



Office of the Attorney General
Washington, D. C. 20530

March 31, 2008

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This letter presents the views of the Department of Justice on the Manager's Amendment to S. 2533, the "State Secrets Protection Act." We strongly oppose this legislation. If the legislation were presented to the President in its current form, his senior advisors would recommend that he veto it.

The Constitution and settled Supreme Court precedent define the law governing the state secrets privilege, and this well-developed and well-tested body of law already strikes the appropriate balance between the need to protect the national security in civil litigation and the need to protect the rights of litigants in cases that implicate national security information. For the reasons set forth below, the Manager's Amendment would needlessly and improperly interfere with the appropriate constitutional role of both the Judicial and Executive branches in state secrets cases; would alter decades of settled case law; and would likely result in the harmful disclosure of national security information that would not be disclosed under current doctrine.

1. The state secrets privilege has a long and well-established pedigree.

The state secrets privilege long has been recognized by United States courts as a method of allowing the Executive branch to safeguard information regarding the Nation's security or diplomatic relations. *See Totten v. United States*, 92 U.S. 105, 107 (1875) (dismissing contract claim to protect civil war era espionage relationship). Over fifty years ago, in *United States v. Reynolds*, 345 U.S. 1 (1953), the Supreme Court articulated the basic contours of the state secrets privilege. The Supreme Court held that the United States may prevent the disclosure of information in a judicial proceeding if "there is a reasonable danger" that such disclosure "will expose military matters which, in the interest of national security, should not be divulged." *Id.* at 10. The Supreme Court recognized the imperative of protecting such information when it further held that even where a litigant has a strong need for that information, the privilege is absolute: "Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake." *Id.*¹

¹It has been claimed that the privileged documents at issue in *Reynolds* (concerning the investigation of a B-29 crash) did not actually contain any sensitive national security information. However, the Court of Appeals for

2. Several procedural and substantive requirements preclude the state secrets privilege from being lightly invoked or accepted.

Reynolds also imposes procedural and substantive requirements that preclude the state secrets privilege from being lightly invoked or accepted. As an initial matter, *Reynolds* requires that the privilege be formally asserted by (a) the head of the agency or Department that has control over the matter (b) after actual personal consideration. See 345 U.S. at 7-8. Mere invocation of the privilege is not enough. Rather, the privilege is not to be “lightly accepted,” *id.* at 11, and the Judicial branch must decide whether invocation of the privilege is proper and should be upheld, *see id.* at 9-10.

Once the privilege is upheld, a court still must decide what impact exclusion of the protected information will have on the case. For example, the court may decide that the privileged information is peripheral and that the case can proceed without it. Thus, assertion of the state secrets privilege does not necessarily result in dismissal of a lawsuit. But where the privileged information goes to the core of the case, where the plaintiff would need the information to establish a prima facie case, or where the defendant would need the information to present a defense, the case must be dismissed because there is no way to proceed without disclosing the information.

Dismissal of civil lawsuits to protect state secrets seemingly may impose a “harsh remedy” on individual plaintiffs, but the state secrets privilege is premised upon the conclusion that “the greater public good — ultimately the less harsh remedy” — is dismissal in order to protect the interests of all Americans in the security of the nation. See *Bareford v. General Dynamics Corp.*, 973 F.2d 1138, 1141 (5th Cir. 1992).

3. It is highly questionable that Congress has the authority to alter the state secrets privilege, which is rooted in the Constitution and is not merely a common law privilege.

It is far from clear that Congress has the constitutional authority to alter the terms and conditions of the state secrets privilege, as the bill purports to do. Congress, of course, cannot alter the President’s constitutional authorities and responsibilities by statute. The state secrets privilege is not a mere common law privilege, but instead, as the courts have long recognized, is a privilege with a firm foundation in the Constitution. Any doubt that the privilege is rooted in the Constitution was dispelled in *United States v. Nixon*, 418 U.S. 683 (1974), in which the Supreme Court explained that, to the extent a claim of privilege “relates to the effective discharge of the President’s powers, it is constitutionally based.” *Id.* at 711. The Court went on to recognize expressly that a “claim of privilege on the ground that [information constitutes]

the Third Circuit rejected a claim that the United States had committed a fraud on the court in *Reynolds* and reaffirmed that disclosure of the information over which the United States had asserted the privilege in *Reynolds* indeed could have caused harm to national security. See *Herring v. United States*, 424 F.3d 384 (3rd Cir. 2005).

military or diplomatic secrets” — that is, the state secrets privilege — necessarily involves “areas of Art. II duties” assigned to the President. *Id.* at 710; *see Department of Navy v. Egan*, 484 U.S. 518, 527 (1988) (President’s “authority to classify and control access to information bearing on national security . . . flows primarily from” his constitutional authority under Article II as Commander in Chief “and exists quite apart from any explicit congressional grant”); *El-Masri v. United States*, 479 F.3d 296, 303-04 (4th Cir. 2007) (holding that state secrets privilege “has a firm foundation in the Constitution”).

4. The Manager’s Amendment would inappropriately shift the responsibility for making national security judgments away from the Executive and to the courts, which have neither the constitutional authority nor the institutional expertise to assume such functions.

We strongly object to the Manager’s Amendment upon the ground that it allocates to the courts a responsibility that rests with the President under the Constitution: the authority to make independent and controlling determinations respecting the extent of harm to national security that would result from the disclosure of certain information. Under the bill’s proposed new 28 U.S.C. § 4054(e), a court would decide whether the Executive branch’s invocation of the state secrets privilege is “valid,” based upon a determination that disclosure of the information would “cause significant harm to the national defense or foreign relations of the United States.” Furthermore, proposed new 28 U.S.C. §§ 4053-4055 would impose wholly new procedures in civil litigation that would permit courts to require that the Executive branch attempt to segregate classified information or substitute non-classified information — the effect of which would be to have the courts, rather than the Executive branch, determine whether such segregation or substitution was possible without harm to national security. The bill’s treatment of national security determinations in proposed sections 4053-4055 raises separation of powers concerns, because the provisions purport to transfer to the Judiciary through legislation authorities that the Constitution commits to the President. *See, e.g., Egan*, 484 U.S. at 527, 530; *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) (noting limited judicial role with respect to “information properly held in secret”).

To be sure, under current law it is the province of the Judicial branch to determine whether the state secrets privilege has been invoked properly. It is well settled, however, that the courts should make that determination by according the “utmost deference” to the expertise and judgment of national-security officials. *E.g., Halkin v. Helms*, 598 F.2d 1, 9 (D.C. Cir. 1978) (“Courts should accord the ‘utmost deference’ to executive assertions of privilege upon grounds of military or diplomatic secrets.”) (quoting *Nixon*, 418 U.S. at 710). As many courts have recognized, the “utmost deference” to the judgment of the Executive branch is appropriate not only for constitutional reasons, but also for practical reasons, because national security officials “occupy a position superior to that of the courts in evaluating the consequences of a release of sensitive information.” *El-Masri*, 479 F.3d at 305; *see also Al-Haramain Islamic Foundation, Inc. v. Bush*, 507 F.3d 1190, 1203 (9th Cir. 2007) (“[W]e acknowledge the need to defer to the Executive on matters of foreign policy and national security and surely cannot legitimately find ourselves second guessing the Executive in this arena.”). As the courts have recognized, “[t]he

significance of one item of information may frequently depend upon knowledge of many other items of information,” and “[w]hat may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context.” *United States v. Marchetti*, 466 F.2d 1309, 1318 (4th Cir. 1972). “[C]ourts are not,” and should not be, “required to play with fire and chance further disclosure — inadvertent, mistaken, or even intentional — that would defeat the very purpose for which the privilege exists.” *Sterling v. Tenet*, 416 F.3d 338, 344 (4th Cir. 2005).

5. The Manager’s Amendment would raise other serious constitutional concerns.

Several provisions in the Manager’s Amendment, such as proposed new 28 U.S.C. §§ 4054(c) (requiring the Executive branch to submit sensitive and classified national security information to Federal courts) and 4058(a)(2) & (3) (requiring the Executive branch to submit classified affidavits asserting, and classified information relating to, the state secrets privilege to several congressional committees), would infringe upon the Executive’s constitutional authority under Article II to control access to national security information. *See, e.g., Department of Navy v. Egan*, 484 U.S. 518 at 527 (1988). These provisions are incompatible with the President’s constitutionally based privilege to withhold national security information. *See id.* at 527, 530; *Chicago & S. Air Lines*, 333 U.S. at 111; *Whistleblower Protections for Classified Disclosures*, 22 Op. O.L.C. 92, 95 (1998) (President has “the right . . . to decide to withhold national security information from Congress under extraordinary circumstances”); *id.* at 100 (President has the authority “to decide, based on the national interest, how, when and under what circumstances particular classified information should be discussed to Congress”). Of course, by well-established practice with respect to the Federal courts and pursuant to bipartisan traditions and the requirements of the National Security Act of 1947, the Executive branch keeps both the Article III judiciary and Congress appropriately informed of pending national security matters.

Proposed new 28 U.S.C. § 4052(c)(1) also could be construed to authorize courts to demand that the Executive branch grant security clearances to private plaintiffs’ counsel and other attorneys to enable them to access classified information. Furthermore, proposed section 4052(c)(3) appears to authorize Federal courts to second-guess the Executive branch’s reasons for denying a security clearance or, in the court’s eyes, for taking too long to decide whether to issue a security clearance. These provisions raise the same constitutional concerns noted in the preceding paragraph. In *Egan*, the Supreme Court explained that security-clearance determinations “must be made by those with the necessary expertise in protecting classified information,” and declared that “it is not reasonably possible for an outside nonexpert body to review the substance of such a judgment and to decide whether the agency should have been able to make the necessary affirmative prediction with confidence. Nor can such a body determine what constitutes an acceptable margin of error in assessing the potential risk.” 484 U.S. at 529-30. In addition to raising the constitutional concerns noted above with respect to the disclosure of national security information to courts and to Congress, requiring disclosure of the Nation’s secrets to numerous private civil litigants and their lawyers could harm national security.

Finally, proposed new 28 U.S.C. § 4058(b)(1), which requires the Attorney General to file a report with Congress that includes “suggested amendments to this chapter,” would infringe upon the President’s constitutional authority under the Recommendations Clause of the Constitution, U.S. CONST. art. II, § 3. The Recommendations Clause grants the President the authority to recommend for legislative consideration “such Measures as he shall judge necessary and expedient. . . .” The President’s authority to formulate and to present his own recommendations includes the power to decline to offer any recommendation. Legislative provisions that would require the President’s subordinates to provide Congress with assistance in developing particular legislation, regardless of the President’s judgment as to whether such legislation is necessary and expedient, infringe on the powers reserved to the President by the Recommendations Clause. This provision is objectionable unless it is revised to eliminate language requiring the submission of Executive branch proposals or recommendations to Congress.

6. The Manager’s Amendment would alter the state secrets privilege in ways detrimental to national security.

The Manager’s Amendment would alter the state secrets privilege in ways that could harm national security. As an initial matter, S. 2533 would supplant the existing standard under *Reynolds* — that information is protected by the privilege if there is a reasonable danger that its disclosure could harm national security — in favor of a higher threshold that disclosure of the information must be reasonably likely to cause “significant harm” to national security. See proposed new 28 U.S.C. § 4051 (emphasis added). The existing standard has been held to include within its scope information that would result in “impairment of the nation’s defense capabilities, disclosure of intelligence-gathering methods or capabilities, and disruption of diplomatic relations with foreign governments.” *Black v. United States*, 62 F.3d 1115, 1118 (8th Cir. 1995) (quoting *Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983)). On its face, the bill would impose a heightened “significant harm” requirement and, although the bill is not entirely clear on this point, it would appear to permit a court to determine on its own whether a particular harm was significant or not.

This change has the potential to expose to disclosure a wide range of classified national security information. For example, information may be classified at the “confidential” level if its unauthorized disclosure “reasonably could be expected to cause damage to the national security.” Executive Order No. 12958, § 1.2, 60 Fed. Reg. 19825 (Apr. 17, 1995), as amended by Executive Order No. 13292, 68 Fed. Reg. 15315 (Mar. 25, 2003). This change also could expose information classified at the secret level, for which the standard is “serious damage” because of the uncertain distinction between “serious” and “significant.”

There are other reasons to believe that the Manager’s Amendment would make it more likely that national security information would be disclosed through litigation. For example, proposed new 28 U.S.C. § 4055(2) would permit courts to dismiss a case only where “dismissal

of the claim or counterclaim would not harm national security.” This provision would appear to give a judge wide discretion to reject the Government’s security concerns simply because the judge believes that it is important to have a public determination of the legality of the challenged conduct.

Similarly, the legislation would permit courts to dismiss a case only if removing the privileged information “would substantially impair the ability of a party to pursue a valid defense to the claim or counterclaim.” See proposed new 28 U.S.C. § 4055(3). This would narrow significantly the standard for dismissal under existing law, which requires dismissal in three essential circumstances: 1) if “the plaintiff cannot prove the *prima facie* elements of her claim with nonprivileged evidence”; 2) “if the privilege deprives the defendant of information that would otherwise give the defendant a valid defense to the claim”; and 3) “if the ‘very subject matter of the action’ is a state secret.” *Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998) (internal quotations omitted).

At the same time, the legislation would create extremely difficult standards for the Executive branch to meet: The Executive branch would be required to show it was “impossible” to segregate or redact classified information from the case, proposed new 28 U.S.C. § 4055(1), or that there were “no possible means” of proceeding with segregable information, proposed new 28 U.S.C. § 4054(e)(1). If the Executive branch believed that redactions or substitutions were not possible, courts would be authorized to resolve a disputed issue of fact against the Government — penalizing the Government for protecting national security information. See proposed new 28 U.S.C. § 4054(g).

Other provisions of the Manager’s Amendment would prohibit courts from ruling on a motion to dismiss until the completion of pretrial discovery hearings required in the legislation. The risk of disclosure of national security information in the course of discovery proceedings is one of the very things that the state secrets privilege is designed to avoid. Therefore, these provisions of the Manager’s Amendment would put the Nation’s secrets at risk of disclosure.

While purporting to apply principles of the Classified Information Procedures Act to civil proceedings, the Manager’s Amendment would depart radically from CIPA proceedings — which apply solely in criminal settings — because, in the criminal context, the United States maintains the discretion to protect classified information by dropping a prosecution if necessary. The United States does not have that option in civil cases filed against it and, thus, the Manager’s Amendment would put the United States to the Hobson’s Choice of either disclosing classified activities or losing cases.

The Manager’s Amendment also would permit a court to decide whether any opinions or orders may be sealed or redacted to the extent that a court, rather than the Executive branch, decided that doing so was or was not to protect the national security. See proposed new 28 U.S.C. § 4052(e). This provision too would arrogate to the Judiciary determinations that are constitutionally vested in the Executive branch.

7. Additional Concerns

We note that the Manager's Amendment could affect important, ongoing litigation, particularly because the legislation would be immediately applicable to pending cases.

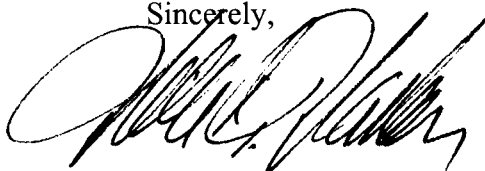
Additionally, the Department of Defense and elements of the intelligence community currently have guidance on what constitutes classified information, the level of classification, and when and how classified information can be released. The Manager's Amendment does not clarify whether it would make these requirements applicable to a court that handled any classified information, as opposed to information for which the state secrets privilege has been invoked.

* * *

For all of the foregoing reasons, the legislation raises serious constitutional questions concerning the ability of the Executive branch to protect national security information under the well-established standards articulated by the Supreme Court in *Reynolds* and would effect a significant departure from decades of well-settled case law, likely resulting in the disclosure of national security information. In attempting to reallocate national security decision making to the Judicial from the Executive branch, the Manager's Amendment also would impose new duties upon the Judiciary that it is ill-equipped to shoulder. Therefore, we strongly oppose the Manager's Amendment to S. 2533.

Thank you for the opportunity to present our views. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,



Michael B. Mukasey
Attorney General

cc: The Honorable Arlen Specter
Ranking Minority Member