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April 2, 2008

LL File No. 2008-000846

TO: The Honorable Edward M. Kennedy
United States Senate

Attention: David Pozen

FROM: Louis Fisher *LF*
Specialist in Constitutional Law

SUBJECT: State Secrets Bill (S. 2533)

You requested my evaluation of the "Views" letter of March 31, 2008, submitted by Attorney General Michael B. Mukasey to Senator Patrick J. Leahy, chairman of the Senate Judiciary Committee, "strongly opposing" the Senate's bill on the state secrets privilege.

1. **"Settled" Precedent.** In the opening paragraph of his letter, Attorney General Mukasey argues that the Constitution and "settled" Supreme Court precedent define the policy governing the state secrets privilege and that current practice is "well-developed" and "well-tested." In fact, current practice is vigorously contested in many quarters, including the May 2007 position paper by the Constitution Project, the August 2008 position paper by the American Bar Association, and hearings already held by the Senate Judiciary Committee on February 13, 2008 and the House Judiciary Committee on January 29, 2008. Legislation has been introduced in each chamber to substantially alter the practices, procedures, and principles governing the state secrets privilege. It is broadly held that current practice is damaging to constitutional rights, the adversary process, judicial independence, checks and balances, and the system of separation of powers. Current practice allows the executive branch to violate the Constitution, statutes, treaties, and individual rights without a fair and full review by federal courts. Many judges have adopted a policy of "deference" and "utmost deference" to executive branch claims.

2. **"Long Pedigree."** Attorney General Mukasey maintains that the state secrets privilege "has a long and well-established pedigree." He first cites *Totten v. United States* (1875), but this Civil War precedent has no application to current state secrets litigation because it involved a secret contract. Although regular contracts may be litigated in court, secret contracts may not. *Totten* involved a very narrow and special category of cases where individuals enter into secret agreements with the government to spy, subject to the understanding that the agreement is to remain secret. The Supreme Court held that any individual who enters into a secret contract cannot expect relief from the courts. Ordinary contracts

are enforceable in courts; secret contracts are not. The *Totten* type of case is not justiciable; state secrets cases are. In the current NSA cases, the executive branch and the telecoms have argued that the companies entered into a secret espionage agreement with the government. However, in cases covered by *Totten* (including *Tenet v. Doe* in 2005) the private parties are plaintiffs; the telecoms are defendants.

3. United States v. Reynolds. Attorney General Mukasey next cites the *Reynolds* case of 1953. Footnote 1 in his letter states: “It 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 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).” It is true that the Third Circuit rejected the *coram nobis* case, but the items identified by the Third Circuit in Footnote 3 of its decision (including “the 3150th Electronics Squadron”) could have been easily redacted and the balance of the accident report given to the trial judge and the plaintiffs, providing clear evidence of negligence by the government. The fact remains that the Supreme Court in *Reynolds* concluded that the report contained “state secrets” (not merely “sensitive” information, as held by the Third Circuit) and it reached that judgment without ever looking at the report. Any court looking at the report would have seen the evidence of government negligence and would have held for the three widows in the case. The principal purpose of S. 2533 is to assure that federal courts do not take at face value assertions by the executive branch, and will discharge their constitutional duty to independently examine claims and arguments brought by both parties to a case. There can be no doubt that the Supreme Court was misled by the executive branch in *Reynolds*, notwithstanding the ruling of the Third Circuit in *Herring*. S. 2533 has been drafted to minimize the risk that in future litigation the executive branch, in order to prevail over private plaintiffs and conceal its abuses, can undermine the integrity and independence of the judiciary.

4. Existing Procedures. In Paragraph 2 of his letter, Attorney General Mukasey reviews what he considers to be “procedural and substantive requirements that preclude the state secrets privilege from being lightly invoked or accepted.” The so-called safeguards he identifies (requiring the head of an agency to formally assert the privilege, after actual personal consideration, etc.) were all followed in *Reynolds* and did not prevent the executive branch from misleading the courts. Although it is true, as Attorney General Mukasey states, that assertion of the state secrets privilege “does not necessarily result in dismissal of a lawsuit,” the fact remains that in the current state secrets cases of NSA surveillance and extraordinary rendition, the executive branch insists that the cases may not proceed at all without jeopardizing national security. Under that reading, the executive branch may violate statutes, treaties, and the Constitution without any chance of independent judicial review or successful challenge in court. Attorney General Mukasey cites the Fifth Circuit in *Bareford* that dismissal of civil lawsuits to protect state secrets 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.” There is no greater public good in permitting the executive branch to violate statutes, treaties, and the Constitution without judicial checks, nor are the interests of citizens protected by tolerating that level of immunity for executive actions.

5. Congressional Authority. Attorney General Mukasey concludes that 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.” Nothing in the Constitution allows one branch to exercise unchecked authority to violate statutes, treaties, and the Constitution. He states that Congress “cannot alter the President’s constitutional authorities and responsibilities by statute.” Many times in the past Presidents have made the same type of argument when they refused to spend appropriated funds, engaged in domestic surveillance, and undertook other actions they claimed to be drawn from exclusive

and plenary powers found somewhere in Article II. Repeatedly, Congress has passed legislation to narrow the scope of presidential power (e.g., the Impoundment Control Act of 1974 and the FISA statute of 1978) and those statutes have been regularly upheld by federal courts. According to Attorney General Mukasey, Presidents are entitled to unilaterally define the scope of their powers under Article II and no other branch has any authority to impose limitations. The Constitution has been interpreted in that manner at times by some President, but never successfully. Such a reading would eliminate the checks and balances that are fundamental to the U.S. Constitution.

6. Judicial Decisions. In Paragraph 3 of his letter, Attorney General Mukasey cites a number of judicial rulings to support his constitutional interpretation. In defending the position that the state secrets privilege is “rooted” in the Constitution, he refers to *United States v. Nixon* (1974), but President Nixon in that case claimed inherent and exclusive authority to withhold documents requested in the Watergate litigation and of course lost that argument in a unanimous decision by the Supreme Court. The language referred to by Attorney General Mukasey in *Nixon*, regarding “military or diplomatic secrets,” was pure dicta and not at issue in the case. Also relied on by Attorney General Mukasey is *Department of Navy v. Egan* (1988), a dispute that was entirely within the executive branch (Merits Systems Protection Board against the Navy). There was no issue of judicial or Congressional access to classified information. *Egan* was fundamentally a case of statutory construction and was so understood throughout the litigation, even if at times the Justice Department tried to lean toward “national security” in oral argument.¹ Although the Court in *Egan* recognized that the President has broad authority in military and national security affairs, it qualified that position by stating: “*unless Congress specifically has provided otherwise.*”² In its briefs in this case, the Justice Department recognized that the scope of presidential power can be narrowed by statutory language: “Absent an unambiguous grant of jurisdiction by Congress, courts have traditionally been reluctant to intrude upon the authority of the executive in military and national security affairs.”³

7. Judicial Competence. In Paragraph 4, Attorney General Mukasey concludes that courts “have neither the constitutional authority nor the institutional expertise to assume such functions [making national security judgments].” Space does not permit a full response to this argument. A number of details rejecting that characterization appear in my recent article in *Harvard Journal on Legislation*.⁴ Citing the *Waterman* case of 1948 is not only drawing from litigation of sixty years ago but relies on a case that was narrowly conceived at the time and whose reasoning has been successively undermined by extensive congressional delegations of authority to courts to receive and consider national security materials. Attorney General Mukasey recognizes a role for the courts in state secrets litigation, but only when courts adopt the “utmost deference” standard (citing *Halkin v. Helms* in 1978). Nothing in *Reynolds* requires that standard and nothing in the Constitution prevents Congress and the courts from adopting a standard that better protects against executive abuse and more properly safeguards the rights of private litigants.

Attorney General Mukasey quotes this language from *Al-Haramain* in the Ninth Circuit: “[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.” He might also have quoted, but did not, language by the Ninth Circuit earlier in the same paragraph: “We take very seriously our obligation to review the documents with a very careful, indeed a skeptical eye, and not to accept at face value the government’s claim or justification of privilege. Simply saying ‘military secret,’

¹ Louis Fisher, “Congressional Access to National Security Information,” 45 Harv. J. on Legis. 219, 230-32 (2008).

² *Id.* at 231 (citing *Department of the Navy v. Egan*, 484 U.S. 518, 520 (1988) (emphasis added)).

³ *Id.*

⁴ *Id.*, especially at 219-220, 225-32, 235.

‘national security’ or ‘terrorist threat’ or invoking an ethereal fear from disclosure will threaten our nation is insufficient to support the privilege.” Constitutional principles should not be drawn from decisions that announce such contradictory positions.

8. Security Clearances. Paragraph 5 of the Mukasey letter raises constitutional objections to compelling the executive branch to release national security documents and to authorize federal courts to demand that the executive branch grant security clearances to private plaintiffs’ counsel and other attorneys to give them access to classified information. These objections are overbroad. Congress and the judiciary are not dependent on the executive branch for the exercise of their constitutional duties, including access to national security documents and having clearance to see and evaluate such materials. Statutory authority may properly grant courts the jurisdiction and powers they need to discharge judicial duties over state secrets cases. The executive branch retains some discretion in withholding documents and in refusing the granting of security clearances, but such actions can come at the cost of losing the case. The administration is not the only branch tasked with protecting national security or determining its meaning.

9. Recommendations Clause. At the top of page 6, Attorney General Mukasey states that proposed language requiring the Attorney General to file a report with Congress “would infringe upon the President’s constitutional authority under the Recommendations Clause of the Constitution. . . . The President’s authority to formulate and to present his own recommendations includes the power to decline to offer any recommendations.” However, the constitutional authority of the President to make recommendations does not prevent Congress from requesting recommendations and reports from the President, as it has done repeatedly from 1789 to the present time. For example, the President’s authority to request appropriations from Congress, implied in his constitutional duties, did not prohibit Congress in the Budget and Accounting Act of 1921 to require the President to submit a national budget and adhere to the format spelled out in law. It is an extreme and impractical argument to suggest that the President, under the Recommendations Clause, may ignore every statutory provision that requires the submission of reports.

10. “Reasonable Danger.” Paragraph 6 objects to any adjustment to the “reasonable danger” threshold for state secrets cases. The Supreme Court in *Reynolds* made no effort to permanently decide the constitutional principles to be applied in state secrets cases. It deliberately avoided such choices, preferring to decide the case on existing statutory standards (the Federal Tort Claims Act), the Federal Rules of Civil Procedure, and the law of evidence, allowing Congress at any time to reenter the field and adopt different standards and thresholds.⁵ Other objections are raised in the Mukasey letter, such as the provision in the bill requiring the executive branch to show it was “impossible” to segregate or redact classified information. If the executive branch believed that redactions or substitutions were not possible, the bill authorizes courts to resolve the disputed issues of fact against the administration, leading to what Attorney General Mukasey says is a penalty to the administration “for protecting national security information.” There is no penalty for protecting national security information. There is a penalty, and a permissible one, when the executive branch decides that it will alone decide what information to release to the courts. In *Reynolds*, both the district court and the Third Circuit held against the administration when it refused to release the accident report to the trial judge to be read in chambers.⁶

11. National Security. Throughout the letter, Attorney General Mukasey appears to conclude that decisions about “national security” are reserved exclusively to the executive branch and may not be shared with other branches. For example, at the bottom of page 6 he states: “The Manager’s Amendment

⁵ United States v. Reynolds, 345 U.S. 1, 6-7 (1953).

⁶ Louis Fisher, In the Name of National Security: Unchecked Presidential Power and the *Reynolds* Case 56-57, 79-86 (2006).

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.” Nothing in the Constitution or in the Framers’ intent gives the executive branch any plenary authority over national security. The design of the Constitution clearly depends on all three branches and the system of checks and balances to safeguard national security.

I trust these observations will be helpful to you. If I can be of additional assistance, please contact me by phone (7-8676) or e-mail (lfisher@loc.gov).