Federalism and Separation of Powers

The State Secrets Privilege: Necessary Evil?

*By Claudio Ochoa**

The state secrets privilege is a common-law evidentiary privilege that allows the Executive to withhold certain information from civil discovery if it believes disclosure would harm the national security or foreign policy of the United States. The privilege is absolute. If a court accepts the Executive's assertion that the subject evidence could reasonably harm the nation's security, the information may not be disclosed regardless how great the need of the party seeking discovery is said to be. In addition to sanctioning sensitive evidence or information in its possession, the Executive can apply the privilege to protect against disclosure of the nation's intelligence gathering sources, methods, and capabilities, and against disruption of diplomatic relations with foreign governments.[1]

The Bush Administration has been thoroughly criticized for its use of the privilege, which it has invoked on numerous occasions.[2] The most notable invocations include dismissals of (1) a suit brought by a FBI "whistleblower" against the Bureau;[3] (2) a claim that the CIA discriminated against an African-American operations officer because of his race;[4] (3) allegations that CIA operatives kidnapped, tortured and held *incommunicado* a foreign-national until releasing him without charges more than a year later; and (4), most recently, the attempt to prevent judicial review of the National Security Agency's domestic surveillance program.[5]

Due to the alarming outcome required by the privilege in these and other cases, the state secrets privilege has come under attack as "undemocratic" and a "relic of the cold war."[6] This article examines the state secrets privilege, its jurisprudential evolution, its critiques and its justifications.

The Jurisprudential Evolution of the Privilege

American courts first alluded to the privilege in the 1807 treason trial of Aaron Burr.[7] While the case did not turn on the matter, the court acknowledged that there may be circumstances where courts should suppress evidence if "it would be imprudent to disclose," or was the "wish of the executive."[8]

The Supreme Court first addressed (a form of) the privilege in 1876 in *Totten v. US*, which involved the estate of a man who claimed he had entered into a clandestine agreement with President Lincoln to spy on the Confederacy during the Civil War.[9] Although he had performed the service, after the President's death, the Government refused to pay his estate, questioning Lincoln's prerogative to enter into such a contract. In reviewing the lower court's opinion, which supported the Government's refusal, the Court noted that its objection was not to the contract, but to the power of the courts to act upon this issue. Given the secret nature of the employment, the Court found that the Judiciary could not review the matter without exposing sensitive details that could pose a "serious detriment [to] the public."[10]

The Supreme Court dismissed the case and closed its opinion by declaring:

> It may be stated as a general principle, that public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated.[11]

The Judiciary did not significantly modify privilege jurisprudence until 1953, when the Supreme Court decided *U.S. v. Reynolds*, which established the basis for our current understanding of the doctrine. *Reynolds* concerned the deadly crash of a B-29 aircraft that was testing secret electronic equipment.[12] Three widows of the deceased civilians onboard sued the Government under the Federal Tort Claims Act. At issue was access to the official accident report, which the Government refused to produce to the plaintiffs on the grounds it was "privileged." The Government also refused to provide the report to the district and appellate court so each could judge the sensitivity of the information itself. Consequently, both courts rejected the Government's privilege claim, holding it in violation of the Constitution's system of checks and balances, and entered judgment for the plaintiffs.[13]

The Court reversed the Third Circuit, however, concluding that such a privilege did exist and should be weighed in the facts of the case. In an attempt to craft a compromise between national security and the need for judicial inquiry, it held that the Executive may invoke this privilege if it can "satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interests of national security, should not be divulged."[14] Recognizing that "judicial control over the evidence in a case can not be abdicated to the caprice of executive officers,"[15] it added that a court should at the same time "not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers."[16]

The decision acknowledged a principle of proportion: the greater the need demonstrated by the moving party, the further the court should inquire as to the propriety of allowing the privilege's invocation.[17] The Court, however, warned that such inquiry did not constitute a strict balancing test: "even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake."[18] Subsequent courts have affirmed this principle, arguing that the balance was "struck"[19] in *Reynolds* "between the interest of the public and the litigant in vindicating private rights and the public's interest in safeguarding the national

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security."[20] In other words, the privilege is absolute—"[n]o competing public or private interest can be advanced to compel disclosure."[21]

Reynolds announced a two-part procedure through which the Executive can formally assert the privilege. First, there must be a formal claim of privilege, lodged by the head of the department that has control over the matter, after personal consideration by that officer.[22] Second, once properly invoked, a court must review the claim to determine if the "circumstances are appropriate for a claim of privilege; such a judicial enterprise requires delicacy, so as not to 'forc[e] a disclosure of the very thing the privilege is designed to protect.'"[23] Courts must uphold the privilege if the Government provides adequate demonstration that "the information poses a reasonable danger to secrets of state."[24]

When considering *Reynolds*, it is important to note that the Supreme Court decided the case during the emergence of the Communist threat. This context appears to have contributed to its decision to suppress the B-29 crash report ("we cannot escape judicial notice that this is a time of vigorous preparation for national defense").[25] Still, the Court's recognition of the privilege appears to stand independent of this fact ("the principles which control the application of the privilege emerge quite clearly from the available precedents)."[26]

Criticism of the Privilege

Criticism of the privilege is understandable given its effect on two staples of our system of government: (1) the concept of separation of powers, and (2) the protection of individual rights.

Separation of Powers

The tension between the privilege and separation of powers was articulated best by the Third Circuit in *Reynolds*:

> But to hold that the head of an executive department of the Government in a suit to which the United States is a party may conclusively determine the Government's claim of privilege is to abdicate the judicial function and permit the executive branch of the Government to infringe the independent province of the judiciary as laid down by the Constitution . . . the Government of the United States is one of checks and balances. One of the principal checks is furnished by the independent judiciary . . . Neither the executive nor the legislative may encroach upon the field which the Constitution has reserved for the judiciary by transferring to itself the power to decide justiciable questions which arise in cases or controversies submitted to the judicial branch for decision.[27]

Courts have nevertheless been reluctant to scrutinize executive invocations of the privilege because national security matters are uniquely within its expertise. As such, the Executive deserves "the utmost deference."[28] Without a meaningful check-and-balance, though, it is conceivable the Executive could abuse this power to shield information for reasons other than national security. As the Supreme Court noted in *U.S. v. Nixon*, in its discussion of the President's claim of executive privilege:

> It is but a small step to assert a privilege against any disclosure of records merely because they might prove embarrassing to government officers. Indeed it requires no great flight of imagination to realize that if the Government's contentions in these cases were affirmed the privilege against disclosure might gradually be enlarged by executive determinations until, as is the case in some nations today, it embraced the whole range of governmental activities.[29]

Despite this warning, courts have tended to grant the Executive significant license to label evidence "secret." This allows it to protect information even for inappropriate purposes—including "to cover up embarrassment, incompetence, corruption or outright violation of law."[30] History is scattered with various examples of such abuse.[31] Some critics claim that the Executive abused the privilege in the very case in which the Supreme Court first formally discussed the privilege, *U.S. v. Reynolds*.[32]

John Dean, former White House Counsel to President Nixon, goes so far as to assert that "the invocation of national security [in state secrets cases] borders on being a hoax."[33] In his opinion, secrets that could harm national security are very rare—most assertions of the privilege are designed to protect embarrassing information and executive overreach of power.[34] As a result, the privilege is "more a sword than a shield," because the government can dispose of a case without litigating the legality of its actions and without having to say exactly why the privilege applies.[35]

Individual Rights

The second critique of the state secrets privilege concerns its effect on individual and constitutional rights. When invoked, the privilege may infringe, if not quash, these rights in the following ways:

i) *Dismissal of legitimate claims*: "Denial of the forum provided under the Constitution for the resolution of disputes, U.S. Const. art. III, § 2, is a drastic remedy that has rarely been invoked."[36] Yet, this is often the result if the Executive chooses to invoke the privilege. Because there is no balancing of the merits of a claim versus the importance of the "secret information," courts will dismiss even legitimate and meritorious claims if they accept the Government's assertion that discovery could reasonably harm national security.[37] In some instances, this could effectively allow executive agencies to "opt out of compliance" with federal statutes by claiming simply that the subject matter touches on issues of national security.[38]

ii) *Ex parte communications*: "Justice is rooted in the notion that 'truth will emerge from two advocates presenting their version of the facts in a structured format to a neutral and detached decision-maker.'"[39] But invocation of the privilege often results in ex parte communications between federal officials and the judge, during which the government seeks to persuade the court that issues of national security are at stake. Because opposing counsel often lacks the adequate clearance, counsel may never know the substance of these meetings or the evidence presented by the Government. Additionally, ex parte communications may deny counsel the right to be heard on an issue, as guaranteed by the Sixth and Fourteenth Amendments.[40]

iii) *In camera review:* "Disclosures in camera are inconsistent with the normal rights of a plaintiff of inquiry and cross-examination, of course, but if the two interests cannot be reconciled, the interest of the individual litigant must give way to the government's privilege against disclosure of its secrets of state."[41]

iv) *"Blind Counsel":* Private counsel require access to information about their client's case in order to serve as an effective advocate. As a result of ex parte communications, classified evidence, and redacted briefs and opinions, it may be impossible for counsel to know the basis of a court's ruling. "In appealing such a ruling," scholars William Weaver and Robert Pallitto note, "it is unclear how a litigant would be able to go about addressing arguments it may not see, drawn from evidence it may not review."[42]

v) *Substantive rights:* The Bill of Rights guarantees certain rights to each citizen of the United States, such as the right to free speech and protection against unreasonable search and seizure. In some recent cases, plaintiffs have claimed that the Government has infringed on these rights in violation of the Constitution. Yet, by invoking the state secrets privilege, the Executive can shield any alleged constitutional violation from substantive review by a court, regardless of the merits of the claim. In this sense, it appears ultra-constitutional.[43]

Justification for a Strong Privilege

Although these are real and concerning byproducts of the privilege, many argue that they must be considered in conjunction with the privilege's justification.

Separation of Powers

First and foremost, it is argued, the Executive does not have absolute, un-checked power to invoke the privilege. The privilege is only absolute in the sense that issues of national security will always pre-empt those of the individual. However, before the privilege can reach that point, a court must be satisfied that the case poses a reasonable danger to secrets of state.[44] A court is free to review, question and analyze the Government's assertion until it reaches that level of comfort. It is ultimately up to the court whether to allow its invocation.

Courts have granted the Executive extreme deference in examples where it has been invoked because they themselves have recognized that the Judiciary is ill-equipped to review matters of national security.[45] For instance, in *Haig v. Agee*, the Court noted: "[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention."[46] Likewise, *El-Masri v. Tenet*: "courts must [] bear in mind the executive branch's preeminent authority over military and diplomatic matters and its greater expertise relative to the judicial branch in predicting the effect of a particular disclosure on national security."[47]

This position has been reinforced by what has become known as the mosaic theory, which recognizes that "intelligence gathering . . . is more akin to the construction of a mosaic than it is to the management of a cloak and dagger affair. Thousands of bits and pieces of seemingly innocuous information can be analyzed and fitted into place to reveal with startling clarity how the unseen whole must operate."[48] Thus, the Executive, which "must be familiar with 'the whole picture,' as judges are not, [is] worthy of great deference given the magnitude of the national security interests and potential risks at stake."[49]

This deference may be grounded on a deeper level, as well. There is significant authority for the argument that the President's authority to invoke the privilege is in part based on Article II of the Constitution, not just strictly the common law.[50] It is widely recognized that the President has the "authority to control access to information bearing on national security . . . [which] exists quite apart from any congressional grant. . . . The authority to protect that information falls on the President as head of the Executive Branch and as Commander in Chief."[51] In *Nixon*, the Supreme Court "emphasized the heightened status of the President's privilege in the context of 'military, diplomatic, or sensitive national security secrets.'"[52]

Notably, Justice Stewart, in his concurrence in *New York Times Co. v. U.S.,* recognized that Executive power in the areas of national defense and international relations were largely unchecked by the legislative and judicial branches.[53] Rather than rein in this power, he concluded: "The responsibility must lie where the power is. If the Constitution gives the Executive a large degree of unshared power in the conduct of foreign affairs and the maintenance of our national defense, then under the Constitution the Executive must have the largely unshared duty to determine and preserve the degree of internal security necessary to exercise that power successfully."[54]

The Founders themselves apparently recognized at least the need for such a privilege. John Jay in *The Federalist Papers* observed that the only way the Executive could gather valuable intelligence was if it could protect its sources from discovery, even by other branches of the government.[55] George Washington, in deciding whether to turn over documents to the Congress, stated that "he could readily conceive there might be papers of so secret a nature, as that they ought not to be given up."[56] His cabinet, including members Thomas Jefferson and Alexander Hamilton, unanimously agreed that "the Executive ought to communicate such papers as the public good will permit, and ought to refuse those, the disclosure of which would injure the public."[57]

Although all these instances dealt with Executive privilege—withholding documents from Congress or the public at large—there is no reason to believe the state secrets privilege—the withholding of evidence in litigation based on national security concerns—should operate differently. The public, and both the legislative and judicial branches can lay an equal claim on the information. Thus, the genesis of the privilege was not the Cold War, but a recognized need to ensure the continued existence of the country.

Individual Rights

At the outset, it must be noted that the state secrets privilege directs dismissal only if the information at issue goes to the core of the claim or a potential defense. It is undeniable that the privilege has a devastating effect on individual litigants who face such a result, but this is an inescapable fact of competing interests. It is often recognized that "[t]he state secrets privilege

is the most basic of government privileges [because] it protects the survival of the state, from which all other institutions derive."[58] In other words, the very purpose of the privilege is to serve the common good. And for this reason, the law must render individual interests secondary to the general citizenry, especially in the context of terrorism where there is a significant potential of wide-spread public harm.

The Fourth Circuit directly faced this dilemma in *Sterling v. Tenet*, where the defendant brought a racial discrimination suit against the Director of the Central Intelligence Agency.[59] In dismissing his claim under the Government's invocation of the privilege, the court noted:

> We recognize that our decision places, on behalf of the entire country, a burden on Sterling that he alone must bear. 'When the state secrets privilege is validly asserted, the result is unfairness to individual litigants—through the loss of important evidence or dismissal of a case—in order to protect the a greater public value.' Yet there can be no doubt that, in limited circumstances like these, the fundamental principle of access to court must bow to the fact that a nation without sound intelligence is a nation at risk.[60]

Secrecy, although disfavored in a democratic government, has long been held a requisite for any successful intelligence operation. [61] The view was put by George Washington, the first President of the Republic, during his time as General:

> The necessity of procuring good intelligence, is apparent and need not be further urged. All that remains for me to add is, that you keep the whole matter as secret as possible. For upon secrecy, success depends in most Enterprises of the kind, and for want of it they are generally defeated.[62]

Further justification of the privilege is made on the grounds that not only is secrecy necessary to gain valuable intelligence to protect Americans but also in ensuring that the very methods used to secure that information not be compromised. According to the current administration, "disclosure of this information 'would enable adversaries of the United States to avoid detection from the nation's intelligence activities, sources, and methods, and/or take measures to defeat or neutralize those activities, thus, seriously damaging the United States' national security interests.'"[63] To give a plaintiff or even a group of plaintiffs the power to force the Executive to disclose details about secret informants, operations, or programs (including those that have been successful in gathering information or preventing attacks)—thereby compromising their integrity and the safety of American citizens—would "convert the constitutional Bill of Rights into a suicide pact."[64]

One might add that the state secrets privilege is also comparable to several other recognized evidentiary privileges.[65] To take one example: the privilege against self-incrimination. This privilege is also absolute in the sense that a witness can maintain it regardless of the need of the Government or any other party.[66] In order to allow its invocation, "the court must be satisfied from all the evidence and circumstances, and 'from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.'"[67] "If the court is so satisfied, the claim of the privilege will be accepted without requiring further disclosure."[68]

CONCLUSION

For these reasons, it can well be argued that the privilege is neither undemocratic nor a relic of the Cold War. Due the drastic effect it has on litigants each time it is invoked, it is also evident, however, that the privilege comes at the expense of individual liberty. This tradeoff, always distasteful, may in the end be necessary to ensure the survival of the very system of government that allows us to pursue those liberty interests in the first place.

Endnotes

1 Memorandum In Support of the United States' Assertion of State Secrets Privilege at 6-7, Arar v. Ashcroft, No. 04-CV-249-DGT-VVP (E.D.N.Y. 2005).

2 *See, e.g.*, Mark Folman, *The Bush Code of Secrecy*, Salon.com, June 23, 2006 ("when it comes to protecting its secrets, the Bush administration has flexed unilateral power to a degree never before seen in U.S. history").

3 Edmonds v. Department of Justice, 323 F. Supp. 2d 65 (D.D.C. 2004).

4 Sterling v. Tenet, 416 F.3d 338 (4th Cir. 2005).

5 Hepting v. AT&T Corp., 2006 U.S. Dist. LEXIS 49955 (N.D. Ca. 2006); Terkel v. AT&T Corp., Memorandum Opinion and Order, Case No. 06 C 2837 (N.D. Il. 2006).

6 *See, e.g.*, Shayana Kadidal, The State Secrets Privilege and Executive Misconduct, University of Pittsburg Law School *Jurist*, June 16, 2006; William Fisher, *"State Secrets" Privilege Not So Rare*, Inter Press Service News Agency, August 15, 2005, *available at* www.ipsnews.net/news.asp?idnews=29902.

7 United States v. Burr, 1807 U.S. App. LEXIS 492 (D. Va. 1807).

8 *Id.* at 23–24.

9 Totten v. United States, 92 U.S. 105 (1876).

10 *Id.* at 106-107.

11 *Id.* at 107.

12 Reynolds v. U.S. (*Reynolds II*), 345 U.S. 1 (1953).

13 *See* Reynolds v. U.S. (*Reynolds I*), 192 F.2d 987, 995 (3d Cir. 1951) ("we regard the recognition of such a sweeping privilege against any disclosure of the internal operations of the executive departments of the Government as contrary to a sound public policy").

14 *Reynolds II*, 345 U.S. at 10.

15 *Id.* at 9-10.

16 *Id.* at 10.

17 *Id.* at 11.

18 *Id.* (citing Totten, 92 U.S. 105).

19 J. Steven Gardner, Comment, *The State Secret Privilege Invoked in Civil Litigation: A Proposal For Statutory Relief*, 29 Wake Forest L. Rev. 567, 575 (1994) (citing In re United States, 872 F.2d 472, 476 (D.C. Cir. 1989) (citation omitted)).

20 *Id.* (citing Halkin v. Helms (*Halkin II*), 690 F.2d 977, 990 (D.C. Cir. 1982)).

21 *Id.* (quoting Ellsberg v. Mitchell, 709 F.2d 51, 57 (D.C. Cir. 1983), *cert. denied sub nom.* Russo v. Mitchell, 465 U.S. 1038 (1984)); see also, e.g., Frost v. Perry, 919 F. Supp. 1459 (D. Nev. 1996) for an example of a case where the court held that the privilege mandated dismissal even in light of a strong public interest, the alleged disposal of hazardous waste near a lake.

22 *Reynolds II*, 345 U.S. at 7-8.

23 *In re* United States, 872 F.2d at 475 (citing *Reynolds II*, 345 U.S. at 8).

24 *Halkin II*, 690 F.2d at 990.

25 *Reynolds II*, 345 U.S. at 10.

26 *Id*. at 7-8 (citing Firth Sterling Steel Co. v. Bethlehem Steel Co., 199 F. 353 (E.D. Pa. 1912) and *In re* Grove, 180 F. 62 (3d Cir. 1910)).

27 *Reynolds I*, 192 F.2d at 997.

28 United States v. Nixon, 418 U.S. 683, 710 (1974).

29 *Reynolds I*, 192 F.2d at 995 (recalling the words of Edward Livingston: "No nation ever yet found any inconvenience from too close an inspection into the conduct of its officers, but many have been brought to ruin, and reduced to slavery, by suffering gradual imposition and abuses, which were imperceptible, only because the means of publicity had not been secured") (citation omitted).

30 Gardner, *supra* note 19, at 585.

31 Gardner, *supra* note 19, at 575 (citing as historical examples of abuse: "assertions of privilege in the Watergate scandal, the burglary of Daniel Ellsberg's psychiatrist's office, actions during the Vietnam war and the bombing of Cambodia, the wiretapping of 'radical' domestic political organizations, and the diversion of the proceeds of the Iranian arms sale to Nicaraguan Contras.").

32 *See, e.g., Government Is Abusing "State Secrets Privilege" to Cover Up National Security Blunders, ACLU Says*, Press Release, ACLU, January 1, 2005, *available at* www.aclu.org/safefree/general/18815prs20050112.html (relating that in 2004, one of the original *Reynolds* plaintiffs obtained a declassified copy of the accident report. According to some, the once classified report contains no state secrets, but instead confirms that crew error and faulty maintenance of the B-29 fleet caused the crash.). *But see* Federation of American Scientists, *Government Denies Fraud in 1953 State Secrets Ruling*, FAS Project on Government Secrecy, January 26, 2004, *available at* http://www.fas.org/sgp/news/secrecy/2004/01/012604.html (responding to this claim, the government stated, "The mere fact that information … may strike the plaintiffs today as innocuous, trivial, or unimportant, is simply not probative" of whether they were sensitive 50 years ago).

33 John W. Dean, ACLU v. National Security Agency*: Why the "State Secrets Privilege" Shouldn't Stop the Lawsuit Challenging Warrantless Telephone Surveillance of Americans*, FindLaw, June 16, 2006, *available at* http://writ.lp.findlaw.com/dean/20060616.html.

34 *Id.*

35 *Id*.

36 *In re United States,* 872 F.2d at 477 (citing Fitzgerald v. Penthouse Int'l, Ltd., 776 F.2d 1236, 1242 (4th Cir. 1985)).

37 El-Masri v. Tenet, 2006 U.S. Dist. LEXIS 34577, at *20 (E.D. Va. 2006) ("The applicability of the state secrets privilege is wholly independent of the truth or falsity of the complaint").

38 William G. Weaver and Robert M. Pallitto, *State Secrets and Executive Power*, Political Science Quarterly, Volume 120, Number 1, 103 (2005) (citing Tilden v. Tenet, 140 F. Supp. 2d 623, 627 (E.D. Va. 2001)).

39 *See* Brian M. Tomney, Case Note: *Contemplating the Use of Classified or State Secret Information Obtained Ex Parte on the Merits In Civil Litigation*: Black Tea Society v. City of Boston, 57 Me. L. Rev. 641, 650 (2005) (citing Roberta K. Flowers, *An Unholy Alliance: The Ex Parte Relationship Between the Judge and the Prosecutor*, 79 Neb. L. Rev. 251, 253 (2000)).

40 *See* Tomney, *supra* note 39, at 644-47.

41 Heine v. Raus, 399 F.2d 785, 791 (4th Cir. 1968).

42 Weaver & Pallitto, *supra* note 38, at 107.

43 *Id.* at 87.

44 Sterling v. Tenet, 416 F.3d 338, 345 (4th Cir. 2005) ("But both Supreme Court precedent and our own cases provide that when a judge has satisfied himself that the dangers asserted by the government are substantial and real, he need not—indeed, should—probe further.").

45 *Id.* at 348 (rejecting plaintiff's proposal that the court adopt special procedures that would it allow it to review the secret material because "[s]uch procedures, whatever they might be, still entail considerable risk."). "Inadvertent disclosure during the course of a trial—or even in camera—is precisely the sort of risk that Reynolds attempts to avoid. At best, special accommodations give rise to added opportunity for leaked information. At worst, that information would become public, placing covert agents and intelligence sources alike at grave risk." *Id.*

46 453 U.S. 280, 292 (1981).

47 El-Masri v. Tenet, 2006 U.S. Dist. LEXIS 34577, at *14.

48 Halkin v. Helms (*Halkin I*), 598 F.2d 1, 8 (D.C. Cir. 1978).

49 CIA v. Sims, 471 U.S. 159, 179 (1985) (affirming that "[i]t is conceivable that the mere explanation of why information must be withheld can convey valuable information to a foreign intelligence agency").

50 *See generally* Memorandum in Support of the United States' Assertion of State Secrets Privilege at 3-4, Arar v. Ashcroft, C.A. No. 04-CV-249-DGT-VVP (E.D.N.Y. 2005) (citing U.S. v. Nixon, 418 U.S. 683, 710 (1974) for the proposition that "[t]he state secrets privilege is based on the President's Article II power to conduct foreign affairs and provide for the national defense, and therefore has constitutional underpinnings.").

51 Department of Navy v. Egan, 484 U.S. 518, 527 (1988) (citations omitted).

52 *Nixon*, 418 U.S. 683, 706 (1974).

53 *See* New York Times Co. v. U.S., 403 U.S. at 728-30 (Stewart, J., concurring).

54 *Id.*

55 *See* Randolph Moss, Deputy Assistant Attorney General, Statement Before the Permanent Select Committee on Intelligence, U.S. House of Representatives (May 20, 1998) (citing The Federalist No. 64, at 392-93 (John Jay) (Clinton Rossiter ed., 1961).

56 *Id.* (citing 1 Writings of Thomas Jefferson 303 (Andrew Lipscomb ed. 1903) (The Anas)).

57 *Id.* (citing 1 Writings of Thomas Jefferson at 304).

58 *Id.* at 93 (quoting Brian Z. Tamanaha, *A Critical Review of the Classified Information Procedures Act*, American Journal of Criminal Law 13, at 318 (1986)).

59 416 F.3d 338 (4th Cir. 2005).

60 *Id.* at 348 (citing Fitzgerald v. Penthouse Int'l, 776 F.2d 1236, 1238 n.3 (4th Cir. 1985); *Reynolds II,* 345 U.S. at 11).

61 CIA v. Sims, 471 U.S. 159, 172 n.16 (1985) ("[s]ecrecy is inherently a key to successful intelligence operations").

62 *Id.* (citing 8 Writings of George Washington 478-479 (J. Fitzpatrick ed., 1933) (letter for George Washington to Colonel Elias Dayton, July 26, 1777)).

63 Memorandum in Support of the United States' Assertion of State Secrets Privilege, *supra* note 1, at 10 (citations omitted).

64 Adam J. White, *The Truth About Secrets: The Bush Administration's Use of the State Secrets Privilege is Neither Novel Nor Undemocratic*, The Weekly Standard, June 1, 2006.

65 *See, e.g.*, Sterling v. Tenet, 416 F.3d 338, 344 (4th Cir. 2005) (citing U.S. v. Zolin, 491 U.S. 554 (1989) which "relied heavily upon Reynolds in discussing a judge's role in determining whether a particular attorney-client conversation fell outside the attorney-client privilege because the client was seeking advice regarding the perpetration of 'a future crime or fraud'").

66 *Reynolds II*, 345 U.S. at 532-33.

67 *Id.* (citing Hoffman v. U.S., 341 U.S. 479, 486-487 (1951)).

68 *Id.*