



May 20, 2009

Dear Chairman Leahy, Ranking Member Sessions, and Members of the Committee:

On behalf of the American Civil Liberties Union, its 53 affiliates and more than 500,000 members nationwide, we write in support of S. 417, the State Secret Protection Act and urge committee passage and floor consideration as soon as possible.

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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,”ⁱ into an alternative form of immunity that is increasingly being used to shield the government and its agents from accountability for systemic violations of the Constitution. Since September 11, 2001, the government has fundamentally altered the manner in which the state secrets privileged is used, to the detriment of the rights of private litigants harmed by egregious government misconduct, and at the sacrifice of the American people’s trust and confidence in our judicial system.

ACLU litigators challenging the government’s illegal policies of warrantless surveillance, extraordinary rendition, and torture have increasingly faced government assertions of the state secrets privilege at the initial phase of litigation, even before any evidence is produced or requested. Courts accept government claims of risk to national security as absolute, without independently scrutinizing the evidence or seeking alternative methods to give our plaintiffs an opportunity to discover non-privileged information with which to prove their cases.

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 accountable to the people. The misuse 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 and the ACLU commends Senator Leahy and Senator Specter for recently introducing legislation to clarify judicial authority over civil litigation involving alleged state secrets.

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 established the legal framework for accepting a state secrets claim and serves as cautionary tale for those judges inclined to accept the government's assertions as valid on their face.ⁱⁱ In *Reynolds*, the 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 invocation of the privilege, it emphasized 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: "judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers."^{ix}

Yet despite these cautions the *Reynolds* Court produced an ambiguous standard for making a judicial determination of whether the disclosure of the evidence in question poses a reasonable danger to national security,^x and it sustained the government's claim of privilege over the accident report without ever looking at it. While the Court allowed the suit to proceed using alternative non-classified information (testimony from the crash survivors) as a substitute for the accident report, the declassification of the report many decades later proved the folly in the Court's unverified trust in the government's claim. The accident report contained no national security or military secrets, but rather compelling evidence of the government's negligence.^{xi}

The Supreme Court has not directly addressed the scope or application of the privilege since *Reynolds*. In the intervening years, the privilege has become unmoored from its evidentiary origins. 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.^{xii} Indeed, 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^{xiii}; in cases of greater national significance^{xiv}; and in a manner that seeks effectively to transform it from an evidentiary privilege into an immunity doctrine, thereby "neutraliz[ing] constitutional constraints on executive powers."^{xv}

In particular, since September 11, 2001, the government has invoked and defended the privilege frequently in cases that present serious and plausible allegations of grave executive misconduct. It has 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, to foreclose review of the NSA's warrantless data mining of calls and e-mails, and to foreclose review of various telecommunication companies' participation in the NSA's surveillance activities.^{xvi} 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.^{xvii} And, of course, it has invoked the privilege to seek dismissal of suits challenging the government's seizure, transfer, and torture of innocent foreign citizens.^{xviii}

The proliferation of cases in which the government has invoked the state secrets privilege, and the lack of guidance from the Court since its 1953 decision in *Reynolds*, have produced conflict and confusion among the lower courts regarding the proper scope and application of the privilege. 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.^{xix} As the Court explained, *Totten* is a "unique and categorical . . . bar – a rule designed not merely to defeat the asserted claims, but to preclude judicial inquiry."^{xx} By contrast, the Court noted, the state secrets privilege deals with evidence, not justiciability.^{xxi} 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.^{xxii} 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.^{xxiii} 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.^{xxiv}

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. Notwithstanding *Reynolds'* clear instruction that the judge has a critical and authoritative role to play in the privilege determination, many courts have held that the government's state secrets claim must be afforded the most extreme form of deference.^{xxv} Other courts properly have scrutinized the government's privilege claim with more rigor – adopting a common-sense approach to assessing the reasonable risk of harm to national security should purported state secrets be disclosed.^{xxvi}

This confusion as to the proper judicial role plays out with 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.^{xxvii} Other courts have refused or declined to examine the allegedly privileged evidence, relying solely on secret affidavits submitted by the government.^{xxviii}

Most recently, the U.S. Court of Appeals for the Ninth Circuit ruled that a landmark American Civil Liberties Union lawsuit against Boeing subsidiary Jeppesen DataPlan Inc. for its role in the Bush administration's unlawful extraordinary rendition program can go forward. It reversed a lower court dismissal of the lawsuit, brought on behalf of five men who were kidnapped, forcibly disappeared and secretly transferred to U.S.-run prisons or foreign intelligence agencies overseas where they were interrogated under torture. The government had intervened, improperly asserting the "state secrets" privilege to have the case thrown out, a position that is maintained by the new administration. The Ninth Circuit ruled that the government must invoke the state secrets privilege with respect to specific evidence, not the entire suit.

Legislative action to narrow the scope of the state secrets privilege and standardize the judicial process for evaluating privilege claims is needed to clear up the 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 STATE SECRETS PROTECTION ACT (S. 2533)

The ACLU commends Senator Leahy and cosponsors for introducing the State Secrets Protection Act (S. 417), a bill that takes great strides toward restoring essential constitutional checks on executive power. S. 417 restores the state secrets privilege to its common law origin as an evidentiary privilege, by prohibiting the dismissal of cases prior to discovery. S. 417 ensures independent judicial review of government state secrets claims by requiring courts to examine *in camera* 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 responsibly handling national security information in criminal cases involving terrorism and espionage, and there is no reason to suggest courts will

not be just as reasonable in fulfilling their obligations in civil cases. S. 417 uses the Classified Information Procedures Act (CIPA) as a model, and appropriately so, because CIPA has both protected the national security and the rights of individuals in adversarial proceedings against the government for more than twenty years.^{xxix} CIPA not only establishes procedures, now tested, for handling classified information in an adversarial process, it also correctly shifts the burden that results from the government's withholding of evidence to the government where it belongs. The balancing test under CIPA holds that our collective national interest in protecting the rights of an individual the government seeks to deprive of his liberty outweighs the government's interest in pursuing its criminal justice mission or protecting its secrets. This is the appropriate balance because the government is in the best position to weigh the competing risks and come to a determination whether protecting its secret is more or less important than prosecuting the individual, and placing the burden on the government is the only way to compel it to make that choice. While not every tort case implicates issues of collective national interest, courts should be allowed to consider broader interests of justice in those cases that do involve torture in addition to torts.

S. 417 brings this balance to civil litigation. S. 417 would allow courts to protect evidence from disclosure that would legitimately harm national security, yet would allow the litigation to proceed if possible with non-privileged evidence. Like CIPA, S. 417 would allow courts to compel the government to produce non-privileged substitutes for privileged evidence and, if the government refuses to produce substitutes, would allow the court to resolve the issue in favor of the non-government party. These procedures would ensure the litigation can proceed to a just result unless the court determines the government is unable to present specific privileged evidence that establishes a valid defense. For these reasons, the ACLU recommends committee passage and floor consideration as soon as possible.

For more information, please contact Michelle Richardson at mrichardson@dcaclu.org or (202) 715-0825.

Sincerely,



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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 *Id.*, at 8 (“The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect.”).

^{xi} *See*, Herring v. United States, Civil Action No. 03-5500 (LDD) (E.D. Pa. Sept. 10, 2004).

^{xii} *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); *ACLU v. NSA*, 438 F. Supp. 2d 754 (E.D. Mich. 2006); *Terkel v. AT&T Corp.*, 441 F. Supp. 2d 899 (N.D. Ill. 2006); *Edmonds v. U.S. Dep’t of Justice*, 323 F. Supp. 2d 65 (D.D.C. 2004), *cert. denied*, 74 USLW 3108 (U.S. Nov. 28, 2005) (No. 05-190); *El-Masri* 437 F. Supp. 2d 530 (E.D. Va. 2006); *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (E.D.N.Y. 2006) (dismissed on other grounds).

^{xiii} 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.”)

^{xiv} 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=023b94ae28666f34&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.”).

^{xv} Note, *The Military and State Secrets Privilege: Protection for the National Security or Immunity for the Executive?*, 91 YALE L.J. 570, 581 (1982).

^{xvi} *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); *ACLU v. NSA*, 438 F. Supp. 2d 754 (E.D. Mich. 2006); *Terkel v. AT&T Corp.*, 441 F. Supp. 2d 899 (N.D. Ill. 2006).

^{xvii} *Edmonds v. U.S. Dep’t of Justice*, 323 F. Supp. 2d 65 (D.D.C. 2004), *cert. denied*, 74 USLW 3108 (U.S. Nov. 28, 2005) (No. 05-190).

^{xviii} *See*, *El-Masri*, 437 F. Supp. 2d 530 (E.D. Va. 2006) ; *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (E.D.N.Y. 2006) (dismissed on other grounds).

^{xix} *Tenet v. Doe*, 544 U.S. 1 (2005).

^{xx} *Id.*, at 6.

^{xxi} *Id.*, at 9, 10.

^{xxii} Reynolds, 345 U.S. at 3.

^{xxiii} *See, e.g.*, In re United States, 872 F.2d 472, 478 (D.C. Cir. 1989) (rejecting categorical, pre-discovery 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).

^{xxiv} *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.

^{xxv} *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").

^{xxvi} *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").

^{xxvii} *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).

^{xxviii} *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).

^{xxix} Pub. Law 96-456 (1980).