



April 2, 2008

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Arlen Specter
Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

AMERICAN CIVIL
LIBERTIES UNION
WASHINGTON
LEGISLATIVE OFFICE
915 15th STREET, NW, 6TH FL
WASHINGTON, DC 20005
T/202.544.1681
F/202.546.0738
WWW.ACLU.ORG

Caroline Fredrickson
DIRECTOR

NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2500

OFFICERS AND DIRECTORS
NADINE STROSSEN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

RICHARD ZACKS
TREASURER

Dear Senators:

The American Civil Liberties Union, a non-partisan organization of over a half-million members dedicated to the defense of civil liberties guaranteed by the Constitution and the Bill of Rights, welcomes the opportunity to respond to Attorney General Michael Mukasey's March 31, 2008 letter opposing the "State Secrets Protection Act" (S. 2533).

Attorney General Mukasey's letter shows a shocking disregard for the co-equal branches of government, the Congress and the Judiciary; a disregard for the rights of persons harmed by government misconduct; and, most dangerously, a disregard for the constitutional system of checks and balances that the Framers so carefully crafted to keep our nation both safe and free for over 230 years. By claiming powers that neither the legislature nor the judiciary can properly regulate, the Bush administration has endeavored to upend this delicate balance. In Federalist No. 47 James Madison warned, "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." Attorney General Mukasey's letter reflects the expansive view of executive power that the Bush administration has used to justify the most onerous programs and policies, including extra-judicial detention, warrantless domestic surveillance, and torture. Ironically, it also serves as the most compelling argument for Congressional reform of the state secrets privilege to reign in the administration's misuse of executive power.

1. Procedural and substantive requirements regarding state secrets are insufficient protections against abuse.

Contrary to Attorney General Mukasey's letter, experience has demonstrated that the current procedures and substantive requirements regulating the invocation of state secrets have not been sufficient to prevent abuse. Over the last several years we have seen the state secrets privilege mutate from a common-law evidentiary rule allowing the government "to block discovery in a lawsuit of any information that, if disclosed, would adversely affect national security,"¹ into an alternative form of outright immunity used to shield the government and its agents from accountability for systemic violations of the Constitution. Since September 11, 2001, the Bush administration has fundamentally altered the manner in which the state secrets privilege is used, to the detriment of the rights of private litigants harmed by egregious government misconduct, and at the expense of the American people's trust and confidence in our judicial system.²

It has been more than half a century since the Supreme Court formally recognized the common-law state secrets privilege in *United States v. Reynolds*, a case that not only established the legal framework for a state secrets claim but also now serves as cautionary tale for those judges inclined to accept the government's assertions as valid on their face.³ In the intervening years, the privilege has become unmoored from its evidentiary anchor. No longer is the privilege invoked solely with respect to discrete secret evidence; rather, the government now routinely invokes the privilege at the pleading stage, before any evidentiary disputes have arisen.⁴ Indeed, *Reynolds'* instruction to weigh a plaintiff's showing of need for particular evidence in determining how deeply to probe the government's claim of privilege is rendered wholly meaningless when the privilege is invoked before any request for evidence has been made. Moreover, the government has invoked the privilege with greater frequency⁵; in cases of greater national significance⁶; and in a manner that seeks effectively to transform it from an evidentiary privilege into an immunity doctrine, thereby "neutraliz[ing] constitutional constraints on executive powers."⁷

In particular, since September 11, 2001, the government has invoked the privilege frequently in cases that present serious and plausible allegations of grave executive misconduct. The current administration has sought to foreclose judicial review of the National Security Agency's (NSA's) warrantless surveillance of United States citizens in contravention of the Foreign Intelligence Surveillance Act (FISA), to foreclose review of the NSA's warrantless data mining of calls and e-mails, and to foreclose review of various telecommunication companies' participation in the NSA's surveillance activities.⁸ It has invoked the privilege to terminate a whistleblower suit brought by a former FBI translator who was fired after reporting serious security breaches and possible espionage within the Bureau.⁹ And, of course, it has invoked the privilege to seek dismissal of suits challenging the government's seizure, transfer, and torture of innocent foreign citizens.¹⁰

The proliferation of cases in which the government has invoked the state secrets privilege, and the lack of guidance from the Court since its 1953 decision in *Reynolds*,

have produced conflict and confusion among the lower courts regarding the proper scope and application of the privilege. In *Tenet v. Doe*, the Supreme Court clarified the distinction between the evidentiary state secrets privilege, which may be invoked to prevent disclosure of specific evidence during discovery, and the so-called *Totten* rule, which requires outright dismissal at the pleading stage of cases involving unacknowledged espionage agreements.¹¹ As the Court explained, *Totten* is a “unique and categorical . . . bar – a rule designed not merely to defeat the asserted claims, but to preclude judicial inquiry.”¹² By contrast, the Court noted, the state secrets privilege deals with evidence, not justiciability.¹³ Nevertheless, some courts have permitted the government to invoke the evidentiary state secrets privilege to terminate litigation even before there is any evidence at issue.

There is substantial confusion in the lower courts regarding both *when* the privilege properly may be invoked, and *what* precisely the privilege may be invoked to protect. The *Reynolds* Court considered whether the privilege had been properly invoked during discovery, at a stage of the litigation when *actual evidence* was at issue.¹⁴ Consistent with *Reynolds*, some lower courts have properly rejected pre-discovery, categorical assertions of the privilege, holding that the privilege must be asserted on an item-by-item basis with respect to particular disputed evidence.¹⁵ Other courts, however, have permitted the government to invoke the privilege at the pleading stage, with respect to entire *categories* of information – or even the entire subject matter of the action – before evidentiary disputes have arisen.¹⁶

There is also a wide divergence among the lower courts regarding how deeply a court must probe the government’s claim of privilege, and what, exactly, the court must examine in assessing a privilege claim and its consequences. Notwithstanding *Reynolds*’ clear instruction that the judge has a critical and authoritative role to play in the privilege determination, many courts have held that the government’s state secrets claim must be afforded the most extreme form of deference.¹⁷ Other courts properly have scrutinized the government’s privilege claim with more rigor – adopting a common-sense approach to assessing the reasonable risk of harm to national security should purported state secrets be disclosed.¹⁸

This confusion as to the proper judicial role plays out with particularly dire consequences when a successful claim of privilege results in dismissal of the entire lawsuit. Some courts correctly have held that where dismissal might result from a successful invocation of the privilege, the court must examine the *actual* evidence as to which the government has invoked the privilege before making any determination about the applicability of the privilege or dismissal.¹⁹ Other courts have refused or declined to examine the allegedly privileged evidence, relying solely on secret affidavits submitted by the government.²⁰

Legislative action to narrow the scope of the state secrets privilege and standardize the judicial process for evaluating privilege claims is needed to clear up the confusion in the courts and to bring uniformity to a too often flawed process that is increasingly denying justice to private litigants in cases of significant national interest.

2. Congress has the constitutional authority to alter the manner in which the courts state secrets privilege

Attorney General Mukasey's letter suggests Congress is impotent to regulate the executive branch's exercise of the state secrets privilege because the privilege is "rooted in the Constitution and is not merely a common law privilege." This analysis is wrong on both the facts and the law. As law professor Robert Chesney made clear in his recent testimony before your committee:

As a historical matter, there is little doubt that the privilege emerged as a common law evidentiary rule, very much as did the attorney-client privilege and similar rules that function to exclude from litigation otherwise-relevant information in order to serve a higher public purpose.²¹

The Supreme Court has never held, as Attorney General Mukasey suggests, that the state secrets privilege is rooted in the Constitution. To the contrary, the *Reynolds* Court called it "a privilege which is well established in the law of evidence."²² The only Supreme Court decision Attorney General Mukasey cited to support this argument, *United States v. Nixon*, regarded an invocation of executive privilege rather than the state secrets privilege.²³ Moreover, the lower court decision Attorney General Mukasey cited to support the contention that the state secrets privilege "has a firm foundation in the Constitution," *El-Masri v. United States*,²⁴ is the sole outlier among many other Circuit Court of Appeals decisions and congressional reports that clearly indicate a consensus view that state secrets privilege arises from federal common law.²⁵ But Professor Chesney contends that even if one were to assume for the sake of argument a constitutional basis for the state secrets privilege, "Congress would have authority at least to regulate the process through which assertions of the privilege are to be adjudicated."²⁶

Indeed, the Constitution grants Congress "near plenary" powers over the jurisdiction of federal courts, which arises "logically from its control over the very existence of the lower federal courts."²⁷ Congress has the power to police executive branch activities through judicial oversight, and by conferring authority to hear cases challenging the use of executive power Congress has empowered courts to act as a check against executive abuses. Despite Attorney General Mukasey's statements to the contrary in the letter, the Department of Justice has recognized the legitimacy of Congress's role in regulating the executive's use of the state secrets privilege. In pleadings seeking dismissal of the ACLU's challenge to the National Security Agency's warrantless wiretapping program on state secrets grounds, the Department of Justice argued:

This is not to say there is no forum to air the weighty matters at issue, which remains a matter of considerable public interest and debate, but that the resolution of these issues must be left to the political branches of government.²⁸

What this argument misses, of course, is that the “political branch” – Congress – did speak when it conferred jurisdiction to the courts to hear constitutional challenges to executive branch actions.²⁹ Congress obviously then retains the power to regulate the manner in which courts exercise such authority.

Attorney General Mukasey seems to accept Congress’s power to regulate the manner in which courts handle secret evidence in his discussion of the Classified Information Procedures Act,³⁰ which established procedures the courts would use to handle classified evidence in criminal prosecutions. Attorney General Mukasey argues that CIPA is somehow more legitimate than the Manager’s Amendment because in the criminal context the executive retains “the discretion to protect classified information by dropping a prosecution if necessary.” Attorney General Mukasey alleges the Manager’s Amendment would force the executive into a “Hobson’s Choice” of either disclosing information or losing cases, which is exactly the choice required in a criminal case under CIPA. The argument in fact would be much stronger in the reverse, especially since classified information in criminal cases primarily arises in espionage and terrorism prosecutions. The decision to disclose information or forego prosecution of a suspected terrorist must be more difficult than a decision to accept liability for monetary damages. Underneath Attorney General Mukasey’s specious argument, however, is the acceptance of the notion that Congress does have the authority to regulate the measures courts must take to protect national interests, which include both the national interest in protecting properly classified information and the national interest in allowing private litigants harmed by executive abuses of power to have their day in court.

3. Courts have long had both the authority and the institutional expertise to resolve evidentiary issues that pertain to national security information, and have never jeopardized our security in the meantime.

The discussion of CIPA reveals another fault in Attorney General Mukasey’s logic. Courts are plainly competent to review cases implicating even the most sensitive national security issues, and have done so routinely.³¹ In fact, the administration’s consistent overreaching since the attack of September 11, 2001, has given the courts ample opportunity to adjudicate national security programs and authorities: courts have decided whether the President can detain enemy combatants captured on the battlefield in Afghanistan and whether those captured are entitled to due process;³² whether individuals detained at Guantanamo Bay can challenge their detention,³³ and whether the trial of detainees by military commissions passes constitutional muster.³⁴ Courts have required access to the testimony of enemy combatant witnesses;³⁵ decided whether, consistent with the Constitution, the FBI can unilaterally demand that internet service providers turn over customer records related to national security investigations and gag them forever without judicial review;³⁶ whether the government can require closure of all post-9/11 deportation hearings for national security reasons;³⁷ and whether the government must disclose information about the treatment of detainees in Iraq, Afghanistan, and Guantanamo Bay.³⁸ Yet through all of this litigation, the administration cannot point to a single incident where the courts erred and jeopardized our security.

Further, even before the attacks of 9/11, our courts regularly fulfilled their constitutional role through times of emergency, war or other danger. In the past, courts have determined whether the military can try individuals detained inside and outside zones of conflict, during times of hostility and peace;³⁹ whether the government could prevent newspapers from publishing the Pentagon Papers because it would allegedly harm national security;⁴⁰ whether the executive branch, in the name of national security, could deny passports to members of the Communist Party;⁴¹ whether U.S. civilians outside of the country could be tried by court-martial;⁴² whether the President could seize the steel mills during a labor dispute when he believed steel was needed to fight the Korean War;⁴³ whether the Executive could continue to detain a loyal Japanese-American citizen under a war-related executive order;⁴⁴ whether the President could block southern ports and seize ships bound for Confederate ports during Civil War;⁴⁵ and whether the President could authorize the seizure of ships on the high seas in a manner contrary to an act of Congress during a conflict with France.⁴⁶ One cannot put too fine a point on it: for over two hundred years courts have played a crucial role as an independent branch of government, even when national security issues are involved. If courts were able to decide these cases without once jeopardizing national security, nothing should preclude Congress from setting statutory guidelines about how evidence shall be presented, received and used by those very same courts in the current age.⁴⁷

Courts not only have the ability to handle sensitive national security cases but an obligation. Indeed, courts have a special duty to review executive action that threatens fundamental liberties. As the Supreme Court recently emphasized, the Constitution “envisions a role for all three branches when individual liberties are at stake.”⁴⁸ Ultimately, legislation such as the State Secrets Protection Act helps facilitate this most important role for the courts by realigning the executive and judicial branches as co-equal partners in defending our security and our liberties.

CONCLUSION

The framers carefully and deliberately distributed power among the three branches of government, creating a system of checks and balances that prevents any one branch from becoming powerful enough to threaten individual liberty. Our democracy is strongest when the three branches operate together in mutual respect for one another, and in respect for the rights of the governed. In his concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, Justice Jackson warned of the threat to “the equilibrium established by our constitutional system” when a President acts against the expressed will of the Congress. But that equilibrium is equally threatened when Congress and the courts fail to exercise their essential roles as checks on executive power.

Sadly, the last seven years have seen a retreat by both the legislative and judicial branches, which have relinquished ever greater power to the executive. In the name of fighting the so-called “war on terror,” the fundamental balance created by our Constitution has been thrown askew and sorely needs to be righted. S. 2533 makes great strides towards rebalancing government power -- in one honorable sweep it reasserts

Congress' authority and preserves a meaningful role for the courts in protecting our civil liberties. We strongly urge all members of the Judiciary Committee to support this important bill.

Sincerely,



Michael W. Macleod-Ball
Chief Legislative and Policy Counsel



Michael German
Policy Counsel

¹ *Ellsberg v. Mitchell*, 709 F.2d 51, 56 (D.C. Cir. 1983); *See also*, *United States v. Reynolds*, 345 U.S. 1, 10 (1953); *Tenenbaum v. Simonini*, 372 F.3d 776, 777 (6th Cir. 2004).

² *See*, Caroline Fredrickson, Statement for the Record to the United States Senate, Committee on the Judiciary, Feb. 13, 2008.

³ *Reynolds*, 345 U.S. 1 (1953).

⁴ *See Hepting v. AT&T, Corp.*, 439 F. Supp. 2d 974 (N.D. Cal. 2006), *appeal docketed*, No. 06-17137 (9th Cir. Nov. 9, 2006); *Al-Haramain Islamic Found., Inc. v. Bush*, 451 F. Supp. 2d 1215 (D. Or. 2006); *ACLU v. NSA*, 438 F. Supp. 2d 754 (E.D. Mich. 2006); *Terkel v. AT&T Corp.*, 441 F. Supp. 2d 899 (N.D. Ill. 2006); *Edmonds v. U.S. Dep't of Justice*, 323 F. Supp. 2d 65 (D.D.C. 2004), *cert. denied*, 74 USLW 3108 (U.S. Nov. 28, 2005) (No. 05-190); *El-Masri* 437 F. Supp. 2d 530 (E.D. Va. 2006); *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (E.D.N.Y. 2006) (dismissed on other grounds).

⁵ Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 FORDHAM L. REV. 1931, 1939 (2007) ("The Bush Administration has raised the privilege in twenty-eight percent more cases per year than in the previous decade, and has sought dismissal in ninety-two percent more cases per year than in the previous decade.")

⁶ Editorial, *Too Many Secrets*, N.Y. Times, Mar. 10, 2007, at A12, available at: <http://www.nytimes.com/2007/03/10/opinion/10sat2.html?ex=1331182800&en=023b94ae28666f34&ei=5090&partner=rssuserland&emc=rss> ("It is a challenge to keep track of all the ways the Bush administration is eroding constitutional protections, but one that should get more attention is its abuse of the state secrets doctrine.")

⁷ Note, *The Military and State Secrets Privilege: Protection for the National Security or Immunity for the Executive?*, 91 YALE L.J. 570, 581 (1982).

⁸ *See*, *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974 (N.D. Cal. 2006), *appeal docketed*, No. 06-17137 (9th Cir. Nov. 9, 2006); *Al-Haramain Islamic Found., Inc. v. Bush*, 451 F. Supp. 2d 1215 (D. Or. 2006); *ACLU v. NSA*, 438 F. Supp. 2d 754 (E.D. Mich. 2006); *Terkel v. AT&T Corp.*, 441 F. Supp. 2d 899 (N.D. Ill. 2006).

⁹ *Edmonds v. U.S. Dep't of Justice*, 323 F. Supp. 2d 65 (D.D.C. 2004), *cert. denied*, 74 USLW 3108 (U.S. Nov. 28, 2005) (No. 05-190).

¹⁰ *See*, *El-Masri*, 437 F. Supp. 2d 530 (E.D. Va. 2006); *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (E.D.N.Y. 2006) (dismissed on other grounds).

¹¹ *Tenet v. Doe*, 544 U.S. 1 (2005).

¹² *Id.*, at 6.

¹³ *Id.*, at 9, 10.

¹⁴ *Reynolds*, 345 U.S. at 3.

¹⁵ See, e.g., *In re United States*, 872 F.2d 472, 478 (D.C. Cir. 1989) (rejecting categorical, pre-discovery privilege claim because “an item-by-item determination of privilege [would] amply accommodate the Government’s concerns”); *Hepting*, 439 F. Supp. 2d at 994 (N.D. Cal. 2006) (refusing to assess effect of pleading stage, categorical assertion of the privilege in suit challenging phone company’s involvement in warrantless surveillance, preferring to assess the privilege “in light of the facts.”); *Nat’l Lawyers Guild v. Att’y General*, 96 F.R.D. 390, 403 (S.D.N.Y. 1982) (holding privilege must be asserted on document-by-document basis).

¹⁶ See, e.g., *Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544, 546 (2d Cir. 1991) (finding privilege properly asserted at pleading stage over all information pertaining to ship’s defense system and rules of engagement); *Sterling v. Tenet*, 416 F.3d 338, 345-46 (4th Cir. 2005) (upholding pre-answer invocation of privilege over categories of information related to plaintiff’s employment as well as alleged discrimination by CIA); *Black v. United States*, 62 F.3d 1115, 1117, 1119 (8th Cir. 1995); *Terkel*, 441 F. Supp. 2d at 918.

¹⁷ See, e.g., *Zuckerbraun*, 935 F.2d at 547; *Sterling*, 416 F.3d at 349 (accepting government’s pleading-stage claim that state secrets would be revealed if plaintiff’s suit were allowed to proceed, holding that court was “neither authorized nor qualified to inquire further”); *Kasza*, 133 F.3d at 1166 (holding that government’s privilege claim is owed “utmost deference”).

¹⁸ See, e.g., *In re United States*, 872 F.2d at 475 (“[A] court must not merely unthinkingly ratify the Executive’s assertion of absolute privilege, lest it inappropriately abandon its important judicial role.”); *Ellsberg*, 709 F.2d at 60 (rejecting claim of privilege over name of Attorney General who authorized unlawful wiretapping, explaining that no “disruption of diplomatic relations or undesirable education of hostile intelligence analysts would result from naming the responsible officials”); *Hepting*, 439 F. Supp. 2d at 995 (holding that “to defer to a blanket assertion of secrecy” would be “to abdicate” judicial duty, where “the very subject matter of [the] litigation ha[d] been so publicly aired”); *Al-Haramain*, 451 F. Supp. 2d at 1224 (rejecting government’s overbroad secrecy argument, stating that “no harm to the national security would occur if plaintiffs are able to prove the general point that they were subject to surveillance . . . without publicly disclosing any other information”).

¹⁹ See, e.g., *Ellsberg*, 709 F.2d at 59 n.37 (when litigant must lose if privilege claim is upheld, “careful *in camera* examination of the material is not only appropriate . . . but obligatory”); *ACLU v. Brown*, 619 F.2d 1170, 1173 (7th Cir. 1980).

²⁰ See, e.g., *Sterling*, 416 F.3d at 344 (finding “affidavits or declarations” from government were sufficient to assess privilege claim even where asserted to sustain dismissal, and holding that *in camera* review of allegedly privileged evidence not required); *Black*, 62 F.3d at 1119 (examining only government declarations); *Kasza*, 133 F.3d at 1170 (same).

²¹ Robert M. Chesney, Testimony before the United States Senate Committee on the Judiciary, at 2, Feb. 13, 2008.

²² 345 U.S. 1, 6-7, (1953).

²³ 418 U.S. 683, (1974).

²⁴ 479 F.3d 296, (4th Cir. 2007).

²⁵ 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); 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).

²⁶ *Id.*, at 3.

²⁷ Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 *FORDHAM L. REV.* 1931, 1939, 1951, (2007); See also, U.S. CONST. Art. I, § 8, cl. 18; U.S. CONST. Art. I, § 8, cl. 9; U.S. CONST. Art. III, § 1.

²⁸ Memorandum of Points and Authorities in Support of the United States’ Assertions of the Military and State Secrets Privilege; Defendants’ Motion to Dismiss or, in the Alternative, for Summary Judgement; and Defendants’ Motion to Stay Consideration of Plaintiffs’ Motion for Summary Judgement at 49, *ACLU v. NSA*, 438 R.Supp 2d 754 (no. 10204).

²⁹ Amanda Frost, at 1933.

³⁰ 18 U.S.C. app. III § 1 *et seq.*

³¹ See Statement of Senator Muskie, 120 Cong. Rec. 17023 (1974) (referring to the “outworn myth that only those in possession of [] confidences can have the expertise to decide with whom and when to share their knowledge,” in floor debate regarding standards for judicial review of claims under Exemption 1 of FOIA).

³² *Hamdi*, 542 U.S. 507.

³³ *Rasul v. Bush*, 542 U.S. 466 (2004).

³⁴ *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005), *cert granted*, 74 USLW 3287 (U.S. Nov. 7, 2005) (No. 05-184).

³⁵ *United States v. Moussaoui*, 365 F.3d 292 (4th Cir. 2004).

³⁶ *Doe v. Ashcroft*, 334 F.Supp.2d 471; *Doe v. Gonzales*, 386 F.Supp.2d 66 (D. Conn. 2005), *appeal dismissed as moot*, --- F.3d ---, 2006 WL 1409351 (2d Cir. May 23, 2006).

³⁷ *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002).

³⁸ *ACLU v. Dep’t of Defense*, 389 F. Supp. 2d 547 (S.D.N.Y. 2005).

³⁹ *U. S. ex rel. Toth v. Quarles*, 350 U.S. 11 (1955) (court martial proceedings in Korea); *Madsen v. Kinsella*, 343 U.S. 341 (1952) (commissions in occupied Germany); *Ex parte Quirin*, 317 U.S. 1 (1942) (German saboteurs tried by military commission); *Duncan*, 327 U.S. 304 (military trial of civilians in Hawaii); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866) (civilian in Indiana tried by military commission).

⁴⁰ *New York Times Co. v. United States*, 503 U.S. 703 (1971).

⁴¹ *Kent v. Dulles*, 357 U.S. 116 (1958).

⁴² *Reid v. Covert*, 354 U.S. 1 (1957).

⁴³ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

⁴⁴ *Ex parte Endo*, 323 U.S. 283 (1944).

⁴⁵ *The Prize Cases (The Amy Warwick)*, 67 U.S. 635 (1862).

⁴⁶ *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804).

⁴⁷ Courts also routinely handle classified evidence in criminal cases, *see generally* Classified Information Procedures Act, 18 U.S.C. app. III § 1 *et seq.*

⁴⁸ *Hamdi*, 542 U.S. at 536; *see also Doe v. Gonzales*, 2006 WL 1409351, at *6 (“while everyone recognizes national security concerns are implicated when the government investigates terrorism within our Nation’s borders, such concerns should be leavened with common sense so as not forever to trump the rights of the citizenry under the Constitution”) (Cardamone, J., concurring). “[A] blind acceptance by the courts of the government’s insistence on the need for secrecy . . . would impermissibly compromise the independence of the judiciary and open the door to possible abuse.” *In re Washington Post Co. v. Soussoudis*, 807 F.2d 383, 392 (4th Cir. 1986).