



AMERICAN BAR ASSOCIATION

GOVERNMENTAL AFFAIRS OFFICE • 740 FIFTEENTH STREET, NW • WASHINGTON, DC 20005-1022 • (202) 662-1760

WRITTEN STATEMENT OF
H. THOMAS WELLS, JR., PRESIDENT-ELECT
submitted for the record on behalf of the
AMERICAN BAR ASSOCIATION
to the
COMMITTEE ON JUDICIARY
of the
U.S. Senate
for the hearing on
“Examining the State Secrets Privilege: Protecting National Security
While Preserving Accountability”

February 13, 2008

Chairman Leahy, Senator Specter and distinguished Senators:

I am pleased to submit this statement for the record in my capacity as President-elect of the American Bar Association at the request of the current ABA President William H. Neukom. The American Bar Association is the world's largest voluntary professional organization with a membership of hundreds of thousands of lawyers, judges, and law students worldwide, including a broad cross-section of civil litigators and national security lawyers, prosecutors and judges. As it has done during its 130-year existence, the ABA strives continually to improve the American system of justice and to advance the rule of law throughout the world. Thank you for the opportunity to share the views of the ABA on the state secrets privilege.

Clarification of the State Secrets Privilege is Needed

The state secrets privilege is a common law privilege that shields sensitive national security information from disclosure in civil litigation. The roots of the privilege reach back to the beginning of the Republic.¹ However, today most public discussion focuses on the U.S. Supreme Court's modern articulation of the privilege in the seminal decision, *United States v. Reynolds*, 345 U.S. 1 (1953).

During the past several years, the government has asserted the state secrets privilege in a growing number of cases, including those involving fundamental rights and serious allegations of government misconduct, and has sought dismissal at the pleadings stage of the case, arguing that the complaint cannot be answered without confirming or denying facts that would expose a state secret. Courts have been required to evaluate these claims of privilege without the benefit of statutory guidance or clear precedent. This has resulted in the application of inconsistent standards and procedures in determinations regarding the applicability of the privilege.²

Several of the lawsuits allegedly involving state secrets raise critical legal issues. Should the government be able to terminate a court case simply by declaring that it would compromise national security without having the court scrutinize that claim? In a number of lawsuits,

¹ See *United States v. Burr*, 25 F. Cas. 30, 37 (C.C.D. Va. 1807).

² See, e.g., *Hepting v. AT&T*, 439 F. Supp. 2d 974 (N.D. Cal. 2006) (appeal pending) and *ACLU v. NSA* __ F.3d __, WL 1952370 (6th Cir. 2007) (warrantless wiretapping in the United States alleged to be both illegal and unconstitutional) and *El-Masri v. U.S.*, 479 F.3d 296 (4th Cir. 2007), *cert. denied*, 2007 U.S. LEXIS 11351 (Oct. 9, 2007) (extraordinary "rendition" of terrorism suspects from the United States to foreign countries alleged to have engaged in torture and other abusive conduct).

including those involving electronic surveillance by the government, that is exactly what is happening.

Concerned about these circumstances, the ABA concluded that a measured response was necessary to promote meaningful independent judicial review and protect two core principles at stake: 1) Americans who believe that their rights have been violated by the federal government should have a day in court; and 2) the government's responsibility to protect our national security should not be compromised. Accordingly, in August 2007, the ABA House of Delegates adopted a policy that calls upon Congress to establish procedures and standards designed to ensure that, whenever possible, cases are not dismissed based solely on the state secrets privilege.

The ABA believes that enactment of federal legislation, prescribing procedures and standards for the treatment of information alleged to be subject to the state secrets privilege, as outlined in this statement, would benefit our justice system. Such legislation would affirm the appropriate role of the courts in our system of government by assuring that they have a meaningful role in making decisions about the evidence that is subject to the privilege. More searching judicial review, informed by evidence, would ensure that government assertions of necessity are truly warranted and not simply a means to avoid embarrassment or accountability.

Accordingly, the ABA strongly supports S. 2533, the State Secrets Protection Act, recently introduced by Senators Edward Kennedy (D-MA) and Arlen Specter (R-PA) (the "Kennedy-Specter Bill"). The State Secrets Protection Act clearly lays out a procedural roadmap for courts to follow in considering claims that may be subject to the state secrets privilege.

Without such procedural guidance, courts today are at times deferring to the government without first engaging in sufficient inquiry into the veracity of the government's assertion that information is subject to the privilege. As a result, courts may be dismissing meritorious civil litigation claims leading to potentially unjust results. By dismissing civil actions without further consideration, courts also may be abdicating their responsibility under the constitutional system of checks and balances to review potential Executive Branch excesses. Federal legislation outlining procedures and substantive standards for consideration of privilege claims would facilitate the ability of the courts to act as a meaningful check on the government's assertion of the privilege.

The codification of such standards also would bring uniformity to the manner in which the courts apply the state secrets privilege, regardless of whether the government is an original

party to the litigation or has intervened in the litigation. Uniform standards and procedures will bring greater transparency and predictability to the process and benefit the system as a whole.

Last year, the U.S. Supreme Court declined to address these issues by denying certiorari in the appeal of Khaled el-Masri, a German citizen, from the dismissal of his lawsuit alleging the U.S. government kidnapped and tortured him as a suspected terrorist in what has been described as a case of mistaken identity. In 2005, he sued the former director of the Central Intelligence Agency, three private airlines and 20 individuals. The government intervened to argue that the suit should be dismissed to avoid providing admissions or evidence that would compromise national security. The federal district court concurred, and dismissed the case at the pleadings stage.

By refusing to hear the *el-Masri* case, the United States Supreme Court has declined the opportunity to resolve lingering issues regarding the correct interpretation of *Reynolds* and to clarify the standard to be applied by the courts in cases involving assertion of the privilege. Given the current landscape, we believe that Congress should provide this much-needed clarification by adopting federal legislation, and we hope that our policy recommendations will be beneficial to you in that process.

ABA Recommendations for Legislation to Codify the State Secrets Doctrine

Fundamentally, the ABA believes that courts should vigorously evaluate privilege claims in a manner that protects legitimate national security interests while permitting litigation to proceed with non-privileged evidence, and that cases should not be dismissed based on the state secrets privilege except as a very last resort. To accomplish these objectives, we urge adoption of legislation that includes the following elements.

First, legislation should require a court to make every effort to permit a case to proceed past the pleadings stage while protecting the government's legitimate national security concerns at the same time. Under our proposal, the government would be permitted to plead the state secrets privilege in response to particular allegations of a complaint, but would not admit or deny those allegations nor face adverse inferences for invoking the privilege.

The Kennedy-Specter Bill lays out a comprehensive approach to accomplish this very goal. Its authors have stated their shared desire to ensure that national security information is adequately safeguarded from disclosure under their proposal. The ABA believes that the

Kennedy-Specter Bill could successfully provide the courts with a more uniform approach to evaluating these claims without requiring exposure of any sensitive national security information that is privileged. For example, consistent with the ABA's recommended approach, Section 4053(c) of the Kennedy-Specter Bill permits the government to plead the state secrets in response to any allegation in a particular claim or counterclaim in a complaint, without suffering any adverse inferences.

Second, legislation should require the government to provide a full and complete explanation of the privilege claim and make available for *in camera* review the evidence the government claims is subject to the privilege. *In camera* judicial review is appropriate and necessary in order for the court to fulfill its recognized responsibility to determine whether the privilege applies.³ The court simply cannot determine whether the government has met its burden in a vacuum: only an *in camera* review of the evidence in question will permit a thorough evaluation of the government's privilege claims.

This requirement challenges the Supreme Court's statement in *Reynolds* that there are some situations in which the privileged evidence is so sensitive that there should be no "examination of the evidence, even by the judge alone, in chambers."⁴ Commentators have properly criticized that suggestion as an abdication of judicial responsibility.⁵ Courts are charged with applying the law to facts in cases, not taking assertions as a matter of faith. It is as big a mistake for them to rule on the merits in a vacuum as it is for them to assess the need for secrecy without first examining the evidence. We believe that it is essential for courts to evaluate the government's claims *in camera*, away from the public eye, before deciding whether a lawsuit truly threatens the nation's safety.

Years after the court dismissed the *Reynolds* case without questioning the government's assertion of state secrets, the documents alleged to contain state secrets that were needed by the plaintiffs to plead their case were declassified and found NOT to contain any state secrets. Had

³ See *Reynolds*, 345 U.S. at 8; *Ellsberg v. Mitchell*, 709 F.2d 51, 57-59 (D.C. Cir. 1983); *Terkel*, 441 F. Supp. 2d at 908-09.

⁴ *Reynolds*, 345 U.S. at 10.

⁵ See Louis Fisher, *In the Name of National Security: Unchecked Presidential Power and the Reynolds Case*, 253-62 (University Press of Kansas) (2006); Scott Shane, *Invoking Secrets Privilege Becomes a More Popular Legal Tactic by U.S.*, N.Y. Times, June 4, 2006, at 32, available at 2006 WLNR 9560648. In addition, the federal courts' role in assessing classified information has evolved substantially since *Reynolds*, and numerous courts have followed the practice. See, e.g., *Kasza v. Browner*, 133 F.3d 1159, 1169-70 (9th Cir. 1998); *Ellsberg*, 709 F.2d at 56, 59; *Halkin v. Helms*, 598 F.2d 1, 7-8, 9 (D.C. Cir. 1978).

the court been more diligent in executing its responsibility to ascertain for itself whether the documents contained state secrets, it is virtually certain that the plaintiffs in this case – widows of three of the civilian contractors who died aboard the military plane when it crashed – would not have been denied their day in court to adjudicate their claims for monetary damages for the federal government’s alleged negligence in the death of their spouses. We can prevent such patently unjust outcomes by requiring a court to conduct its own *in camera* review and by establishing standards for it to apply in assessing the legitimacy of the government’s privilege claims regarding potentially sensitive national security information. Such an enactment will improve government accountability and confidence in our system of checks and balances.

Consistent with the ABA’s recommended approach, the Kennedy-Specter Bill calls for comprehensive procedures that enhance the ability of the courts to evaluate the government’s assertion of the state secrets privilege. Taken together, Sections 4052 and 4054 of the legislation clearly authorize the court to conduct *in camera* hearings in its review of state secrets claims, including an evaluation of the evidence with respect to which privilege is claimed.

Third, legislation should require a court to assess the legitimacy of the government’s privilege claims and deem evidence privileged only if the court finds, based on specific facts, that the government agency has reasonably determined that disclosure of the evidence would be significantly detrimental or injurious to the national defense or would cause substantial injury to the diplomatic relations of the United States.⁶

Under this proposed standard, the government agency must make a reasonable determination of “significant injury” to trigger the privilege when national defense secrets are at risk or a reasonable determination of the more exacting “substantial injury” to trigger the privilege when diplomatic relations are at stake. The term, “diplomatic relations” as opposed to “international relations” is intended to limit the circumstances in which the privilege can be claimed, and coupled with the more exacting “substantial injury” requirement, to ensure that the privilege cannot be claimed when disclosure of evidence would do little more than embarrass the government.

⁶ The standard proposed in the policy is a modification of drafts by the Advisory Committee for Federal Rules of Evidence that would have codified the state secrets privilege in a Federal Rule of Evidence 509. Congress ultimately rejected Fed. R. Evid. 509 and other evidentiary privilege rules submitted contemporaneously in favor of Fed. R. Evid. 501, which recognizes common law evidentiary privileges but does not mention the state secrets privilege. The policy also recognizes that since the Supreme Court’s decision in *Reynolds*, which established the privilege in cases in which disclosure of military secrets is at risk, subsequent decisions have extended the privilege to cases in which diplomatic secrets are at risk. See, e.g., *United States v. Nixon*, 418 U.S. 683, 706 (1974).

The Kennedy-Specter Bill adopts a definition of a state secret that is similar to the definition endorsed by the ABA. Section 4051 of the legislation defines a state secret as “any information that, if disclosed publicly, would be reasonably likely to cause significant harm to the national defense or foreign relations of the United States.”

The ABA recommendation goes further than the Kennedy-Specter Bill by establishing a standard for judicial review by directing the courts to consider the specific basis upon which the relevant government agency rests its claim that particular information is privileged. The court would not make this determination *de novo*, but rather would decide whether the government had reasonably determined that the standard was met. The standard contemplated by this requirement is intended to give the courts sufficient flexibility to decide what information is subject to the privilege after reviewing the assertions of both the plaintiff and the Executive Branch, which has substantial expertise in assessing the potential injury to the national defense or diplomatic relations that could result from disclosure of the information.

Fourth, legislation should allow discovery to proceed under flexible procedures designed to protect the government’s legitimate national security interests. To accomplish this, legislation should authorize the courts to permit discovery of non-privileged evidence, to the extent that it can effectively be segregated from privileged evidence, and issue protective orders, require *in camera* hearings and other procedures where necessary, to protect the government’s legitimate national security interests. Disentanglement of privileged and non-privileged evidence is the most effective way to protect both the interests of the private party and the government’s responsibility to protect national security secrets. The requirement that courts make efforts to separate privileged from non-privileged information is consistent with the Court’s determination in *Reynolds* that the case be remanded to the lower court so the plaintiffs could adduce facts essential to their claims that would not touch on military secrets. Courts generally make efforts in state secrets cases to separate privileged from non-privileged information, or they ultimately make a determination that separation is impossible.

Consistent with the ABA’s recommendations, the Kennedy-Specter Bill establishes clear procedures that give the courts flexibility in evaluating the veracity of the government’s claim that state secrets are at issue. Section 4054 of the legislation provides courts with a procedural roadmap for evaluating privilege claims and highlights the tools that are available to the courts directing the government to separate privileged from non-privileged information.

Fifth, legislation should require the government, where possible, and without revealing privileged evidence, to produce a non-privileged substitute for privileged evidence that is essential to prove a claim or defense in the litigation. In cases in which it is possible to generate such a substitute, and the government is a party asserting a claim or defense that implicates the privilege, the legislation would require the government to elect between producing the substitute and conceding the claim or defense to which the privileged evidence relates.

The requirement that the government produce where possible a non-privileged substitute for privileged information derives both from the *Reynolds* case and from the Classified Information Procedures Act (CIPA),⁷ which governs the treatment of classified information in the criminal context. The *Reynolds* court based its decision upholding the government's privilege claim in part on the availability of alternative evidence in the form of testimony that might give the respondents the evidence they needed without the allegedly privileged documents. To preserve the defendant's constitutional right to confront the evidence in a criminal case, CIPA allows the government to provide a substitute for classified information to be used in a defendant's defense. The recommendation adopts the CIPA structure, but employs a slightly lower standard for the substituted evidence to meet because the Confrontation Clause, which requires the high CIPA standard, is not applicable in civil cases.⁸ To allow for further fairness, the policy also derives from CIPA the notion that the court can order the government to forego a claim or defense when it fails to provide a substitute for privileged information.⁹

The Kennedy-Specter Bill also endorses the authority of the courts to require the government to produce a non-privileged substitute, when possible. Section 4054(f) and (g) adopt an approach similar to that of the ABA when the court has determined that it is possible to prepare a non-privileged substitute but the government does not wish to provide it.

Sixth, legislation should provide that a ruling on a motion that would dispose of the case should be deferred until the parties complete discovery of facts relevant to the motion.¹⁰

⁷ 18 U.S.C. App. 3.

⁸ In *Fitzgerald v. Penthouse Int'l, Ltd.*, 776 F.2d 1236 (4th Cir. 1985), the court referred to CIPA as a possible model for use in the state secrets context.

⁹ A similar provision also appeared in legislation proposed in 1973 by the Advisory Committee for Federal Rules of Evidence for a Federal Rule of Evidence 509 that would have codified the state secrets privilege. The proposed Rule of Evidence was never adopted by Congress.

¹⁰ This provision of the policy relies on Rule 12(a)(4)(A) of the Federal Rules of Civil Procedure, which authorizes the court to "postpone[] its disposition" of a motion to dismiss "until the trial on the merits" and Rule 56(f) of the

Dismissal based on the state secrets privilege prior to the completion of discovery of relevant facts would be permissible only when the court finds there is no credible basis for disputing that the state secrets claim inevitably will require dismissal. This is a very high standard, and we anticipate that it would be met only in very limited circumstances.

Consistent with the ABA's recommended approach, the Kennedy-Specter Bill endorses procedures that limit the ability of courts to dismiss cases at the pleadings stage on state secrets grounds without more searching judicial review. Section 4053(b) of the legislation requires that "a ruling on a motion to dismiss, or for summary judgment, based on the state secrets privilege shall be deferred pending completion of the discovery and pretrial hearings provided under this chapter." We believe that it is appropriate for courts to be discouraged from dismissing complaints based solely on the state secrets privilege without closer judicial review.

Seventh, legislation should provide that, after taking the steps described above to permit the use of non-privileged evidence, the case should proceed to trial unless at least one of the parties cannot fairly litigate with non-privileged evidence. Specifically, a court should not dismiss an action based on the state secrets privilege if it finds that the plaintiff is able to prove a *prima facie* case, unless the court also finds, following *in camera* review, that the defendant is substantially impaired in defending against the plaintiff's case with non-privileged evidence (including the non-privileged evidentiary substitutes described above). To state this more plainly, if the plaintiff could prove the essential elements of his claim without privileged information, the case would be allowed proceed as long as the government could fairly defend against the claim without having to use privileged information. However, if the government would have its hands tied behind its back by not being able to invoke essential privileged information in defending against the plaintiff's case, the case would be dismissed. Likewise, if the court determines that a plaintiff cannot prove the essential elements of his claim without the privileged information, the case also would need to be dismissed.

The Kennedy-Specter Bill also recognizes that at times legitimate state secrets information may limit the ability of the government to defend against a claim. After the comprehensive procedures established by the bill are exhausted, Section 4055 identifies the situations when the court determines that evidence protected by the state secrets privilege is

Federal Rules of Civil Procedure, which permits a "continuance" for "discovery to be had" in resolving a summary judgment motion.

necessary for adjudication of a claim or counterclaim and a non-privileged substitute is not possible.

Finally, our policy supports legislation providing the government with the opportunity for an expedited interlocutory appeal from a district court decision authorizing the disclosure of evidence subject to a claim under the state secrets privilege. Allowing for an expedited appeal before completion of the case recognizes the government's legitimate interests in protecting against disclosure of sensitive national security information that could be compromised if an appeal of such a decision had to await final judgment, given that the disclosure, once made, could not be undone.

Consistent with the principle endorsed by the ABA, the Kennedy-Specter Bill recognizes the value and efficiency that interlocutory appeals add to the process. Section 4056 of the legislation establishes clear procedures for expedited appellate review of a district court ruling on a state secrets privilege issue. This additional procedural safeguard ensures timely judicial consideration and provides an additional layer of protection against the disclosure of sensitive information that should appropriately be guarded as privileged.

What the ABA recommendations would *not* do is as important as what enactment of them would accomplish. The legislation we support would not require disclosure of information subject to the state secrets privilege to the plaintiff or the plaintiff's counsel. Even if counsel has a security clearance and agrees to a stringent protective order, under no circumstances would privileged information be disclosed to anyone except the presiding judge. The legislation we support would not require courts to balance the interests of the plaintiff in accessing particular privileged information against the government's national security interests. No matter how compelling the plaintiff's claim or the plaintiff's need for the privileged information to prove his claim, if disclosure of the information sought is reasonably likely to be significantly detrimental or injurious to the national defense or to cause substantial injury to the diplomatic relations of the United States, the information will be privileged and the legislation for which we call would not require its disclosure. It would also not require the government to choose between disclosing privileged information and foregoing a claim or defense. The government would face such a choice only with respect to the information the court had already determined was not privileged.

The ultimate goal of all of these recommendations and the objective that should underlie any legislative response is the protection of both the private litigant's access to critical evidence, including evidence necessary to obtain redress for constitutional violations and other wrongful

conduct, and our critically important national security interests which, if not protected, could put the nation at grave risk.

Congressional Response

Congressional action in this area is entirely appropriate. In fact, many of the ABA recommendations are drawn from the tested and proven procedures established by Congress in CIPA. Under CIPA, federal courts review and analyze classified information in criminal cases. Congress has also outlined a role for the courts in handling sensitive information with the adoption of the Foreign Intelligence Surveillance Act of 1978 and the 1974 amendments to the Freedom of Information Act. While some have argued that consideration of sensitive information should be left only to the Executive Branch, there is ample precedent demonstrating that courts can and do make measured, careful decisions about classified information in these other contexts. Further, cases in which the state secrets privilege is invoked increasingly involve allegations that the government has violated fundamental, constitutional rights, making federal court involvement especially important.

The ABA's policy respects the roles of all three branches of government in addressing state secrets issues. The policy does not suggest that courts should substitute their judgments on national security matters for those of the executive branch but instead provides that executive branch privilege claims should be subject to judicial review, under a deferential standard that takes into account the executive branch's expertise in national security matters. The ABA believes this is a proper role for the judiciary, because courts routinely perform judicial review of decisions made by expert governmental agencies. In addition, as the *Reynolds* case explained, the state secrets privilege is an evidentiary privilege; the judiciary properly makes the final decisions on privilege claims in cases involving executive branch agencies as litigants. Finally, it is constitutionally permissible and appropriate for Congress to act in this area, to provide greater clarity to the jurisdiction and procedures of the courts. For example, Congress routinely approves the proposed federal rules of civil and criminal procedure as well as considers legislation establishing the federal rules of evidence to ensure fair procedures for the courts. In

fact, in 1973 the Congress considered, but ultimately did not adopt, proposed Rule of Evidence 509, which would have codified the state secrets privilege.¹¹

We believe that Senators Edward Kennedy (D-MA) and Arlen Specter (R-PA) have offered the Committee a perfect starting point for action with the introduction of the State Secrets Protection Act. We strongly support this legislation and believe that it embodies a number of the principles advocated by the ABA to provide greater clarification to the application of the state secrets privilege. As we have already discussed in detail, the Kennedy-Specter Bill establishes comprehensive procedures that ensure that claims of privilege are met with meaningful judicial review. It requires that a court review asserted state secrets evidence in a secure proceeding in order to determine whether disclosure of the evidence would endanger national security or foreign relations. It requires that the Government provide an unclassified or redacted alternative to evidence that the court concludes is protected by the state secrets privilege. It also allows expedited appeals of state secrets decisions. Finally, the legislation requires regular reports to Congressional committees on the use of the state secrets privilege. The ABA believes that these core principles should be the baseline elements of legislation clarifying the procedures for adjudicating state secrets claims. We hope a measure similar to the Kennedy-Specter Bill will be introduced soon in the House.

Going forward, robust congressional oversight will strengthen the ability of our government as a whole to ensure that our justice system is properly equipped to balance national security interests with the protection of individual rights and liberties. Additionally, with the adoption of new legislation establishing procedures for the application of the state secrets privilege, close congressional oversight could guard against any unintended consequences in the implementation of new uniform standards.

Conclusion

The ABA believes that now is the time for Congress to step in to ensure that the courts maintain a meaningful role in making decisions about the evidence that is subject to the privilege. It is within the constitutional mandate of Congress to oversee these issues with

¹¹ See Louis Fisher, *In the Name of National Security: Unchecked Presidential Power and the Reynolds Case* (University Press of Kansas) (2006).

authority and to offer corrective legislation to allow for an inquiry into the government's assertion that information is subject to the privilege. We believe that our proposal provides ample opportunity for the government to assert the privilege, and to back up its assertion in confidential proceedings. And it entitles the government to a speedy appeal from any court decision that authorizes disclosure of evidence subject to a state secrets claim, or that imposes penalties for nondisclosure or refuses to grant a protective order to prevent disclosure. National security interests would be well protected.

As then-Supreme Court Associate Justice O'Connor observed, "Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake."¹² The American Bar Association urges Congress to assert its proper role and to take action to ensure that the state secrets privilege is applied in a manner that protects the rights and civil liberties of private parties to the fullest extent possible without compromising legitimate national security interests.

On behalf of the American Bar Association, thank you for considering our views on an issue of such consequence to ensuring access to our justice system.

¹² *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (quoting *Mistretta v. United States*, 488 U.S. 361, 380 (1989)).