

April 2, 2008

The Honorable Patrick J. Leahy, Chairman  
The Honorable Arlen Specter, Ranking Minority Member  
Committee on the Judiciary  
United States Senate  
Washington, DC 20510

**Re: State Secrets Protection Act, S. 2533**

Dear Chairman Leahy and Ranking Member Specter:

This letter addresses the question of whether Congress has authority to enact legislation like S. 2533 to govern assertion of the state secrets privilege.

The majority view among the Circuit Courts of Appeals is that the state secrets privilege is a federal common law privilege, which means Congress can establish standards and procedures as part of a comprehensive program that regulates the assertion of the state secrets privilege as is prescribed by S. 2533. Even under the minority view, expressed in a single case describing the privilege as constitutionally based, Congress has concurrent constitutional authority to alter the privilege according to the formulation set forth in *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952), which defined the parameters of such concurrent authority under the Constitution's separation of powers and its system of checks and balances.

**1. The State Secrets Privilege is a Rule of Federal Common Law That Congress May Address With a Comprehensive Regulatory Program.**

Multiple decisions by the Circuit Courts of Appeals describe the state secrets privilege as arising from the federal common law. *See Monarch Assur. P.L.C. v. U.S.*, 244 F.3d 1356, 1358 (Fed. Cir. 2001) ("common-law state secrets privilege"); *Kasza v. Browner*, 133 F.3d 1159, 1167 (9th Cir. 1998) ("the state secrets privilege is an evidentiary privilege rooted in federal common law"); *Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544, 546 (2d Cir. 1991) ("common law evidentiary rule"); *In re United States*, 872 F.2d 472, 474 (D.C. Cir. 1989) (same). That description is consistent with *United States v. Reynolds*, 345 U.S. 1 (1953), which said that the privilege is "well established in the *law of evidence*," *id.* at 6-7 (emphasis added), not in constitutional law. *See also* Fed R. Evid. 501 notes of Committee on the Judiciary, H. REP. NO. 93-650 (describing "secrets of state" privilege as one of nine "nonconstitutional privileges" the Supreme Court submitted to Congress). Most recently, the Ninth Circuit Court of Appeals reiterated this majority view, plainly describing the privilege as "a common law evidentiary privilege," *Al-Haramain Islamic Foundation, Inc. v. Bush*, 507 F.3d 1190, 1196 (9th Cir. 2007), in spite of the defendants' insistence in briefing before the court that the privilege is constitutionally based.

In this respect, the state secrets privilege differs from executive privilege, which the Supreme Court has suggested is "inextricably rooted in the separation of powers under the Constitution." *United States v. Nixon*, 418 U.S. 683, 708 (1974). The Supreme Court has never

said that the state secrets privilege is similarly rooted in the constitutional separation of powers. The Attorney General's letter to the Committee dated March 31, 2008 relies on *Nixon* for the proposition that the privilege derives from the President's Article II duties, but *Nixon* held nothing of the sort. *Nixon* did not adjudicate any issues regarding the state secrets privilege.

A single appellate decision states the contrary minority view that the state secrets privilege is constitutionally based. See *El-Masri v. United States*, 479 F.3d 296, 303-04 (4th Cir. 2007). The prevailing view today remains that the privilege is one of federal common law.

As a federal common law privilege, the state secrets privilege may be displaced by statute. *Dickerson v. United States*, 530 U.S. 428, 437 (2000) ("Congress retains the ultimate authority to modify or set aside any judicially created rules of evidence and procedure that are not required by the Constitution"); see also *Tenet v. Doe*, 544 U.S. 1, 11 (2005) (Stevens, concurring) ("Congress can modify the federal common-law rule"). This may occur through legislation – like S. 2533 – that "occupie[s] the field through the establishment of a comprehensive regulatory program." *Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981).

In *Milwaukee v. Illinois*, a statutory scheme regulating interstate water pollution preempted federal common law on nuisance abatement because "[t]he establishment of such a self-consciously comprehensive program by Congress . . . strongly suggests that there is no room for courts to attempt to improve on that program with federal common law." *Id.* at 319. Similarly here, Congress can establish standards and procedures as part of a comprehensive program that regulates the assertion of the state secrets privilege in connection with the litigation of cases that implicate national security concerns.

## **2. Even if the State Secrets Privilege is Constitutionally Based, Congress Has Concurrent Constitutional Authority to Address the Privilege.**

Even if the state secrets privilege is constitutionally based, that just means the President and Congress have concurrent constitutional authority over protection of state secrets. The presence of such concurrent constitutional authority invokes the standards set forth in *Youngstown Sheet and Tube Co.*, 343 U.S. 579 (1952), for determining the parameters of such authority according to our Constitution's separation of powers and its system of checks and balances. Congressional power in this area also cannot invade the judicial power or violate the constitutional rights of litigants.

Congress's constitutional authority to regulate protection of state secrets has multiple roots in the Constitution. The state secrets privilege is an *evidentiary* privilege, and "Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes or Constitution of the United States." *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9-10 (1941). This authority is rooted in Congress's power to "constitute tribunals inferior to the Supreme Court" under Article I, Section 8, cl. 9, and its power to "make all laws which shall be necessary and proper for carrying into execution the foregoing powers." *Id.*, cl. 18. Congressional power to regulate protection of state secrets is also rooted in Article III, Section 2 of the Constitution, which subjects the jurisdiction of the federal courts to "such regulations as

the Congress shall make.” *Id.*, cl. 2.

Further, to whatever extent the state secrets privilege might be rooted in the President’s Article II authority as commander-in-chief of the Army and Navy, such authority is subject to Congress’s Article I power to “make rules for the government and regulation of the land and naval forces.” *Id.*, Section 8, cl. 14; see *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2773 (2006).

The Constitution also invests Congress with broad authority “to deal with foreign affairs,” *Afroyim v. Rusk*, 387 U.S. 253, 256 (1967), and “to legislate to protect civil and individual liberties,” *Shelton v. United States*, 404 F.2d 1292, 1298 n. 17 (D.C. Cir. 1968).

Congress’s constitutional authority to regulate protection of state secrets is multi-faceted. If there is any constitutional underpinning for the state secrets privilege, it is checked and balanced by concurrent congressional constitutional authority.

Justice Robert Jackson’s concurring opinion in *Youngstown Sheet and Tube* prescribes a formulation for determining the extent of presidential power where Congress and the President share concurrent constitutional authority. Justice Jackson observed that the Constitution “enjoins upon its branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.” 343 U.S. at 635. Thus, the extent of presidential power frequently depends on the presence or absence of congressional action:

- “When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.” *Id.*
- “When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.” *Id.* at 637.
- “When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.” *Id.*

This formulation is not tossed aside in times of war. “Whatever power the United States Constitution envisions for the Executive in 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.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004). “[T]he greatest security against tyranny . . . lies not in a hermetic division among the Branches, but in a carefully crafted system of checked and balanced power within each Branch.” *Mistretta v. United States*, 488 U.S. 361, 381 (1989). Hanging in the balance is “the equilibrium established by our constitutional system” between three separate but interdependent branches of government. *Youngstown*, 343 U.S. at 638 (Jackson, J., concurring).

According to the *Youngstown* formulation, Congress has constitutional authority to put presidential power at its “lowest ebb” by exercising its concurrent power to regulate protection of state secrets — in the case of S. 2533, with legislation that strikes a balance between the interests in protecting national security and safeguarding civil liberties.

Thank you for considering our views on the constitutionality of this important legislation. Please direct any questions about this letter to Kevin Bankston at the Electronic Frontier Foundation, 415/436-9333 x 126, bankston@eff.org.

Sincerely,

Kevin S. Bankston  
Senior Staff Attorney  
Electronic Frontier Foundation

Jon B. Eisenberg  
Eisenberg & Hancock LLP  
Counsel for plaintiffs Al-Haramain Islamic Foundation, Inc.,  
Wendell Belew, and Asim Ghafoor in *Al-Haramain Islamic  
Foundation, Inc. v. Bush*

Caroline Fredrickson  
Director, Washington Legislative Office  
American Civil Liberties Union

Gregory T. Nojeim  
Director, Project on Freedom, Security & Technology  
Center for Democracy & Technology

cc: Members of the Senate Judiciary Committee  
Sen. James Webb and Sen. Hillary Clinton, co-sponsors