

**BRENNAN
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FOR JUSTICE**

Brennan Center for Justice
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To: David Pozen
From: Aziz Huq, Emily Berman
Date: April 3, 2008
Re: State Secrets Protection Act S.2248

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This memorandum addresses the constitutional power of Congress to enact the State Secrets Protection Act, S.2248 (“SSPA”), establishing rules regulating the invocation of the state secrets privilege, and addresses some of the points made by Attorney General Michael Mukasey in his letter of March 31, 2008, to Hon. Patrick Leahy. Such regulation falls well within Congress’s authority, would not be an unconstitutional infringement on Article II powers, and need not compromise national security.¹

I. Congress Has Authority To Regulate Courts’ Handling of Security-Related Materials

As a threshold matter, there is no dispute that Congress has the power to prescribe regulations for the taking of evidence in the federal courts.² Congress has exercised this authority to enact rules governing sensitive evidence in many contexts, including the Classified Information Procedures Act³ (“CIPA”), the Foreign Intelligence Surveillance Act⁴ (“FISA”), and the Freedom of Information Act (“FOIA”).⁵ Significantly, no serious question has arisen as to the constitutionality of any of these statutes. Nor has the operation of these statutes compromised national security information.⁶

The “long and well-established pedigree”⁷ of the state secrets privilege mentioned by the Attorney General does not undermine Congress’s power to regulate the use and admissibility of evidence in the courts. As an initial matter, this pedigree is simply not that well-established. The Court only articulated a “state secrets” privilege in 1953, even though

¹ Because the constitutional issues raised by the executive’s use and release of national security information are complex, the Brennan Center is currently engaged in researching a comprehensive report on the topic. This memo therefore is necessarily a brief sketch of a complex topic.

² *See, e.g.*, Act to Establish Rules of Evidence for Certain Courts and Proceedings, Pub L. No. 93-595, 88 Stat. 1926 (1975) (enacting the Federal Rules of Evidence); *see also* Art. I, § 8 (Congress has the power “[t]o constitute Tribunals inferior to the supreme Court”); Art. III, § 2 (“[T]he supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.”).

³ 18 U.S.C. app. 3.

⁴ 50 U.S.C. § 1806(f).

⁵ 5 U.S.C. § 552(a)(4)(B).

⁶ Claims that the use of CIPA has compromised national security are baseless. *See* Serrin Turner & Stephen J. Schulhofer, *THE SECRECY PROBLEM IN TERRORISM TRIALS* (2006).

⁷ Letter from Attorney General Michael Mukasey to the Honorable Patrick J. Leahy, Chairman of the Judiciary Committee of the United States Senate 1 (Mar. 31, 2008) (hereinafter “Attorney General Mukasy Letter”).

dicta implying some kind of privilege goes back earlier.⁸ It is implausible to suggest that a tradition that is barely fifty years old is sacrosanct and immune from legislation. And in the nineteen year period following *United States v. Reynolds*, courts saw only six state secrets assertions.⁹ There is no deep-rooted tradition or reliance on the specific form of the privilege that would counsel against action now. In any event, Congress frequently reverses or revises rules announced by the courts, including in the national security arena.¹⁰ Legislation on state secrets would be both legitimately within Congress's powers and permissible insofar as it would not disrupt any settled expectations.

II. State Secrets Legislation Would Not Trench on Article II Authority

Assuming *arguendo* that the state secrets privilege is constitutionally based, its constitutional complexion does not translate automatically into unfettered executive discretion to determine the manner in which it operates.

Only in cases “where the Constitution by explicit text commits the power at issue to the exclusive control of the President” have the courts refused to acknowledge a role for the legislature.¹¹ But since responsibility for the national security of the United States is not textually committed exclusively to the President, but shared between the political branches, the control of national security information is a matter properly determined by both of those branches.

Article II contains no express textual grant of nondisclosure. The Commander-in-Chief Clause does not convey this power: “Aside from the president’s prerogative of superintendence over the armed forces and the federally conscripted militia, the evidence does not reveal an original understanding that the Commander in Chief enjoyed preclusive authority over matters pertaining to war making.”¹²

Instead, as the courts have recognized time and again, the Constitution assigns *shared* responsibility in the area of national security and military controls both to the executive and to Congress.¹³ In this area, the Supreme Court has rejected the proposition that the President has unilateral prerogatives even when it comes to core questions of battlefield

⁸ *United States v. Reynolds*, 345 U.S. 1 (1953).

⁹ Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249, 1297 (2007).

¹⁰ For example, the Congress enacted the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, in response to the Supreme Court’s decision invalidating the President’s use of military commissions in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). And the Court’s decision in *City of Boerne v. Flores*, 521 U.S. 507 (1997), was the direct impetus for the passage of the Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803.

¹¹ *Public Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 485 (1989) (Kennedy, J., concurring).

¹² Barron & Lederman, *The Commander in Chief at the Lowest Ebb—a Constitutional History*, 121 HARV. L. REV. 941, 946 (2008).

¹³ See U.S. Const., art. I (Conferring on Congress the powers to declare war, to raise and support armed forces and, in the case of the Senate, to consent to treaties and the appointment of ambassadors).

conduct and the treatment of individuals seized on a battlefield.¹⁴ This is hardly a novel development. Reaching back to the early 1800s, the federal courts have regulated the conduct of military and security affairs whenever Congress has set forth a relevant statute establishing boundaries to the President’s authority.¹⁵ If Congress has the authority to determine the metes and bounds of military conduct attendant to the battlefield, it *a fortiori* has the authority to regulate how military actions will be regulated for the purposes of loss allocations. And in the case of state secrets, which usually are invoked in circumstances having nothing to do with the battlefield,¹⁶ we have moved even farther away from any area committed solely to the executive’s control.

Unsurprisingly, therefore, the D.C. Circuit has held in *United States v. AT&T*, that the executive branch does not have an absolute discretion with respect to the flow of information in the national security area.¹⁷

A contrary result would rest on a unilateral executive authority to withhold information—even from another branch of government. This would indeed be surprising because it would have significant repercussions across a spectrum of national security questions: It would at least cast into shadow Congress’s authority to promulgate rules concerning classification, security clearance, and disclosure. It would also arguably mean that congressional investigations into national security matters—and indeed any legislative actions resting on information from the executive—would proceed at the sufferance of the executive. And it would cast into constitutional doubt a host of long-standing statutes, including FISA, FOIA, and CIPA, as unconstitutional trenching on the authority of the executive branch.

Nor do the two principal cases relied on by the Attorney General in his constitutional analysis¹⁸—*Chicago and Southern Airlines v. Waterman S.S. Corporation*¹⁹ and *Department of Navy v. Egan*²⁰—dictate a contrary result. Neither case supports the executive branch’s expansive claims to unilateral authority. Both cases trained on judicial

¹⁴ See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004); accord *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2799 (2006); see also *id.* at 2774 n.23 (“Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers.”).

¹⁵ See, e.g., *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804); see also *Bas v. Tinguy*, 4 U.S. (4 Dall.) 37 (1800). *Little* and *Bas* concerned the scope of statutory grants of authority to conduct captures overseas.

¹⁶ See, e.g., *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007) (rendition program); *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190 (9th Cir. 2008) (warrantless surveillance program).

¹⁷ *United States v. AT&T*, 567 F.2d 121, 128 (D.C. Cir. 1977) (“While the Constitution assigns to the President a number of powers relating to national security, . . . it confers upon Congress other powers equally inseparable from the national security. . . . More significant, perhaps, is the fact that the Constitution is largely silent on the question of allocation of powers associated with foreign affairs and national security. These powers have been viewed as falling within a “zone of twilight” in which the President and Congress share authority or in which its distribution is uncertain.”) (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)).

¹⁸ See Attorney General Mukasey Letter, *supra*, at 3-4.

¹⁹ 333 U.S. 103 (1948).

²⁰ 484 U.S. 518 (1988).

interpretations of a *statutory* scheme that vested review of agency decisions in an administrative review board. Although both cases suggested in dicta that the executive had some Article II authority respecting national security matters, in neither case did the Court confront a situation in which Congress and the President were acting at cross-purposes regarding the dissemination of national security information. Under the famous *Youngstown*²¹ framework, that is, *Egan* and *Waterman* involved situations at which the executive's authority was at its highest mark—supported by Congress. Here—where Congress would have stepped in to *remove* the President's authority—the executive's power is at its lowest ebb.

At a minimum, *Egan* and *Waterman* do not remotely stand for the broad proposition of unilateral executive control of information that the Attorney General claims. More directly, a host of Founding era precedent—renewed and reaffirmed by the Supreme Court in 2004 and 2006—confirm that the President lacks unilateral and preclusive authority in this situation.²²

III. The SSPA Does Not Alter Existing Law in Dangerous, Novel, Or Unmanageable Ways

The Attorney General's letter argues that the consequences of the SSPA are novel, unfair, and unwise. Yet the manner in which the SSPA resolves the tension between justice and secrecy is neither new nor unfair to the government. To the contrary, it embodies a longstanding means of both preserving secrecy and also preventing the unfair distribution of costs from national security activities.

With respect to the content of the pending SSPA, the Attorney General's letter overstates the bill's modest effect.²³ The SSPA does not meaningfully change the definition of what qualifies as a state secret. The SSPA's application hinges on whether public disclosure "would be reasonably likely to cause significant harm" to national defense or foreign relations. This basically tracks the standard established in *Reynolds* and recognized throughout subsequent case law.²⁴

The Attorney General's letter argues that the word "significant" alters the substantive standard.²⁵ But whether or not the significance of the harm is reviewed by the court or simply asserted by the government, this would not in our view constitute a substantial change in the legislative scheme. The executive has never—to our knowledge—argued that an insignificant harm warrants nondisclosure, and it would be a remarkable departure for courts to grant the privilege if the harm were not substantial.

²¹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

²² See *supra* notes 14 and 15.

²³ Attorney General Mukasey Letter, *supra*, at 5-6.

²⁴ Under presently applied case law, information is a state secret if "there is a reasonable danger" that disclosure of the information "will expose military matters which, in the interest of national security, should not be divulged." *El-Masri v. United States*, 479 F.3d 296, 302 (4th Cir. 2007) (quoting *Reynolds*, 345 U.S. at 10).

²⁵ Attorney General Mukasey Letter, *supra*, at 5.

Nor does any provision of the SSPA compel disclosure or authorize a court to compel disclosure. Rather, “the court shall resolve the disputed issue of fact or law to which the evidence pertains in the non-government party’s favor” in suits against the government.²⁶ To be sure, this *may* lead to a judgment against the government. But it may not. Even if it does, the government *still* will not be forced to make any disclosure: Any constitutional privilege will remain unstained.

The Attorney General also argues that the bill puts the government to a “Hobson’s choice.”²⁷ Perhaps it is true that, at times, the government might have to choose between submitting evidence it prefers to keep secret and a court finding against it on a particular question of law or fact. In effect, that finding against the government—and any possible resulting damages judgment—is the cost of maintaining secrecy. But using this as an argument against the SSPA is flawed in two respects. First, it seems to assume that, under the current state of the law, there is no cost of government secrecy. And this is not the case. Under the status quo, the cost of secrecy falls on injured plaintiffs who, for want of non-confidential evidence, cannot prove their case. Thus, in essence, the true Hobson’s choice is a choice about who should bear the cost of secrecy—the government or those who are injured? And if the need for secrecy must exact a toll, it seems more just to let the cost of that secrecy fall upon the government than upon injured individuals. Second, the executive itself will never bear a direct cost as a result of the SSPA for maintaining secrecy. The only potential cost is to the government’s coffers. And the question whether the government should risk a damages judgment against it as a result of a decision to maintain secrecy is exactly the sort of decision about the use of the public fisc that falls squarely within Congress’s jurisdiction.

A related point is that the SSPA does not mark an innovation from previous schemes to deal with secrecy. Rather than “depart[ing] radically” from the model of CIPA, as the Attorney General suggests,²⁸ this statutory scheme is the exact analog of CIPA. Just as CIPA sometimes requires the executive to choose between dropping a prosecution and disclosing information, the SSPA might require the executive to choose between disclosure and a finding against it on a question of fact or of law. Arguably, the costs imposed by CIPA—permitting a possibly guilty criminal to go free—exceed the costs contemplated by the SSPA—paying damages to a plaintiff possibly injured by the government’s national security policy.

Finally, the Attorney General insists that the executive’s supposed expertise on national security matters necessitates complete executive control over decisions regarding the danger of disclosing a particular piece of information. There is no reason to believe that the SSPA would lead judges to disregard this expertise. The bill does not alter the degree of deference a judge gives to the executive’s argument that a specific piece of information would cause national security harms if disclosed. As a practical matter, federal judges are

²⁶ SSPA § 4054(g).

²⁷ Attorney General Mukasey Letter, *supra*, at 6.

²⁸ *Id.*

and remain very deferential to executive claims of national security. This trait is unlikely to diminish or change any time soon.

The SSPA simply provides judges with a mechanism for sifting true expertise-based claims from situations of abuse or malfeasance. There is good reason to leave the judiciary in control of this final decision. Both history and logic teach that overreliance on the executive's expertise in the area of national security can lead down undesirable paths. As Justice Souter recently noted,

[f]or reasons of inescapable human nature, the branch of the Government asked to counter a serious threat is not the branch on which to rest the Nation's entire reliance in striking the balance between the will to win and the cost in liberty on the way to victory; the responsibility for security will naturally amplify the claim that security legitimately raises.²⁹

And indeed there are examples of such amplified security concerns leading to disastrous results.³⁰

Through the SSPA, Congress is simply attempting to recalibrate this balance. Aiding in the vindication of the rights of those who may have been injured by the executive's well-meaning efforts to protect the security of the homeland is well within Congress's constitutional powers. It is also consistent with the ideals and principles that make that homeland worth protecting.

²⁹ *Hamdi v. Rumsfeld*, 542 U.S. 507, 545 (2004) (Souter, J., concurring).

³⁰ See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944) (Deferring to executive's determination that security concerns justified the discriminatory treatment of Japanese Americans during World War II).