Testimony of

The Honorable Carl J. Nichols

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STATEMENT
OF
CARL J. NICHOLS
DEPUTY ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION
DEPARTMENT OF JUSTICE
BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
CONCERNING
"EXAMINING THE STATE SECRETS PRIVILEGE:
PROTECTING NATIONAL SECURITY WHILE PRESERVING ACCOUNTABILITY"
PRESENTED ON
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Chairman Leahy, Ranking Member Specter, Members of the Committee, thank you for the opportunity to appear before you to address the important subject of today's hearing, the state secrets privilege. Since March 2005, I have served as a Deputy Assistant Attorney General in the Civil Division in the Department of Justice. In that capacity I both have been involved in the decisionmaking process regarding whether and when the Executive Branch will assert the state secrets privilege in civil litigation, and have gained an appreciation for the important role that the privilege plays in preventing the disclosure of national security information.

I would like to address two separate but related points in my testimony.

First, the state secrets privilege serves a vital function by ensuring that private litigants cannot use litigation to force the disclosure of information that, if made public, would directly harm the national security of the United States. The privilege has a longstanding history and has been invoked, during periods of both conflict and peace, to protect such information. But the role of the state secrets privilege is particularly important when, as now, our Nation is engaged in a conflict with a terrorist enemy in which intelligence is absolutely vital to protecting the homeland. The privilege is thus firmly rooted in the constitutional authorities and obligations assigned to the President under Article II to protect the national security of the United States.

Second, accountability is preserved by a number of procedural and substantive requirements that must be satisfied before a court may accept an assertion of the state secrets privilege. These protections ensure that the privilege is asserted by the Executive Branch, and accepted by the courts, only in the most appropriate cases.

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

Any discussion of the state secrets privilege must begin with the vital role it plays in protecting the national security. The state secrets privilege permits the United States to ensure that civil litigation does not result in the disclosure of information related to the national security that, if made public, would cause serious harm to the United States. As the Supreme Court held in United States v. Reynolds, 345 U.S. 1, 10 (1953), such information should be protected from disclosure when there is a "danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged." The Supreme Court recognized the imperative of protecting such information when it further held that even where a litigant has a strong need for that information, the privilege is absolute: "Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake." Id. (emphasis added). As the Court of Appeals for the Fifth Circuit has noted, the "greater public good - ultimately the less harsh remedy - " is to protect the information from disclosure, even where the result might be dismissal of the lawsuit. Bareford v. General Dynamics Corp., 973 F.2d 1138, 1144 (5th Cir. 1992).

The state secrets privilege thus plays a critical role, even in peacetime. But the privilege is particularly important during times, such as the present, when our Nation is engaged in a conflict with an enemy that seeks to attack the homeland. We remain locked in a struggle with al Qaeda, a terrorist enemy that does not acknowledge or comply with basic norms of warfare; that seeks to operate by stealth and secrecy, using the openness of our society against us; and that intends to inflict indiscriminate, mass casualties in the civilian population of the United States. In these circumstances, litigation may risk disclosing to al Qaeda or other adversaries details regarding our intelligence capabilities and operations, our sources and methods of foreign intelligence gathering, and other important and sensitive activities that we are presently undertaking in our conflict. The state secrets privilege ensures that critical national security efforts are not weakened or endangered through the forced disclosure of highly sensitive information.

The state secrets privilege is rooted in the constitutional authorities and obligations assigned to the President under Article II as Commander in Chief and representative of the Nation in the realm of foreign affairs. It is well established that the President is constitutionally charged with protecting information relating to the national security. As the Supreme Court has stated, "[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).

The state secrets privilege is not, therefore, a mere "common law" privilege. Instead, as the courts have long recognized, the privilege has a firm foundation in the Constitution. Any doubt that the privilege is rooted in the Constitution was dispelled in United States v. Nixon, 418 U.S. 683 (1974), in which the Supreme Court explained 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. The Court then went on to expressly recognize that a "claim of privilege on the ground that [information constitutes] military or diplomatic secrets" - that is, the state secrets privilege - necessarily involves "areas of Art. II duties" assigned to the President. Id. at 710. The lower

courts have reaffirmed this conclusion. See, e.g., El-Masri v. United States, 479 F.3d 296, 303-04 (4th Cir.), cert. denied, 128 S.Ct. 373 (2007) (holding that the state secrets privilege "has a firm foundation in the Constitution"). As the D.C. Circuit has noted, the state secrets privilege "must head the list" of "the various privileges recognized in our courts." Halkin v. Helms, 598 F. 2d 1, 7 (D.C. Cir. 1978).

Before I turn to the second subject of my testimony, I would like to take an opportunity to discuss an issue arising out of Reynolds itself. Some have claimed that a review of declassified information in Reynolds demonstrates that the United States' assertion of the state secrets privilege in that case was somehow improper. Not only is that claim incorrect, but it has been rejected by two federal courts. In Herring v. United States, 2004 WL 2040272 (E.D. Pa. 2004), living heirs to those killed in the air crash at issue in Reynolds filed suit to set aside a settlement agreement, alleging that the United States' state secrets privilege assertion in Reynolds was fraudulent. After again reviewing the matter in 2004, Judge Davis held that the Air Force had not "misrepresent[ed] the truth or commit[ted] a fraud on the court" in Reynolds. See Herring, 2004 WL 2040272, at *5; see also id. at *6. Judge Davis reached this conclusion after analyzing precisely why disclosure of the information contained in an accident report of the crash would have caused harm to national security by revealing flaws in the B-29 aircraft. See id. at 9. As Judge Davis found, "[d]etails of flight mechanics, B-29 glitches, and technical remedies in the hands of the wrong party could surely compromise national security," and thus "may have been of great moment to sophisticated intelligence analysts and Soviet engineers alike." Id. The Court of Appeals for the Third Circuit, reviewing the matter de novo, unanimously affirmed Judge Davis's decision. See Herring v. United States, 424 F.3d 384 (3rd Cir. 2005), cert. denied, 547 U.S. 1123 (2006).

II. Various Procedural and Substantive Requirements Ensure that the Privilege Is Invoked and Accepted Only in the Most Appropriate Cases.

Any discussion of the state secrets privilege should also recognize the significant procedural and substantive requirements for asserting the privilege. Several of these requirements are set forth in the Supreme Court's decision in Reynolds, and ensure that the privilege is invoked and accepted only in appropriate cases. This careful process ensures - and my experience confirms - that the privilege is not, in the words of the Supreme Court, "lightly invoked." 354 U.S. at 7.

Starting with the procedural protections, Reynolds enumerates three basic but important requirements. First, the privilege can be invoked only by the United States (that is, it cannot be invoked by a private litigant), and only through a "formal claim of privilege." Reynolds, 345 U.S. at 7-8. Second, the privilege cannot be invoked by a low-level government official, but instead must be "lodged by the head of the department which has control over the matter" - in other words, only an agency head may assert the privilege. Id. at 8. Third, that official must give "actual personal consideration" to the matter before asserting the privilege. Id. Separate from these important requirements, because the state secrets privilege is asserted in litigation, the Department of Justice, as the agency charged with conducting litigation involving the United States, 28 U.S.C. §§ 516 & 519, must also agree that asserting the privilege in a particular situation is appropriate. Only if there is a "reasonable danger" that disclosure of the privilege will cause harm to the national security, see Reynolds at 10, will the privilege be asserted.

In practice, satisfying these requirements typically involves many layers of substantive review and protection. The agency with control over the information at issue reviews the information internally to determine if a privilege assertion is necessary and appropriate. That process typically involves considerable review by agency counsel and officials. Once that review is completed, the agency head - such as the Director of National Intelligence or the Attorney General - must personally satisfy himself or herself that the privilege should be asserted.

An important part of that process is the agency head's personal review of various materials, including the declaration (or declarations) that he or she must sign in order to assert the privilege. The point of such declarations is to formally invoke the privilege and to explain to the court the factual basis supporting the privilege. If the head of the department concludes that the privilege is warranted, the official formally invokes the privilege by signing the declarations, which are then made available to the court along with any supporting declarations. By signing the declarations, the department head and any supporting official attest, under penalty of perjury, to the truthfulness of their statements and to their personal attention to the matter.

Once the privilege is asserted, it is up to the court to decide whether, based on its review of the unclassified and classified materials that have been made available to it, the assertion should be upheld. It is well established that the court, in reviewing the privilege assertion, must accord the "utmost deference" to the privilege assertion and to the national security judgments of the Executive Branch. Kasza v. Browner, 133 F.3d 1159, 1166 (9th Cir. 1998); see also Al-Haramain Islamic Foundation, Inc. v. Bush, 507 F.3d 1190, 1203 (9th Cir. 2007) (reaffirming "the need to defer to the Executive on matters of foreign policy and national security" and concluding that the court "surely cannot legitimately find [itself] second guessing the Executive in this arena"). Still, notwithstanding this deferential standard of review, "[t]he court itself must determine whether the circumstances are appropriate for the claim of privilege." Reynolds, 345 U.S. at 8. In other words, it is for the court to determine, after applying the appropriate level of deference, whether the Executive Branch has adequately demonstrated that there is a reasonable danger that disclosure of the information would harm the national security. This review serves as an important check in the state secrets process.

In making its determination, moreover, a court often reviews not just the public declarations of the Executive officials explaining the basis for the privilege, but also classified declarations providing further detail for the court's in camera, ex parte review. One misperception about the state secrets privilege is that the underlying classified information at issue is not shared with the courts, and that the courts instead are simply asked to dismiss cases based on trust and non-specific claims of national security. Instead, in every case of which I am aware, out of respect for the Judiciary's role the Executive Branch has made available to the courts both unclassified and classified declarations that justify, often in considerable detail, the bases for the privilege assertions. By way of example, the Court of Appeals for the Ninth Circuit recently noted in upholding the government's assertion of the state secrets privilege that the panel had:

spent considerable time examining the government's declarations (both those publicly filed and filed under seal). We are satisfied that the basis for the privilege is exceptionally well documented. Detailed statements [in the government's classified filings] underscore that disclosure of information concerning the Sealed Document and the means, sources and methods

of intelligence gathering in the context of this case would undermine the government's intelligence capabilities and compromise national security.

Al-Haramain Islamic Foundation, Inc. v. Bush, 507 F.3d 1190, 1204 (9th Cir. 2007) (emphasis added); see also id. ("We take very seriously our obligation to review the documents with a very careful, indeed a skeptical eye, and not to accept at face value the government's claim or justification of privilege. Simply saying 'military secret,' 'national security,' or 'terrorist threat' or invoking an ethereal fear that disclosure will threaten our nation is insufficient to support the privilege. Sufficient detail must be - and has been - provided for us to make a meaningful examination.") (emphasis added).

Finally, I should also address the common misperception that the Executive Branch always seeks dismissal in each case in which it has asserted the state secrets privilege, and that the courts must dismiss each case in which the privilege has been asserted. That is incorrect. Instead, once a court has concluded that the privilege has been properly asserted, the privileged information is removed from the case, and the court must then decide whether, and how, the case can proceed without that information. To be sure, the result is that some cases must be dismissed because there is no way to proceed without the information. But in other cases, the privileged information is peripheral and the case can proceed without it. By way of example, in BCG v. Guerrieri, et al., No. 2004CV395 (Weld Cty., Colo. 19th Dist. Ct.), a real estate and contract dispute between private parties, the United States asserted the state secrets privilege over certain information and moved for a protective order precluding disclosure of that information, but did not seek dismissal of the action.

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