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

Oversight Hearing on the Reform of State Secrets

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Chairman Nadler, Ranking Member Franks, Members of the Subcommittee, thank you for the opportunity to appear before the subcommittee to address the important subject of today's hearing, the state secrets privilege. When I served as an Associate Deputy Attorney General at the Department of Justice from 2003 to 2005 I gained some expertise relating to the privilege and the critical function it plays in preventing the disclosure of national security information in litigation. Since my return to the private sector, I have continued to watch developments in this area of the law with interest. I should emphasize that I am expressing purely my personal views here today, and I am not here in any representative capacity.

I would like to focus on three points in my testimony.

First, the state secrets privilege serves a vital function in ensuring that private litigants cannot force the disclosure of information bearing on the foreign affairs or national security of the United States. Particularly at a time when the Nation is still engaged in a conflict with al Qaeda in which intelligence is critical for our success, the state secrets privilege is a necessary mechanism for the Executive Branch to protect the national security.

Second, the privilege is rooted in the constitutional authority of the President as Commander in Chief and representative of the Nation in foreign affairs to protect the national security of the United States. Any effort, therefore, to legislate concerning the privilege must be

undertaken with the utmost caution to ensure that Congress does not impermissibly entrench upon authority assigned by Article II of the Constitution exclusively to the Executive.

Third, I want to caution against two possible legislative changes that I believe would be misguided.

I. The State Secrets Privilege Serves a Critical Function in Preventing the Disclosure of National Security Information.

Any discussion of possible legislation altering or regulating the state secrets privilege should begin with a recognition of the vital function the privilege serves. It is a mechanism by which the United States can ensure the secrecy of information related to foreign affairs and national security that would do harm to the United States if publicly disclosed. The Supreme Court recognized the importance of the privilege in *United States v. Reynolds*, 345 U.S. 1, 11 (1953), as it explained that the privilege, when properly invoked, is absolute. "Even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake." *Id.*

The privilege plays a particularly vital role when, as now, the Nation is involved in an armed conflict. The United States remains locked in a years-long struggle with al Qaeda -- an enemy that operates by secrecy and stealth and whose primary objective is to unleash surprise attacks on the civilian population of the United States. In combating this shadowy enemy, superior intelligence is essential for the Nation's success. Yet currently pending litigation would, without the interposition of the state secrets privilege, force the disclosure of innumerable details concerning the sources and methods of foreign intelligence operations, signals intelligence operations, and other activities the United States conducts in the ongoing conflict with al Qaeda. Allowing such information to be disclosed would aid our enemies and gravely damage the national interest. Indeed, it is no exaggeration to say that it would put American

lives at risk. The state secrets privilege thus plays a critical role in ensuring that the Executive Branch can fulfill its constitutional duty to protect the national security of the United States.

II. The Privilege Is Rooted in the Constitutional Authorities Assigned to the Executive Branch.

Any approach to legislating with respect to the state secrets privilege must also begin with a recognition that it is not merely a common law evidentiary privilege subject to plenary regulation by Congress. To the contrary, the privilege is rooted in the constitutional authorities assigned to the President under Article II as Commander in Chief and representative of the Nation in foreign affairs. As the Supreme Court has explained in discussing protection of national security information, "[t]he authority to protect such information falls on the President as head of the Executive Branch and as Commander in Chief." *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). Exercise of the states secrets privilege is thus a part of the Executive's constitutionally assigned responsibilities and necessarily implicates what the Supreme Court has described as "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

In *United States v. Nixon*, 418 U.S. 683 (1974), the Supreme Court expressly recognized that the privilege has its underpinnings in the Constitution. The Court explained generally 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. And it expressly recognized that a "claim of privilege on the ground that [information constitutes] military or diplomatic secrets," necessarily involves "areas of Art. II duties" assigned to the President. *Id.* at 710. *See also 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").

The state secrets privilege thus shares the same constitutional underpinnings as the authority that the Executive Branch has long maintained to withhold diplomatic or national security information even from Congress when the President deems it necessary in the interests of the foreign affairs or security of the Nation. Since the Founding of the Republic, beginning with the administration of President Washington, the Executive has claimed the authority, based upon the constitutional separation of powers, to refuse to provide Congress information related to the conduct of foreign affairs when the President deems that the information should remain secret. Most famously, when Congress sought information concerning the negotiation of the Jay Treaty with France, President Washington explained that "[t]he nature of foreign negotiations requires caution, and their success must often depend on secrecy," and refused to provide information that the Executive determined should remain secret. 1 *A Compilation of Messages and Papers of the President 1789-1897*, at 194 (James D. Richardson ed. 1897). As the Supreme Court has explained, the "wisdom" of his response "was recognized by the House itself and has never since been doubted." *Curtiss Wright*, 299 U.S. at 320.

Since the Washington Administration, the Executive Branch, under presidents of both parties, has consistently maintained the constitutional authority of the President to withhold certain information relating to foreign affairs and intelligence matters from Congress. As Walter Dellinger, the head of the Office of Legal Counsel under President Clinton explained, President Washington established the view that the "Constitution delegates to the President the authority to withhold documents relating to diplomatic negotiations from Congress when disclosure would be, in his judgment, contrary to the public interest." *Presidential Certification Regarding the Provision of Documents to the House of Representatives Under the Mexican Debt Disclosure Act of 1995*, 20 Op. Off. Legal Counsel 253, (1996). He went on to explain that "[t]he constitutional

position originally formulated by the Washington Administration has thus become the practice of the Executive Branch as an ongoing institution, and the Attorneys General and the heads of this Office have consistently maintained that it is the correct interpretation of the powers of [the] President and Congress." *Id.* He noted, also, that "Congress has usually accepted the Executive's position as a practical matter." *Id. See also The President's Compliance with the "Timely Notification" Requirement of Section 501(B) of the National Security Act*, 10 Op. Off. Legal Counsel 159, 171-73 (1986) (concluding that a statutory requirement of "timely notification" to Congress concerning covert operations must be construed, in light of constitutional concerns, to permit President to withhold information until he deems that revealing it will not jeopardize the success of an operation).

Given the unique constitutional role of the Executive with respect to the protection of diplomatic, intelligence, and national security information, any legislation that would seek to "reform" the state secrets privilege as it is currently applied by the courts must be undertaken with the utmost caution. Legislation that would undermine the Executive's authority to protect national security information would run a grave danger of impermissibly encroaching on authority assigned by the Constitution to the Executive Branch.

III. Congress Should Not Attempt to Substitute the Judgment of the Judiciary for the Executive Concerning What Information Merits Secrecy for Foreign Affairs or National Security Reasons and Should Beware of Analogies Concerning CIPA in the Context of Civil Litigation.

Finally, I would like to address and caution against two types of legislative changes that may be considered by Congress. My comments here are necessarily tentative, both because of the short time I have had to prepare for this hearing and because there is no specific legislative proposal before the subcommittee. Although a bill entitled the "State Secrets Protection Act" was introduced in the Senate just last week, the exact text of the bill, S. 2533, is not yet available.

The general description of the bill, however, suggests two considerations that warrant mention as Congress considers any legislation relating to the state secrets privilege.

First, Congress should tread carefully in considering any legislation that would purport to alter substantially the deferential standard of review that courts apply in evaluating a claim of state secrets privilege. In particular, I believe it would be a mistake to attempt to have Article III judges substitute their own independent judgment concerning what information should remain secret, without deference to the judgment of the Executive. Such a standard of review would be a marked departure from the law established by the Supreme Court. The *Reynolds* Court properly emphasized that it remained the duty and responsibility of the courts to determine whether the privilege had been validly invoked in any particular case. The mere assertion of the privilege by the Executive does not require a court to accept without question that the material involved is a state secret. As the Supreme Court put it "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." 345 U.S. at 9-10. Nevertheless, the Court also made clear that a judge should not simply substitute his judgment for that of the Executive Branch. Rather, a court should proceed cautiously, showing deference to the judgment of the Executive concerning what constituted a secret that might do harm to the Nation if disclosed. In *United States v. Nixon*, 418 U.S. 683 (1974), the Court further explained that, where the Executive makes a "claim of privilege on the ground [of] military or diplomatic secrets," the "courts have traditionally shown the utmost deference to Presidential responsibilities." *Id.* at 710. They have done so, moreover, because these are "areas of Art. II duties" under the Constitution. *Id. See also Halkin v. Helms*, 598 F.2d 1, 9 (D.C. Cir. 1978) ("The standard of review here is a narrow one. Courts should accord the 'utmost deference' to

executive assertions of privilege upon grounds of military or diplomatic secrets.") (citation omitted).

The deferential standard of review is thus itself infused with constitutional significance based upon the separation of powers and the unique authorities of the Executive under Article II. The assertion of the state secrets privilege is, at its heart, an exercise of policy judgment concerning how the disclosure of certain information may affect the foreign affairs, the military and intelligence posture, or, more broadly, the national security of the United States. Time and again the Supreme Court and lower courts have cautioned that such judgments are constitutionally assigned to the Executive and that the judiciary is not institutionally suited to making them. Thus, in the context of a court evaluating a claim by the Executive that certain information must remain classified and protected from disclosure, the Supreme Court has cautioned that "what 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." *CIA v. Sims*, 471 U.S. 159, 178 (1985). The Court went on to explain that the Director of Central Intelligence is "familiar with the whole picture, as judges are not" and that his decisions upon what must be kept secret are therefore "worthy of great deference." *Id.* Similarly, the United States Court of Appeals for the Fourth Circuit has explained that "[t]he courts, of course, are ill equipped to become sufficiently steeped in foreign intelligence matters to serve effectively in the review of secrecy classifications." *United States v. Marchetti*, 466 F.2d 1309, 1318 (4th Cir. 1972). And again the Supreme Court has explained:

> The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports neither are nor ought to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. . . . [T]he very nature of executive decisions as to foreign policy is political, not judicial. . . . They are

> decisions of a kind for which the Judiciary has neither aptitude, facilities, nor responsibility . . . .

Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948).

Any legislative proposal, therefore, that would attempt to alter the standard of review established under *Reynolds* and *Nixon* by permitting an Article III judge simply to substitute his or her independent judgment for that of the Executive concerning the need for secrecy on a particular piece of information would be a mistake. Attempting to assign the courts that role by legislation would, at a minimum, raise a serious question of an impermissible encroachment on authority assigned to the Executive under the Constitution.

Second, the descriptions of S. 2533 make analogies to the Classified Information Procedures Act, or CIPA, 18 U.S.C. App. 3 § 1 *et seq.*, which applies in criminal cases. The summary of the legislation suggests a mandatory procedure under which the court may order the United States to produce unclassified summaries of (or substitutes for) classified information, including substitutes or similar alternatives "crafted by the court." The proponents of the bill have analogized such provisions to CIPA. State Secrets Protection Act (S. 2533): Section-by-Section Summary.[1]

I am concerned that analogies to CIPA oversimplify matters. There are two critical differences between the proposals described in the Senate bill and the regime under CIPA. First, under CIPA, the Executive Branch always clearly retains absolute authority to determine what is classified and what is not. If a substitute is prepared under CIPA, it is the Executive that retains full discretion to determine whether or not the substitution has successfully removed any classified information. If the Executive determines that the substitution is still classified, the Attorney General may object to the disclosure of the classified information and the statute directs

[1] *Available at* /kennedy.senate.gov/newsroom/press_release.cfm?id=c56bd1d0-7ad3-46ea-9d30-a77317f28b70.

in mandatory terms that the "the court shall order that the defendant not disclose or cause the disclosure of such information." 18 U.S.C. App. 3 § 6(e)(1). The descriptions of the proposal in the Senate suggest the possibility that, under that legislation, which permits the court to order a substitution "crafted by the court," the Executive might not retain that ultimate control. State Secrets Protection Act (S. 2533): Section-by-Section Summary. At a minimum, this provision seems to authorize an Article III judge independently to determine what is properly classified and what is not, without regard to the judgment of the Executive -- a grant of authority that, as described above, at least raises a significant constitutional question.

Second, CIPA applies to criminal prosecutions, which are always initiated by the United States. If a court's rulings under CIPA in a particular prosecution were to create a situation in which the Executive Branch determined that proceeding with the case would still risk disclosure of sensitive national security information, the United States always has the option of dropping the prosecution to avoid compromising national security. In civil litigation brought by private plaintiffs, however, the Executive will not retain that ultimate control as a backstop for protecting national security. For that reason, I believe it would be inaccurate to think that there can be an easy analogy between CIPA and legislation that would mandate the creation of substitutes for classified information -- particularly judicially crafted substitutes -- in the context of civil litigation.

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Thank you, Mr. Chairman, for the opportunity to address the subcommittee. I would be happy to address any questions that the Members may have.