signed into law, it is going to be a future Administration—we need to control the use of the state secrets privilege. And whether or not the Bush administration has used it more frequently is an interesting question.

But the real change is that it is used today in a way that it wasn't used previously to dismiss a case ab initio, that is from the beginning, not merely to object to a specific piece of evidence. And this bill seeks to deal with that question too, although we haven't had any comment on that.

But I will now yield to the gentleman, the Chairman of the full Committee, the gentleman from Michigan, Mr. Conyers, for questions.

Mr. CONYERS. Thank you, Mr. Chairman. This is an incredible hearing for this reason. My dear friend, the Ranking Member, thinks it is an incredible hearing for another reason. But the reason that I think it is incredible is that all of the witnesses have a common point of agreement except on the exact standard of court review. That is really quite amazing to me.

Mr. Vatis argues for deference. Ms. Fuchs and Shapiro and Fein caution strongly against that. And we may be able to—is there someway that there is a compromise that could loom up that would get all of you aboard on this point that Mr. Vatis has raised, or are we going to have to decide one way or the other?

Mr. VATIS. Mr. Chairman, I think there are ways to bridge the perceived gap because I don't think the gap is as large as it might be described. I think there are, as I mentioned earlier, different levels of deference that can be accorded.

Ms. Fuchs has said courts are going to defer anyway, but essentially I think she said don't invite them to defer too much. I think

by being specific in the statute that is ultimately passed, Congress can make sure that they don't defer too much. If the statute doesn't say with specificity how much deference to give, how much weight to give to the Administration's assertion, some courts will defer too much; other courts won't defer enough in my judgment.

And so I just think Congress should be specific about how much weight should be given to the Administration's assertions of harm. And I think different words can be used, and we could probably come up with words or options, I think, that might be a compromise.

Mr. CONYERS. Well, that is encouraging.

Mr. FEIN. I think, however, that there needs to be some consensus as to whether or not the judge only is to be alerted to the fact that the government has expertise without mentioning it does, but it also has the incentive to use that expertise for political purposes and distort the record. They are both true, and they both look in opposite directions when it comes to paying attention to what the executive branch has said would be the national security fallout.

The fact is the government sometimes lies about what it knows—I mean, if we would go back to the Gulf of Tonkin Resolution with President Lyndon Johnson about whether there were torpedoes shot against the Turner Joy. So, it doesn't mean that they always lie, but sometimes they do; sometimes they don't. And I think it is important that the statute flag that as an element that the judge should consider. I think there is a too ready acceptance that anytime the executive branch says anything, well, we should automatically bow like vassals and say it must be true.

Mr. CONYERS. But is Mr. Vatis right that we might be able to resolve this language? This is a matter of phrasing.

Mr. SHAPIRO. Mr. Chairman, let me just say, I do not think this is an unbridgeable gap. But I think the first point you made is really the most important and that is that the areas of agreement among all of us are far more substantial than this area of disagreement, as important as it may be.

So, everybody who is testifying here today believes: number one, that Congress has the constitutional authority to act; number two, Congress should exercise that authority; number three, Congress should exercise that authority in a way that preserves a meaningful and independent judicial role in reviewing the state secrets privilege; and number four, the state secrets privilege should not, except in the rarest of circumstances, be used to dismiss cases in their entirety.

Those areas of common agreement, seem to me, form the basis for very significant legislation from this Committee and this Congress. I happen to agree with Mr. Fein and Ms. Fuchs that the issue is really not one of deference, that the issue is one of persuasiveness. Deference tends to confuse the issue.

And to use Mr. Vatis' example, if you have a present Administration official who has access to ongoing intelligence information that is no longer available to a former Administration official, then the present Administration official's testimony will be more persuasive and is likely to be credited by the judge for that reason without having to put the language of deference or substantial weight into

the bill. I think the way to address the concern that Mr. Vatis is raising, which I understand, may be not in the language of the bill but in some cautionary language in the Committee report.

Mr. CONYERS. Does the witness represent your views, Ms. Fuchs, pretty well?

Ms. FUCHS. I would say that does represent my view. I just want to add one point, which is that this bill also does provide for interlocutory appeal. And so there is a protection against a judge who is overreaching from the government's perspective. While it may be that there is a concern about one rogue judge, once you get it to the court of appeals where you have three appellate judges, that is certainly a significant protection against a judge going too far.

But I also just would add that the former director of the Information Security Oversight Office, who is also the secretary of the Interagency Security Classification Appeals Panel, which decides on classification reviews within the government, has said that his power to actually order declassification was never used but proved to be a very forceful power to have in trying to get the agency to explain why things couldn't be declassified.

Mr. CONYERS. Well, I want to thank you all. This has been a very important and significant hearing.

Mr. NADLER. The gentleman from Virginia is recognized.

Mr. SCOTT. Thank you, Mr. Chairman, and thank you for calling the hearing.

Mr. Fein, as I understand your testimony, the state secret privilege does not exist in criminal court.

Mr. FEIN. There is a requirement that if the government is unable to provide a summary of classified information that would give the defendant all the due process, notice and warning that he would need to mount an adequate defense, the government either has to dismiss the case or yield the evidence.

Mr. SCOTT. And if the government is being sued as a defendant in a case, the state secret is a defense in a civil case.

Mr. FEIN. That is correct. And I think what this bill does in circumstances where the judge would think it would be in the interest of judgment to say that if the government does not comply with an obligation to give over evidence that it may think should be protected but the judge says should not be, then the government has to choose either default judgment or give over the evidence.

Mr. SCOTT. Okay, now, this works when the government is a defendant. How does it work if the government is not a defendant but just evidence is needed to sue somebody else?

Mr. FEIN. The government usually then intervenes and makes the case. That is what happened in the telecommunications cases that were recently mooted by this House's decision to vote for the FISA Amendments Act of 2008.

Mr. SCOTT. Now, who gets to claim the privilege? Is it the president himself, high-ranking officials or any Federal employee?

Mr. FEIN. I think the Congress could stipulate who should be required to actually submit the affidavit and claim the privilege. Customarily, it has not been required to be the president. Oftentimes, it would be CIA director, sometimes Defense Department persons. But I think this body could require the highest level of attention

to this, like in executive privilege cases where the president would have to invoke the privilege for it to apply.

Mr. SCOTT. Now, you have indicated that there is a difference between a state secret and an embarrassing situation. And if you have presented a prima facie case, you don't want the government just to say we win but we have a state secret and can't show you why.

Mr. FEIN. No, I don't want that to happen, especially when you have constitutional wrongdoing at stake. And I think, Mr. Congressman, that it is especially important to preserve the ability to seek redress for constitutional wrongdoing in a private litigation because as we know that the government has exclusive discretion to bring criminal charges against an executive official based upon alleged constitutional wrongdoing, and there is no check on the executive branch that decides that is not appropriate. So, this is a complement to separation of powers to enable at least a different forum to examine what is allegedly a constitutional wrong.

Mr. SCOTT. And with a state secret privilege claim, who has the burden of proof now, and who would have the burden of proof under the bill?

Mr. FEIN. Well, the burden of proof and privilege customarily lies on the party seeking to invoke it. And this bill I think properly makes it clear that the burden of proof is on the government. I would suggest that in constitutional claims it be a burden not just by preponderance but by clear and convincing evidence when the result is if it is proven, the claim is dismissed.

Mr. SCOTT. Now, is this an ex parte or an adversary proceeding?

Mr. FEIN. It is really up to the judge to decide what is necessary to protect national security.

Mr. SCOTT. And is the fact that our government actually tortured someone—is that a state secret?

Mr. FEIN. Well, I think certainly in many executive branch officials that would be correct because you are disclosing a method of intelligence collection. And it is often said the reason why we have to keep secret all these methods is that otherwise the enemy would know how to train its cohorts to resist this kind of torture. And that is what, to me, makes the state secrets doctrine without some regulation quite an instrument of oppression.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. NADLER. I see Mr. Cohen is just arriving.

And, Mr. Cohen, do you wish to be recognized to ask questions at this point?

The gentleman from Tennessee is recognized.

Mr. COHEN. Thank you, Mr. Chairman. I have been in Transportation, where I had a bill.

What should the judge do if the government provides a substitute for limited release to counsel and parties but the government argues it cannot provide an unclassified version as the bill currently stipulates?

Mr. Fein, can you help me with that?

Mr. FEIN. Well, my desire is that if the unclassified version provides all the evidence needed for the plaintiff to move forward on the case, there is nothing wrong with that. That is how it works in the criminal context.

My view is that if the plaintiff can establish a prima facie constitutional wrong, and that obviously means the government has to have an opportunity to discredit the evidence submitted, and then the government says, but sorry, you lose because state secrets would be disclosed in order to prove a defense maybe that we didn't torture you or whatever, then I think, as in the criminal context, the judge should have discretion, just award judgment for the plaintiff.

The plaintiff would have to then prove the amount of damages involved. I don't think it comports with our idea of justice to tell someone you lose your right for a remedy for a constitutional wrong because the government would disclose a state secret in order to defend or in order for you to prevail.

And let me give an example of the situation: the el-Masri case, where the gist of the government's defense was if Mr. el-Masri had to prove the identity of the CIA operatives who kidnapped and took him to Bagram for coercive questioning—well, a CIA operative is an intelligence source and so there is a state secret, so you lose. That seems to me a monstrous proposition in a government that is supposed to be a government of laws and not of men.

Mr. COHEN. Does anybody on the panel differ? Good.

I understand state secrets and the importance of the state secrets, but as Mr. Fein points out, the government is supposed to be of laws, and we are supposed to give people an opportunity when they have had some wrong done to them to have a redress of grievances. That seems inherent in our system of government, a due process hearing and opportunity for a hearing and then for some type of a decision. And it does seem like we should come up with some type of an alternative that can satisfy both parties, which we normally do in these cases.

And I would yield the remainder——

Mr. NADLER. Would the gentleman yield for a moment before he yields back?

Mr. COHEN. Yes.

Mr. NADLER. Thank you.

I just want to mention that the bill is very clear on that point. It says in a civil action brought against the government, if the court orders the government to provide a non-privileged substitute for evidence or information and the government fails to comply, in addition to any other appropriate sanctions, the court shall find against the government—the court shall find against the government on the factual or legal issue to which the privileged information is relevant.

It doesn't go as far as Mr. Fein would say that the courts shall find against the government on the case that you win. But it says on the factual or legal evidence, on the factual or legal issue to which the point of evidence is relevant, that if the government refuses to provide it despite the court saying it can be provided, that the court shall find against the government on that factual or legal issue, which may or may not determine the outcome of the entire case.

Mr. COHEN. And now I yield back the remainder of my time.

Mr. NADLER. Let us see—we have no further witnesses. Without objection—well, first of all, let me say I thank the witnesses, and I thank the Members for their participation.

Mr. FEIN. Mr. Chairman——

Mr. NADLER. I am told that Mr. Fein had something he wanted to add, so——

Mr. FEIN. I just would like——

Mr. NADLER. Without objection, I will recognize him.

Mr. FEIN. Thank you, Mr. Chairman.

I would like to make this closing observation, and that is there has been a suggestion that all of these efforts to inject due process in the rule of law makes us less safe. Well, we have 26 CIA operatives under indictment and prosecution in Milan, Italy, for kidnapping and allegedly taking an Egyptian cleric to Egypt for torture. That is not making us safer.

With Mr. el-Masri's case, I believe there are arrest warrants out for 13 CIA operatives for the kidnapping and abuse of Mr. el-Masri. We now have suggestions in the recent book by Jane Mayer that FBI agents who are experts in interrogation refused to participate in detainee debriefing by the CIA because they did not want to be complicit in war crimes. Those kinds of things don't make us safer. It is wrong to assume that every time we move to a rule of law we become safer.

Mr. FRANKS. Mr. Chairman, could I just respond—60 seconds? I——

Mr. NADLER. Without objection.

Mr. FRANKS [continuing]. Absolutely believe that the gentleman makes a good point. I would suggest that the indictments and that these people are being looked for is some evidence that the system is working already.

Mr. NADLER. But those—excuse me, would the gentleman yield?

Mr. FRANKS. Sure.

Mr. NADLER. Are those indictments in the United States or in other countries?

Mr. FEIN. They are indictments of the United States officials, and moreover we have refused to extradite and cooperate——

Mr. NADLER. So, they are indictments in other countries.

Mr. FEIN. Yes.

Mr. NADLER. Thank you.

I would suggest that indictments in other countries don't necessarily show—Mr. Franks, I would suggest that indictments of American government officials by other countries don't necessarily show that the system is working well.

Mr. FRANKS. To suggest that we have war crimes on our hands here, Mr. Chairman, I just am convinced that, you know, when we see wrongdoing in our system, there is an existing commitment to pursue that. We are going to execute one of our own soldiers before long, Mr. Chairman. This country is committed to justice. And I am just convinced that we are going in a direction here that is ultimately not to the benefit of the American people and the Constitution.

Mr. CONYERS. Mr. Chairman, might I——

Mr. NADLER. Without objection, the Chairman is——

Mr. CONYERS. What is the direction that you see me going in that is detrimental to the country?

Mr. FRANKS. Mr. Chairman, I think in general—I have said this before. I think in general this Committee has—and I understand the political nature of the Committee, but I think we have been so focused on things like habeas corpus for terrorists, which will ultimately make our efforts against them unworkable, things like that, that we are moving so much in a direction here to make it easier for terrorists to survive the system that we are overlooking the fact that jihadist terrorism and the coincidence of nuclear proliferation represents a profound threat to this country. And perhaps we may have to revisit this in times in the future that we don't——

Mr. CONYERS. And do you have the same view of the direction of the Supreme Court?

Mr. FRANKS. I apologize, Mr. Chairman.

Mr. CONYERS. I said do you have the same view about the direction of the Supreme Court as well as this Committee?

Mr. FRANKS. Well, the only Supreme Court ruling that I talked about today was the Boumediene decision, and I think that was wrongly decided. And I think ultimately the Congress will have to address it.

Mr. CONYERS. I am not talking about that one case. I am talking about the direction of the Supreme Court in your opinion.

Mr. FRANKS. You are talking about the general trend——

Mr. CONYERS. Yes.

Mr. FRANKS [continuing]. Of the United States Supreme Court?

Mr. CONYERS. That is right.

Mr. FRANKS. Well, I guess right now it is pretty much, you know, been politicized to the extent that almost everyone in this Congress knows that there are four liberals on the court and four conservatives and one guy in the middle. And it shouldn't be such that every time the Supreme Court sits down that we have to wonder what one guy is going to do to the Constitution.

Mr. CONYERS. So then, I presume that your answer to my question is yes.

Mr. FRANKS. I am not trying to be dense here, Mr. Chairman. Your question is: Do I think the Supreme Court is doing what?

Mr. CONYERS. Well, that is what I was trying to find out from you, sir. You were the one who said you thought the Committee was moving in the wrong direction.

Mr. FRANKS. Right.

Mr. CONYERS. And then I was asking you do you think the Supreme Court is moving in the wrong direction as well, and I presume that your answer is yes.

Mr. FRANKS. I think they went in the wrong direction with the Boumediene decision, yes, sir, I do.

Mr. CONYERS. Well, I give up.

Mr. FRANKS. You know——

Mr. CONYERS. But we have plenty of opportunity—look, you and I work together 4 to 5 days a week whenever we are in session, and so we have a great opportunity to continue this discussion without taking up the time——

Mr. FRANKS. Thank you, Mr. Chairman, I would be glad. I really do want to—I do think Mr. Alito and Mr. Roberts were great additions to the court.

Mr. NADLER. Well, thank you for that opinion.

Inspired by this colloquy, without objection, I am going to ask the witnesses one final question for each of you. And this will actually get back to discussing this bill sort of. [Laughter.]

If you have an Administration, and I don't mean to cast any aspersion on this or any other Administration. I am asking a theoretical question now. If you have an Administration that is abusing civil liberties, that does wrong things to people, and let us assume that an agent of that Administration improperly arrests someone, improperly holds that person under incommunicado, improperly tortures that person, improperly does all kinds of violations of rights of that person, one presumes that that Administration will not prosecute itself, will not prosecute its own agents for those terrible acts.

The normal remedy in American law—the only remedy that I know of—is for that person, once recovered from the torture, to sue for various kinds of damages and in court elucidate the facts and so forth and get some justice and perhaps bring out to light what happened so that that Administration would not do it again or the next one wouldn't.

If, however, that lawsuit can be dismissed right at the pleading stage by the assertion of state secrets, and if the court doesn't look behind the assertion to the validity of that assertion and simply takes it at face value, well, the government says state secrets would be revealed and it would harm the national security if this case went forward, therefore case dismissed, which seems to be the current state of the law—if that continues and if we don't change that, what remedy is there ever to enforce any of our constitutional rights? Or am I being too alarmist?

Why don't we go left to right here.

Ms. FUCHS. I mean, indeed that is a fact, sort of the model in the FOIA, because the government certainly isn't doing anything to make sure that the public is getting information it wants. And so we are very free to sue, and we go to court. And Congress has said in cases where its exemption—where the information is security classified, you can still sue, and you can still challenge the secrecy. And so that is exactly what is needed here.

I wonder if I might take one moment to respond to Mr. Franks' statements earlier—because I have a burning desire to do so—about the importance of protecting our country. I suspect that everyone on this panel cares a great deal about protecting country. I mean, we are all American citizens. You know, I have children; I am a mother. I want my kids safe. And I live in Washington, D.C., which some people think is, you know, ridiculous.

I don't think this bill is about, you know, whether or not we are protecting our country. The reality is that our government spent $8 billion in the last year protecting secrets, and I would like that $8 billion of my tax money and everyone else's tax money to be spent protecting real secrets, not protecting things that are just embarrassing to the government and not using that to interfere with people's ability to seek compensation——

Mr. NADLER. Thank you.

Mr. Shapiro?

Mr. SHAPIRO. Four quick sentences: Number one, what you describe as hypotheticals are, of course, sadly not hypotheticals for the actual experiences of not only Mr. el-Masri but Mr. Arar and others. Number two, I think when the government invokes the state secrets privilege to prevent inquiry into serious allegations of torture and kidnapping, courts need to look at the invocation of the state secrets privilege skeptically and make sure that it is really being raised to protect national security and not to shield government officials from legal and political accountability.

Number three, I will say that the point you raise about not dismissing cases at the outset is an extraordinarily important one. I tried to address it, albeit briefly, in my opening remarks. I have no doubt that had we been given the opportunity in the el-Masri case, we could have proven that he had been the victim of serious and government misconduct and abuse based on non-privileged information in the public record. We were never given that opportunity.

And fourth, I think if the courts are not going to respond, I would hope at the very least that this Committee and other Committees in Congress could perform a fact-finding role in some of these cases——

Mr. NADLER. All right, but my question, and I hope you will answer the question and the other two witnesses also. Let us assume we change nothing with regard to the state secrets and it continues the way it is. What mechanism exists if any under which we can prevent any Administration from violating all sorts of constitutional rights period?

Mr. SHAPIRO. I think we have no legal mechanism, Mr. Chairman.

Mr. NADLER. Thank you.

Mr. Vatis?

Mr. VATIS. Mr. Chairman, I think even under this bill, if it were passed as written today, there would still be cases where the government could violate the law, could violate criminal laws, and yet the state secrets privilege would result in the case ultimately being dismissed if there were no other way to make the case with unclassified, non-secret evidence. But there is another mechanism. We should not rely just on the courts to check illegal conduct by the executive branch.

There is, after all, this body, which has extensive oversight powers and also ultimately has the power of impeachment, which at least in the last 8 years has not been utilized. And I will leave it purely in the realm of the hypothetical that you pose, but if an Administration is acting lawlessly and repeatedly so in violation of criminal laws, that is certainly a high crime and misdemeanor worthy of impeachment. And so the political branch that this body represents, I think, has a role that it can and should play in such instances.

Mr. NADLER. Thank you.

Mr. Fein?

Mr. FEIN. I don't need to elaborate on my view of impeachment, but there is an alternate idea that maybe can be explored. I understand the independent counsel law fell into—because of disrepute,

but it would be constitutional under the Supreme Court's decision to establish the ability to create a special counsel, if you will, appointed by judges in cases where the government had the clear conflict of interest you identified that would prevent an evenhanded assessment of whether or not crime had been committed to enable something like a second edition of Archibald Cox to investigate something like Watergate.

And that is what I think needs to be seriously explored, because you are not going to resort to impeachment, you know, every time the government violates a law and it is not prosecuted by the president of the United States. So, it is something that would be an ad hoc kind of arrangement when the conflict of interest is most acute, when it is the higher-level-up officials who are implicated.

And one example would be: I know the investigation now underway with the CIA officers who destroyed that video interrogation tape would be guilty of obstruction of justice or otherwise. There the reliance upon the Department of Justice to prosecute is—the confidence level is very low. An outside counsel would probably be a better choice.

Mr. NADLER. Thank you.

I will now recognize the distinguished Ranking Member for comment.

Mr. FRANKS. Mr. Chairman, just to clarify. You know, my comments related to what I perceive as the wrong focus of this Committee does not in any way call into question the patriotism or the commitment to anyone on the panel. I would just suggest that while we have spent $8 billion—and I will accept your number—to keep our state secrets, I would remind us all that two airplanes hitting two buildings cost us $2 trillion. And if those same people gain the right state secrets, they may turn jihad into nuclear jihad, and that will be of unfathomable danger to our children.

Thank you, Mr. Chairman.

Mr. NADLER. Thank you.

I wish to thank our witnesses and the remaining Members.

Without objection, all Members will have 5 legislative days to submit to the Chair additional written questions for the witnesses, which we will forward and ask the witnesses to respond as promptly as you can so that the answers may be made part of the record. Without objection, all Members will have 5 legislative days to submit any additional materials for inclusion in the record.

With that, again I thank the witnesses. I thank the Members.

And this hearing is adjourned.

[Whereupon, at 2:04 p.m., the Subcommittee was adjourned.]