State Secrets and Executive Power

WILLIAM G. WEAVER
ROBERT M. PALLITTO

To cover with the veil of secrecy the common routine of business is an abomination in the eyes of every intelligent man and every friend to his country.

—Patrick Henry

For those of us defending the government from the range of legal assaults, openness is like AIDS—one brief exposure can lead to the collapse of the entire immune system . . . but we can always play the trump card—state secrets—and close down the game.¹

—Anonymous U.S. Government Attorney

Assertions of the need for secrecy, long associated with the activities of the executive branch, have proliferated under the administration of George W. Bush to the point where criticisms are being voiced by Republicans as well as Democrats and by members of the federal judiciary. Since the administration of Jimmy Carter, there has been a sharp increase in secrecy claims by executive branch officials, especially in the context of litigation. However, the Bush administration is extending this penchant with even greater intensity, and has been quick to raise secrecy-based objections in response to requests for information that has historically been publicly available. Secrecy claims are raised so routinely and broadly that in some cases, the administration officials involved do not even know what the allegedly secret documents contain.² Taken together, administration officials' statements interpreting law and their blanket


WILLIAM G. WEAVER is associate professor of political science at the University of Texas at El Paso. ROBERT M. PALLITTO is an assistant professor of political science at the University of Texas at El Paso.
denials of requests for documents demonstrate an intention to greatly expand the power of the executive branch to withhold information from the public, free from any kind of oversight. Moreover, federal courts have become impatient with the administration's apparent unwillingness to be diligent or accurate in its assertions of privilege; in one case, the federal district court noted that the administration had invoked a secrecy privilege 245 times, and at least one of those invocations covered a document that had already been provided in discovery by another defendant.¹

This trend has threatening implications for the separation of powers, and executive branch officials over the last several decades have been emboldened to assert secrecy privileges because of judicial timidity and because of congressional ineffectiveness in reviewing the myriad of substantive secrecy claims invoked by presidents and their department heads. At present, it is costless for the president to assert a secrecy privilege: the overwhelming odds are that the assertion will be successful, and even if unsuccessful, the process of overturning claims of privilege is lengthy and the only potential cost of excessive claims of national security is in bad publicity.

In view of the extensions of secrecy policy undertaken by the executive branch since the attacks of September 11, 2001, an evaluation of the mechanisms of executive secrecy is particularly timely. We focus here on the most powerful privilege available to the president, the state secrets privilege, which the Supreme Court held in United States v. Reynolds prevents disclosure of information in court proceedings when "there is a reasonable danger that compulsion of the evidence will expose matters which, in the interest of national security, should not be divulged."² Despite frequent involvement by Congress in issues concerning executive secrecy, most challenges to refusals to disclose information are handled in the courts, and we believe that the state secrets privilege, a judicial creation, is now judicially mishandled to the detriment of our constitutional system.

The state secrets privilege is most often used by executive branch officials in civil court cases to protect against subpoenas, discovery motions, or other judicial requests for information. The privilege is frequently referred to as a common law privilege, which reflects its lack of grounding in positive law. And it functions like a common law rule, inasmuch as the head of a department of government need not rely on statutory authorization to raise the privilege, and may assert it on his or her own volition. But this apparent simplicity veneers significant issues of accountability and the reach of executive authority, and the privilege creates perplexing constitutional dilemmas for the courts. These dilemmas arise in two forms.

First, it is axiomatic that the Constitution is the supreme law of the land and that the common law is conditioned by the Constitution, and not the other

¹ Int'l Action Ctr. v. United States, Civil Action No. 01-72 (GK) (D.C., 2002).
² 345 U.S. 1, 10 (1953).
way around. But the state secrets privilege reverses this understanding, for in virtually every case that pits the privilege against citizens' constitutional claims, it is the privilege that wins the encounter. The privilege seems to be ultra-constitutional, for the courts have not forced the government to disclose agency-held classified information in any case in which the privilege has been asserted, even when the basis for compulsion has been the assertion of a constitutional right. For example, the case of *Halkin v. Helms*\(^5\) arose as a result of the National Security Agency illegally and unconstitutionally intercepting thousands of phone and electronic communications originating from hundreds of Americans. When sued, administrators invoked the state secrets privilege, and because all of the evidence that the plaintiffs needed to prove their case was in the hands of the very administrators who violated their rights and who had asserted the privilege, the case was lost.

The incentives to abuse the privilege are obvious, and herein lies the second dilemma with the privilege as it is now designed: how may the courts fulfill their constitutional duty of oversight of executive branch activity yet still meet the legitimate goals the privilege seeks to achieve? It is often asserted that the government may invoke the privilege to prevent disclosure of any classified information. In other words, the potential use of the privilege is coextensive with all of the classified material in the possession of the United States. Each year, millions of files, computer programs, intercept tapes, pieces of equipment, and a host of other items are generated and classified under statute and executive order. Virtually all observers acknowledge that overclassification is a significant problem, and this has led to some embarrassing moments for the executive branch. In 1995, for example, the Federation of American Scientists discovered that a report written in 1917, before America entered World War I, was still unavailable due to its classification. The report and five other documents from 1917–1918 still remain classified, and even legal action failed to force their disclosure.\(^6\) And, rather infamously, administrators reasserted classification of the Pentagon Papers after the papers had already been published in *The New York Times*. Even a memo from one member of the Joint Chiefs of Staff to another member claiming that too many documents were being classified, was itself classified.\(^7\) Such occurrences are concrete examples of Max Weber's well-known observation that the "concept of the official secret is the specific invention of bureaucracy, and nothing is so fanatically defended by the bureaucracy."\(^8\) As former Solicitor-General Erwin Griswold noted, it is apparent "to any person who has considerable experience with classified material that there


is massive overclassification and that the principal concern of the classifiers is not with national security, but rather with governmental embarrassment of one sort or another. According to the Commission on Protecting and Reducing Government Secrecy, their final report with the observation that "secrecy is a form of government regulation," and that like any other form of regulation, it is subject to abuse.

So the dilemma for judges is how to make certain that legitimate interests are protected while trying to eliminate abuse of power in the hidden bureaucracy. As presently formulated, the privilege is ill-equipped to balance between these two goals, and it is our contention that the courts have unwisely acquiesced to executive power on this matter. As Charles Alan Wright, the distinguished commentator on federal courts and lead counsel for President Richard M. Nixon in the appeal of United States v. Nixon, observed, "It was long a matter of dispute whether judges were entitled to overrule executive determinations that information qualified for the privilege and the scars of this battle are still visible in the procedures courts have devised to cover their de facto surrender on this crucial question." At the root of the issue over the state secrets privilege are contested views about the limits of judicial review of administrative actions and intrusions by judges into the complex worlds of intelligence gathering and analysis and law enforcement. Although little studied, publicity, public access, and openness work to delimit the arbitrary exercise of administrative discretion. As Justice Louis Brandeis famously noted, "Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." Likewise, Kenneth Culp Davis held that "openness is the natural enemy of arbitrariness and a natural ally in the fight for justice"; all of Davis's "seven instruments" for structuring administrative discretion to avoid arbitrary use of power begin with openness as a predicate. And almost half a century ago, Francis Rourke observed, "Compared to publicity . . . internal checks upon bureaucratic misbehavior . . . have but negligible value." The power to expose agency misdeeds may well be the most important method of controlling executive branch activity, and the courts provide the most formal and routinized means to such control.

15 Ibid., 98–120.
Courts, though, seeking to exercise such control over intelligence and law enforcement agencies inevitably confront those agencies' tendencies toward secrecy. J. Edgar Hoover, for example, claimed that if "we [are] to fully discharge the serious responsibilities imposed upon us, the confidential character of our files must be inviolate." And in support of Mr. Hoover's view, Justice Tom Clark, in dissent in *Jencks v. United States*, predicted that the majority decision of that case would result in disaster for the United States: "Those intelligence agencies of our Government engaged in law enforcement may as well close up shop, for the Court has opened their files to the criminal and thus afforded him a Roman holiday for rummaging through confidential information as well as vital national secrets." These statements tap into a deep-rooted sentiment in the intelligence and law enforcement communities: to do their jobs properly, they must be free of meddling by courts, Congress, and the public. Thus, it is unsurprising that litigation-related requests for classified documents are routinely met with refusal based on broad claims of a need for secrecy. Such refusal, though, seems to have reached new heights in the current Bush administration, where even routine requests for information by Congress and the courts are refused or stonewalled.

But even those who advocate and practice close guarding of information sometimes see the risks posed by state secrecy. Woodrow Wilson, whose own administrations engaged in zealous secrecy, warned that "government ought to be all outside and no inside [for] corruption thrives in secret places [and] it [is] a fair presumption that secrecy means impropriety." So when agencies violate constitutional rights or engage in criminal activities, there are strong reasons for judicial, political, and public access to agency information. The only efficient means to such exposure is through the courts. Although Congress may indeed investigate isolated cases of abuse where the privilege is claimed, unlike the federal courts, it certainly cannot subject administrators to the level and frequency of scrutiny necessary to systematically discourage abuse.

In the state secrets privilege, we have a most profound concrete example of the conflict between two political survival impulses. On the one hand, presidents and their advisors have always advocated, and presumably always will advocate, broad powers of secrecy. Agency officials argue, and courts often agree, that judges and lay people are incompetent to assess the danger that the release of information may pose to national security; the invocation of "national security" gives strong, almost talismanic, force to claims of agency expertise. After all, who wants to argue against national security or even appear to be doing so?

On the other hand, our liberal-democratic political tradition is defined in part by openness in government and checks on the powers of each of its three

---

18 Ibid., 681–682.
branches, and there are powerful arguments for judicial oversight of executive branch action even if national security is involved. First, when agencies violate the constitutional rights of citizens and commit crimes, it is perverse and antithetical to the rule of law that they may avoid judgment in court and exposure of these activities to the public by refusing to disclose inculpatory information. Second, if the privilege protects the executive and agencies from investigation and judicial power, then the incentive on the part of administrators is to use the privilege to avoid embarrassment, to handicap political enemies, and to prevent criminal investigation of administrative action. In these circumstances, the privilege may have the effect of encouraging or tempting agencies to engage in illegal activity. Third, the privilege, as now constructed, obstructs the constitutional duties of courts to oversee executive action. Oversight of executive branch activity is notoriously difficult, and even more so in areas where state secrets exist. The privilege, as now employed, is tantamount to courts capitulating in their oversight function. As we discuss below, judicial intervention in activities undertaken by intelligence agencies is almost nonexistent. Although the privilege is crucial to national security, it is also a bane to constitutional government, and we believe that the judiciary must carefully and selectively exercise oversight of administrators to prevent abuse of the citizenry and the Constitution and the weakening of the rule of law.

In recent years, the privilege has protected the government from citizen litigants in a variety of cases. For example, it prevented disclosure in the following matters:

- The unconstitutional and illegal intercept of thousands of telephone conversations and electronic transmissions by American citizens.\(^{20}\)
- The firing of an executive branch employee and whistleblower seeking to alert Congress that the Central Intelligence Agency (CIA) and other intelligence agencies had systematically deceived Congress in an effort to manipulate it into passing legislation and funding particular programs.\(^{21}\)
- Initiation of Federal Bureau of Investigation (FBI) surveillance of a twelve-year-old boy that then continued for years simply because the boy received mail from foreign countries.\(^{22}\)
- CIA recruitment of a banker who unknowingly became entangled in illegal money laundering operations for the Agency; when the banker discovered the nature of the work and wanted out of the operation, the Agency allegedly destroyed his career and threatened his family with harm.\(^{23}\)
- Alleged racial and sexual discrimination by government employees working in security agencies.\(^{24}\)

\(^{20}\) Halkin v. Helms.
\(^{21}\) Barlow v. United States, Cong. Reference No. 98-887X (Court of Federal Claims, 2000).
\(^{22}\) Patterson v. FBI, 893 F.2d 595 (3rd Cir., 1990).
- Unilaterally reneging on contracts made between security agencies and agents.  
- Harassment of U.S. citizens, allegedly including illegal wiretapping, break-ins, psychological operations designed to cause mental anguish and suffering, and threats.

On occasion, the privilege may also serve to shield criminal defendants from prosecution, as in the cases of some of those charged in the Iran/Contra investigation of the 1980s. The most serious charges against the defendants, as well as all charges against one principal defendant, were dismissed when the administrations of Ronald Reagan and George H.W. Bush refused to allow alleged national security–related information to be introduced into evidence at trial. As the final report of the independent counsel noted, the affair exposed structural problems in the . . . law when central conspiracy counts had to be dismissed because of the Reagan Administration’s refusal to declassify information deemed necessary to a fair trial of the case. This raised serious questions about whether the Reagan Administration—which in the Iran/Contra matter had sought the appointment of Independent Counsel to investigate and prosecute possible crimes because of an appearance of conflict of interest—in fact had the final say in determining what crimes could be tried.

In a postscript to the Iran/Contra affair, a dispute arose over the outgoing Reagan administration’s plan to destroy backup e-mails that were discovered in the course of the investigation. These backup files documented communications among National Security Council (NSC) members and key participants in the covert financing of the Nicaraguan Contras and in the Iranian hostage matter. The original e-mails had been destroyed, and so the backup files became indispensable to establishing facts helpful to the Iran/Contra prosecution, insofar as they showed knowledge and participation by parties who had previously denied involvement.

Thus, when the outgoing administration sought to destroy these records, a private archival association went to court to prevent the planned destruction. They argued that the portions already made public demonstrated lying by government officials, and that the remaining undisclosed records were, therefore, particularly important for the public to access. A protracted legal battle ensued, in which the government spent seven years and millions of taxpayer dollars defending its plan to destroy the records. The litigation ended in 1996, during the

administration of Bill Clinton, when the U.S. Court of Appeals for the D.C. Circuit accepted the administration’s surprising argument that the NSC was not an agency (and therefore not subject to the disclosure requirements of the Federal Records Act), but rather a group of presidential advisors. The eventual resolution of the lawsuit in favor of the executive branch of the government demonstrated the truth of the observation, “What does not exist is de facto secret.”

In these Iran/Contra matters, the damage to the rule of law was double: high-level criminal defendants went unprosecuted and the independent counsel was stripped of power and left as a meaningless formality as the President decided when and where the investigation would end.

Likewise, President George H.W. Bush’s refusal to declassify material led to dismissal of all charges against the CIA Costa Rican station chief allegedly involved in the illegal Iran/Contra activity. One of the troubling features of the invocation of the privilege in these cases is that much of the information withheld was already in the public domain through press leaks or in the possession of the independent counsel through investigation. This points up a curious aspect of the privilege: it allows the government to withhold introduction of evidence even if that evidence is known to the public or in the possession of the litigant seeking introduction.

Although the Iran/Contra investigation was a criminal matter, the privilege is most often used in civil cases, where it frequently spells the end of litigation once it is invoked. The power of the privilege, a power that thwarts even constitutional mechanisms of accountability and redress, makes it worthy of investigation, although political scientists have virtually ignored it.

**Origins of the State Secrets Privilege**

A fundamental problem in understanding the state secrets privilege is disentangling it from the more familiar executive privilege. Executive privilege, unlike the state secrets privilege, is a constitutional doctrine founded in the separation of powers. It is a qualified privilege designed to shield executive communication amongst the president and counselors from predation by partisan members of Congress and a prying public. Its goals are to foster frank and open discussion between a president and his or her advisors without the fear that those discussions will be made public to the embarrassment of the discussants. In short, it prevents harassment of the executive by the coordinate branches. In contrast, the state secrets privilege is an absolute privilege and relies more on practicality than constitutional principle for its justification. Although judges occasionally ground the privilege in separation of powers, the ultimate reason for upholding its use is on the practical grounds that it is necessary to the survival of the state.

Claims that the state secrets privilege derived from common law and the U.S. Constitution are only mediately plausible. Sometimes it is characterized

29 Ibid., 160.
as pre-constitutional, even pre-legal, and as arising from the raw fact that countries have a responsibility to prevent becoming instruments of their own destruction. This contention is vaguely and inchoately recognized in the literature, although some commentators briefly trouble themselves to expand on this point. As one commentator explains, "The state secrets privilege is the most basic of government privileges—it protects survival of the state, from which all other institutions derive." And Justice George Sutherland noted in 1936 that the power to ensure national survival is not one granted by the Constitution, but is a "necessary concomitant of nationality." This claim, that power to secure the state is pre-constitutional and acquired naturally without authorization of Constitution or statute, is hardly self-evident. There are strong currents of thought in our political tradition suggesting that all political authority derives from the Constitution, and the Constitution, with but one exception, says nothing about secrecy powers. Congress has never adopted the state secrets privilege in any statute granting authority to the executive branch, and a major effort to define and incorporate the privilege in the Federal Rules of Evidence failed in the early 1970s.

Because the privilege is usually justified by practicality rather than pedigree, its origins are somewhat obscure and confused. This confusion is made worse because historically, presidents have had little incentive, and much disincentive, to disentangle these separate threads. The disincentive derives from the fact that it is in the executive's interest to infect all withheld information, where possible, with allusions to national security. Indeed, attorneys general and others frequently describe the state secrets privilege as a component of executive privilege. So by keeping the lines between executive privilege and the state secrets privilege obscure, presidents have attempted to expand the reach and potency of their powers to withhold information.

In hindsight, we can tease out two major lines of provenance for the state secrets privilege that intersect in Reynolds, the only time the U.S. Supreme Court ruled on the privilege. The first line is founded in the formulation of the U.S. Constitution and in the actions of the first several presidents, and is more properly considered executive privilege rather than the state secrets privilege. But because presidents have never attempted to distinguish between the two privileges, these early executive actions prepared the ground for later assertions of privilege for national security matters. The second source for the privilege is found in United Kingdom law, law that the U.S. Supreme Court explicitly adopted, if in a slightly modified form, in Reynolds.

33 For example, John R. Stevenson and William H. Rehnquist, "The President's Executive Privilege to Withhold Foreign Policy and National Security Information," Department of State and Department of Justice, Office of Legal Counsel Memorandum, 8 December 1969.
Political Origins of the State Secrets Privilege

Concern for the need for secrecy is evident even in the structure and actions of the Continental Congress, where the Committee of Secret Correspondence refused to transmit information to the rest of the Congress because they found by “fatal experience, that the Congress consists of too many members to keep secrets.” And the Framers of the Constitution debated the need for secrecy in certain cases. In discussing whether to allow one or both houses of Congress to withhold information from the public, Elbridge Gerry and Roger Sherman proposed a constraint that would allow for secrecy of material relating to “treaties & military operations.” Contrary to this view, James Wilson thought that “the people have the right to know what their Agents are doing or have done, and it should not be in the option of the Legislature to conceal their proceedings.” This debate yielded what became Article I, Sec. 5, Cl. 3, of the U.S. Constitution, which explicitly gives Congress discretion to keep secrets: “Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy.” This is the only constitutional provision conferring a power of secrecy on a government body or official.

Nevertheless, concerning the power of presidents to engage in secrecy, John Jay held, in The Federalist, No. 64, that “it seldom happens in the negotiation of treaties . . . but that perfect secrecy and immediate dispatch are sometimes requisite . . . and there doubtless are many [people] who would rely on the secrecy of the president, but who would not confide in that of the Senate, and still less in that of a large popular assembly.” It was not long until Jay’s observations underwent a test. In 1792, President George Washington was negotiating an agreement with Algiers that he certainly did not want the French to learn about, yet Senator Ralph Izard, at a dinner party, brought up the negotiations. Thomas Jefferson reported that Izard, “sitting next to [Washington] at table on one hand, while a lady . . . was on his other hand and the Fr[ench] minister next to her . . . got on with his communication, his voice kept rising, and his stutter bolting the words out loudly at intervals, so that the minister might hear if he would.”

Three weeks later, with Izard’s breach fresh in his mind, Washington called his closest advisors together to discuss efforts by members of the House to investigate the decimation of General St. Clair’s army by the Indians. At the meeting, Washington offered no opinion about the power or limits of Congress to investigate executive branch activities, “for he had not thought upon it, nor

was acquainted with subjects of this kind . . . [But he] could readily conceive there might be papers of so secret a nature as they ought not to be given up."  

Washington, at the time, did not locate this right of refusal in constitutional or other legal considerations, and after his advisers discussed the matter, they too advanced political, rather than legal, reasons for the power of the president to withhold information. Jefferson reports that the advisers concluded that "the Executive ought to communicate such papers as the public good would permit, and ought to refuse those the disclosure of which would injure the public," but no authority for this position was asserted.  

Washington did not actually withhold information from Congress until 1796, when he resisted a request from the House of Representatives for the instructions given to the U.S. minister to Great Britain concerning the Jay Treaty. He prefaced his refusal with the remark that he had a "constant endeavor to harmonize with the other branches," but went on to say that because the House had no constitutionally defined function in the making of treaties, the "boundaries fixed by the Constitution between the different departments should be preserved . . . [and this] forbids compliance with your request." The precedent thus established, virtually every president since has justified withholding information from Congress on the same separation of powers grounds. The instance prompting Washington's refusal was squarely in line with situations contemplated by Jay in The Federalist, No. 64, but subsequent presidents broadened the power to encompass withholding information from the public and Congress.  

The power to withhold information in the face of a judicial order developed at around the same time as did the power to withhold information from Congress. The first time this issue arose was in the trial of Aaron Burr for treason, where Justice John Marshall issued a subpoena duces tecum against President Jefferson to produce copies of specified military orders and a letter written to Jefferson by General James Wilkinson. Jefferson refused to comply with the subpoena, claiming that the "letter contains matter which ought not be disclosed." Marshall agreed that information truly detrimental to the United States should not be publicly disclosed, but implied that the decision over what information to withhold was one for the judge, not the executive. Marshall had no doubt that a subpoena could be issued against the President, but expressed concern over whether the President could be compelled to disclose the letter to Burr. On the basis of this incident, Jefferson established the proposition, later to become dogma with succeeding presidents, that the president may withhold information in the face of a judicial order.

---

38 Ibid., 31 March 1792, 262.  
39 Ibid., 2 April 1792, 262.  
41 United States v. Burr, 25 F. Cas. 30 (Cir. Court of Virginia, 1807), 37.  
42 Ibid.
This dogma gained more concrete, if somewhat indirect, support from the judiciary in the case of *Totten v. United States*, where the U.S. Supreme Court faced the issue of whether secret contracts for espionage services could be sued upon by a party alleging breach of payment. Justice Stephen J. Field, writing for a unanimous court, opined that a "secret service, with liability to publicity . . . would be impossible," and that 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." However, this short opinion did not squarely address the issue of executive branch power to withhold information in the face of judicial requests. In another tantalizing case, *Firth v. Bethlehem Steel Co.*, a federal district court allowed attorneys for the United States to intervene in a private suit to assert the "military" privilege to have testimony stricken from the record and to prevent its reintroduction by other means.

But until recently, courts did not undertake to disentangle executive privilege from the power to withhold military and state secrets from judicial proceedings. Washington’s and Jefferson’s refusals to transmit information to Congress and the courts are better thought of as exercises of executive privilege, while the refusal in *Totten* arguably is an example of state secrets privilege. After *Totten*, though, as executive branch resources and power grew, there developed a judicial impatience with frivolous administrative assertion of the state secrets privilege.

In the little-noticed cases of *District of Columbia v. Bakersmith* and *King v. United States*, courts confronted assertion of the state secrets privilege for quotidian activities of the executive branch. *Bakersmith* concerned a request for inspection papers and other documents about a particular culvert in Washington, D.C., but the city, in denying the request, asserted the state secrets privilege, saying, "It is laid down by the authorities as a well-established principle of law that official transactions between the heads of the departments of the government and their subordinate officers are in general treated as secrets of State." The court did not reach the claim of privilege, but simply stated in the first sentence of the opinion that the right to inspect municipal public documents is undoubted.

And in *King*, a criminal defendant sought to examine federal agents as to their efforts to suborn perjury and manufacture evidence. The U.S. attorney objected, asserting the state secrets privilege, to which the Fifth Circuit Court of Appeals responded: "We are clear that the conversations of government detectives and other agents with witnesses, with the purpose and effect of inducing and influencing the evidence of such witnesses, do not rise to the dignity of

---

43 92 U.S. 105 (1875), 106.
44 199 F. 353 (1912).
46 *King v. United States*, 112 F. 988 (1902).
47 *Bakersmith*, 577.
state secrets." King and Bakersmith are the beginnings in the United States of the legal differentiation between executive and state secrets privileges, a differentiation that has only recently gained any degree of clarity. These cases indicate the judiciary's incipient willingness to distinguish between the two privileges, but case law in the United States proved too thin a resource to fully explain this distinction, and so the U.S. Supreme Court turned to the law of the United Kingdom and the development of the doctrine of "crown privilege."

Legal Origins of the State Secrets Privilege

The state secrets privilege derives from crown privilege as it developed in the law of England and Scotland. The beginnings of crown privilege in English and Scots law are unclear, but probably arise in the prerogative rights of the king and queen. William Blackstone noted in his Commentaries that "the duty of a Privy Counselor appears from the oath of office [to require the Counselor] to keep the King's counsel secret . . . [and] to withstand all persons who would attempt the contrary." This duty logically extended to refusal to comply with judicial requests for information, and a 1775 case arising in India was one of the first to question executive authority to withhold sensitive documents from courts and the public. In the Trial of Maha Rajah Nundocomar, a case overlooked by commentators on executive privileges, a court called in a secretary to Governor General Warren Hastings in India to produce the books of the Council to the East India Company. Hastings instructed the secretary to refuse delivery of the books to the court, asserting that they contained "secrets of the utmost importance to the interest, and even to the safety of the state." Unimpressed, the court said that it would be improper to subject the books to "curious and impertinent eyes; but, at the same time . . . [h]umanity requires [that evidence in the hands of the state] should be produced, when in favour of a criminal, justice when against him." The court ended by lecturing Hastings, saying that "where justice shall require copies of the records and proceedings, from the highest court of judicature, down to the court of Pie-Powder," magistrates have the power to compel disclosure. Despite the warm rhetoric, in virtually all reported cases in British courts, judges refused to compel production of the requested documents when the Crown asserted that withholding the documents was in the public interest. And in what for many years was taken to be the classic phrasing of the law on this issue, Chief Baron Pollock, in his speech in Beatson v. Skene, said:

We are of the opinion that, if the production of a state paper would be injurious to the public service, the general public interest must be considered paramount to

48 King, 996.
50 20 State Trials 923 (1775), 1057.
the individual interest of a suitor in a court of justice. . . . It appears to us . . . that the question, whether the production of the documents would be injurious to the public service, must be determined not by the judge but by the head of the department having the custody of the paper.\(^{51}\)

*Duncan v. Cammell, Laird and Co., Ltd.*, which hewed to the line announced in *Beatson*, became the chief modern case on the issue of crown privilege. In that case, family members of submariners killed while putting the submarine Thetis through trials sued the manufacturer of the submarine and sought discovery of blueprints of the craft and other sensitive documents. The Crown asserted privilege to protect the documents, and the Lords held that “the approved practice . . . is to treat ministerial objections taken in proper form as conclusive.”\(^{52}\) The holding of *Duncan* conferred absolute authority on the executive to withhold documents from disclosure in judicial proceedings.

In 1953, at the height of the McCarthy era, the U.S. Supreme Court squarely faced the state secrets privilege for the first time. In *Reynolds*, the family members of civilians who died in a plane crash while testing secret government electronic equipment sued the United States for money damages. The relatives sought documentation from the government relating to the flight and the crash. The government refused to produce the documents, and when ordered to deliver them to the judge for *in camera* inspection to verify that their disclosure would cause harm to national security, the Secretary of the Air Force ignored the order. The court then entered judgment for the families, and the Air Force appealed. The U.S. Supreme Court, in search of guidance, seized on *Duncan*. With almost no examination of the case or the precedents it relied on, the Court adopted the framework of the *Duncan* ruling nearly *in toto*.

Setting requirements almost verbatim from *Duncan*, the Court held that: first, the state secrets privilege “belongs to the Government and must be asserted by it”; second, it should not be “lightly invoked”; third, a claim of privilege must be formally made by the head of a department after “actual personal consideration”; and fourth, the judge must determine if the claim is appropriate, “yet do so without forcing a disclosure of the very thing the privilege is designed to protect.”\(^{53}\) The first and third conditions are merely procedural, and the second condition is a standardless precatory statement. Obviously, only the fourth condition presents substantial problems, and it is a perplexing rule for lower courts to interpret. It is unclear, for example, why the lowliest private with a security clearance is held more trustworthy than federal judges to handle classified information. The clear message of the *Reynolds* ruling is that courts are to show utmost deference to executive assertions of privilege. The Court did write that judicial “control over the evidence in a case cannot be abdicated to the caprice of executive officers,” but also that in cases where administrators...

\(^{51}\) 5 Hurlst. & N. 838 (1860), 853.

\(^{52}\) [1942] A.C. 624 (1942), 641.

\(^{53}\) *United States v. Reynolds*, 8.
make a facial showing of potential harm to national security the "court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence." The Court refused the de jure rule of Duncan that executive assertion of the privilege is conclusive on the courts, but reached that result de facto by modeling the privilege after the procedures described in Duncan.

The reliance in Reynolds on the reasoning in Duncan is improvident in two important respects. First, in Great Britain, there was at the time virtually no distinction between assertion of crown privilege for state secrets and assertion to protect lesser important executive documents. In Great Britain, separation of powers is ill-defined and occupies a relatively less important role in the British Constitution than in that of the United States, and the Supreme Court's adoption of the Duncan scheme fails to recognize this difference. The structure of the U.S. Constitution gives substantial powers of oversight of the executive branch to both Congress and the courts, and the broad privilege recognized in Duncan, and in turn, Reynolds, does not sufficiently respect oversight functions. The Third Circuit Court of Appeals understood better than the Reynolds Court the problems that reliance on Duncan could cause in the United States. Judge Albert Maris, writing for a unanimous panel hearing the Reynolds appeal, found that Duncan's "sweeping privilege against disclosure [is] ... contrary to a sound public policy" and that it is "but a small step to assert a privilege against any disclosure of records merely because they might prove embarrassing." The court concluded that "whatever might be true in Great Britain the Government of the United States is one of checks and balances," and that neither Congress nor the president may encroach on the judiciary by "transferring to itself the power to decide justiciable questions." These fears were nevertheless realized in Reynolds and subsequent lower court application of its holding.

And as it turns out, Judge Maris's concerns were warranted, inasmuch as it is now known that the goal of the government in claiming the privilege in Reynolds was to avoid liability and embarrassment. The material originally requested by the plaintiffs in Reynolds has recently been made public through Freedom of Information Act requests, and it contained no classified or national security information. On the basis of these materials, the original plaintiffs and their relatives asked the U.S. Supreme Court to reverse its decision in Reynolds, at least on the question of governmental liability, because the government perpetrated a "fraud" upon the Court by asserting the state secrets privilege without justification. The Court refused to revisit the case, and the plaintiffs filed a new complaint in federal district court.

Second, both the Duncan and Reynolds courts wrestled with the issues of privilege at times of national crises, and there is reason to believe that the ne-

54 Ibid., 10.
55 Reynolds v. United States, 192 F.2d 987 (3rd Cir., 1951), 995.
56 Ibid., 997.
cessities of the moment, rather than the thought-out effects for civil liberties and constitutional arrangements of power, swayed the courts. For example, the courts in both cases refer to contemporary exigent events. In *Duncan*, a decision rendered at the height of World War II, in April, 1942, the references to the war are elliptical. In *Reynolds*, notice of the current political environment is open, with the Court commenting that “we cannot escape judicial notice that this is a time of vigorous preparation for national defense,” and it “is equally apparent that [our capabilities] must be kept secret if their full military advantage is to be exploited in the national interests.” Under these circumstances, it is possible that the courts were less than adequately concerned about civil liberties and the integrity of constitutional arrangements of power.

The Supreme Court’s holding in *Reynolds* fosters the same confusion presidents have repeatedly sought to promote, for after that decision, executive branch personnel claimed that the *Reynolds* approach applied to a variety of requests for information. For example, in a maligned 1958 statement to Congress, then-Attorney General William Rogers reported, “Courts have uniformly held that the President and the heads of the departments have an uncontrolled discretion to withhold information and papers in the public interest.” This conflation of executive privilege with the state secrets privilege, of course, reached culmination in *Nixon*, where counsel for President Nixon desperately tried to stretch the state secrets privilege to encompass all claims of executive privilege. In their brief to Judge John J. Sirica, White House counsel unsuccessfully claimed that “the principles announced in *Reynolds* have been applied by the lower courts to all claims of executive privilege, whether dealing with military secrets or with other kinds of information.” At the U.S. Supreme Court, Nixon’s lawyers cited *Reynolds*, arguing that “there are some kinds of documents on which the decision of the Executive must be final, and not subject to review by the courts.” But the *Nixon* Court held that “neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity.” For the first time in U.S. history, the Supreme Court made explicit the distinction between the state secrets privilege and executive privilege, and concerning Nixon’s claim that *Reynolds* stood for the proposition that the president’s power to withhold information is an absolute privilege, the Court said, “No case of the Court . . . has extended [*Reynolds’*] high degree of deference to a President’s generalized interest in confidentiality.”

57 United States v. Reynolds, 10.
62 Ibid., 711.
Despite the narrowing of executive privilege in Nixon, however, the state secrets privilege has retained all the scope and power it originally garnered in Reynolds. In less than one-third of reported cases in which the privilege has been invoked have the courts required in camera inspection of documents, and they have only required such inspection five times out of the twenty-three reported cases since the presidency of George H.W. Bush. Even though Reynolds held that “judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers,” the practical effect of the decision is to cause precisely that result.\(^6\) The Court’s caveat is so qualified and tempered by other language that the message cannot but be clear to lower courts that they are to avoid compelling the production of documents, even for court inspection, except in extraordinary cases. As the Court put it in Haig v. Agee, “Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention.”\(^6\) The plain fact is that if department heads or the president know that assertion of the privilege is tantamount to conclusive on the judiciary, and that federal judges rarely order documents for inspection, then there is great incentive on the part of the executive branch to misuse the privilege.

**Closing Down the Game**

Despite presidential advertising to the ancient origins of the state secrets privilege, it is only in the last several decades that it has seen extensive use. The rather clear beginning point for the increased use of the privilege occurred in the administration of President Jimmy Carter. There were more reported cases arising during his four years of presidency than all reported cases from previous presidential history. It seems that the U.S. Supreme Court decision in Nixon did nothing to dampen presidential desire for secrecy and willingness to withhold information.

**Pattern of Use**

Use of the state secrets privilege in courts has grown significantly over the last twenty-five years. In the twenty-three years between the decision in Reynolds and the election of Jimmy Carter, in 1976, there were four reported cases in which the government invoked the privilege. Between 1977 and 2001, there were a total of fifty-one reported cases in which courts ruled on invocation of the privilege. Because reported cases only represent a fraction of the total cases in which the privilege is invoked or implicated, it is unclear precisely how dramatically the use of the privilege has grown. But the increase in reported cases is indicative of greater willingness to assert the privilege than in the past.


In only four cases did courts ultimately reject the government's assertion of the privilege. But even this number is misleading, for in two of those cases, the privilege was obviously misused to protect unclassified information in the Department of Commerce. In a third case, the court rejected the assertion of the privilege because of failure to follow the procedural guidelines set out in Reynolds, although the court allowed the government to assert the privilege in the correct form and indicated that the privilege would then be upheld. And the courts took a novel approach in a 1958 decision, ordering a complete trial to be held in secret to protect national security.

Other than the scarce exception, the privilege is invariably fatal to efforts to gain access to covered documents. It is hardly surprising that such an effective tool would tempt presidents to use it with increasing frequency and in a variety of circumstances.

Injustice and the Failure of Oversight:
Mechanisms of Judicial Deference

Recent events highlight limitations on congressional ability to oversee national security-related activities of the executive branch. In recognition of its limited capacities of oversight, Congress facilitates executive accountability by transferring much of its oversight function to the judiciary. These transfers pit permanent government employees against each other and so make the oversight process more enduring and comprehensive, and instances of these transfers abound. For example, the Federal Tort Claims Act, portions of the Administrative Procedure Act, and the Occupational Safety and Health Act, along with a host of other laws, lodge substantial powers of oversight of the executive branch in the federal courts. These powers are exercised incident to criminal or civil actions and are powers the judiciary usually does not shrink from exercising. Expanded powers of oversight vested in the judiciary, either through statute or judicial creation, are in striking contrast to the complete deference the judiciary affords administrators when the state secrets privilege is invoked. This judicial timidity does not go unnoticed; as the eminent Louis Fisher noted in one of his many appearances before Congress, "Courts have traditionally shown the . . . utmost deference to [claims of privilege]. It is fine for the courts to make that judgment . . . but Congress doesn't have to defer." Although generally accepting the congressional efforts to extend oversight of the executive by employing judicial process, the federal courts have notably failed to take this invitation in the area of national security. The deference emanating from Reynolds toward claims of national security leads to failures of oversight that

threaten our constitutional arrangement of powers. Secrecy may tempt administrators to adopt activities contrary to law and the Constitution, but when those activities are suspected, the courts double the damage by refusing to impose costs on the executive branch for its breaches. The courts employ several mechanisms of deference to comply with the spirit of Reynolds. Although Reynolds located a source for deference in separation of powers, in addition, courts often advance one or both of two justifications for deference to executive branch assertion of the privilege.

**Impossibility of avoiding disclosure.** Often, assertion of the state secrets privilege means the end of a case. If a plaintiff must obtain protected information in order to make out a prima facie case or to prove some essential element of the claim, courts will resolve the action by finding against the plaintiff. For example, in *Tilden v. Tenet*, an employee of the CIA filed suit under federal employment discrimination statutes seeking to rectify discriminatory practices of the CIA and to recover money damages. The court found that “based on a review of the Director’s classified declaration the Court concludes that there is no way in which this lawsuit can proceed without disclosing state secrets [and] there are no safeguards that this Court could take that would adequately protect the state secrets in question.” Judge Claude M. Hilton continued, noting that the “Court is mindful that the invocation of the state secrets privilege in this case will deny the Plaintiff a forum under Article III of the Constitution for adjudication of her claim.” The disturbing possibility exemplified by Tilden and other discrimination cases is that intelligence agencies may simply opt out of compliance with federal statutes.

Similarly, *Halkin*, discussed briefly at the beginning of this article, demonstrates how wholesale constitutional violations may go unremedied. Although the revelation of the interception of thousands of phone and electrical communications of U.S. citizens created tremendous controversy, those who initiated the policies and procedures of methodical violation of the constitutional rights of citizens were never held to account for their actions. The *Halkin* Court shrank from its constitutional duty to constrain the executive from violating the constitutional rights of citizens because the wrongdoing of government administrators was closely entangled with classified operations.

**Mosaic theory.** Judges often accept invocations of the privilege because they feel incompetent to make a determination of what information would or would not be dangerous to national security if revealed. They are extremely reluctant, understandably, to replace administrative judgment on matters of national security with their own. There are some cases in which the injustice caused by this reluctance is of a sharp and disturbing nature. *Frost v. Perry*
and *Kasza v. Browner*\(^2\) are good examples of perverse and harmful uses of the privilege. In these cases, workers at the secret government facility popularly known as “Area 51” sued the government to find out what chemicals they had been exposed to during illegal dumping and burning of toxic waste by Area 51 administrators. The government had violated numerous criminal and civil environmental statutes by burning toxic chemicals and by using other unauthorized methods of transport and disposal of toxic waste. Workers at the site became ill, and some died, allegedly as a result of exposure to the chemicals. The government prevailed after asserting the state secrets privilege, and the workers never did discover what chemical wastes they were exposed to. One of the most disturbing features of *Kasza* was the “mosaic theory” expounded by both the district court and the court of appeals in upholding assertion of the state secrets privilege. This theory holds that even unclassified, seemingly banal information may be protected by the privilege because the sum of a large number of unclassified disclosures may add up to an overall picture of classified operations and capabilities. This theory first saw use in *Halkin*, where the court noted that

> it requires little reflection to understand that the business of foreign intelligence gathering in this age of computer technology 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.\(^3\)

The *Kasza* court noted that accordingly, “If seemingly innocuous information is part of a classified mosaic, the state secrets privilege may be invoked to bar its disclosure.”\(^2\) This leads to the obvious conclusion that the state secrets privilege may now prevent disclosure of unclassified information that cannot in any sense be reasonably characterized as state secrets. This is a rather stunning reach for a privilege that started out as a device to protect only the most sensitive information. Under the theory announced in *Kasza*, literally any piece of information may be argued to be a potential piece of a mosaic leading to a classified picture of U.S. operations. President Clinton provided a climactic moment to the case by issuing a Presidential Determination specifically exempting Area 51 from compliance with environmental regulations and prohibiting release of any information about Area 51 to the *Kasza* plaintiffs.

The privilege also sometimes shields malicious actions of administrators. *Maxwell v. First National Bank of Maryland* was a disturbing case involving illegal arms shipments and money laundering by the CIA. Robert Maxwell, a bank officer, handled, at the request of his supervisor, a number of transactions that were suspicious and lacked proper documentation. Maxwell subsequently learned that the transactions were in support of CIA operations and that his

\(^{2}Kasza v. Browner*, 133 F.3d 1159 (9th Cir., 1998).

\(^{3}Halkin v. Helms*, 8.

\(^{4}Kasza v. Browner*, 1166.
name was attached to additional transactions he knew nothing about. Sternly warned not to keep any personal copies of these transactions and monitored closely at his office and home, Maxwell nonetheless surreptitiously made copies of numerous money transfers. When Maxwell finally expressed concern about the legality of the transactions, he and his family were threatened with harm. Federal agents allegedly harassed and surveilled Maxwell for years after he left the job with the bank, and interfered with his efforts to procure positions at other banks. When Maxwell sued the bank, the government successfully intervened, asserting the privilege to prevent the release of any documents relevant to the case. Moreover, the court precluded the use of information at trial that would establish the existence of a relationship between the CIA and the bank, and even held information to be inadmissible that had already been publicly disclosed. The court cited the mosaic theory as the basis for these determinations and over First Amendment claims to the right to testify, prevented Maxwell “from offering in evidence bank documents already in his possession or his own testimony about alleged admissions by bank officials concerning the relationship of [the bank] and the CIA.”

The mosaic theory turns many of the assumptions of liberal democracy inside out, and allows the government to make information secret and beyond the reach of judicial requests when that information could not properly be classified either under executive order or statute.

**Separation of Powers**

Misplaced judicial deference to the assertion of the privilege means more than citizens left without legal remedies; sometimes it creates instability in constitutional arrangements of power. The danger such deference presents to our constitutional framework is highlighted by the Clinton administration case of *Barlow v. United States*. Barlow, a former CIA employee, was fired from his job at the Department of Defense Office of Non-Proliferation Policy. He believed that the CIA and the Department of Defense were giving false information and testimony to Congress in an effort to manipulate it into passing legislation and funding specified programs. Barlow brought his complaints to his supervisor and stated that he would try to establish contact with members of Congress to inform them of his allegations. He was ordered not to contact members of Congress, even though the members he wished to talk to held security clearances and were already receiving the allegedly false information from the CIA and other intelligence agencies. Barlow argued that he was fired on the suspicion that he could not be trusted to keep secret the efforts to deceive Congress.

The U.S. Senate passed a resolution referring the case to the U.S. Court of Claims, where Barlow sued the United States under the Whistleblower Protection Act. His counsel made very focused discovery requests, and Director of

---

75 Maxwell v. First National Bank of Maryland, 598.
Central Intelligence George Tenet successfully asserted the state secrets privilege. In attempting to counter the claims of Tenet that no material requested could be turned over for evidence in the case for reasons of national security, Barlow submitted an affidavit from Charles Burke, a “high-ranking” former 30-year CIA employee. Burke stated that disclosure of the requested information would not jeopardize national security, and, like Barlow, he believed that Congress had been lied to. Burke also implied that Director Tenet’s assertion of the state secrets privilege was made to prevent disclosure of material that would substantiate Barlow’s claims that intelligence agencies had intentionally deceived Congress.36 Despite the importance of the issues involved and in the face of rather clear evidence of possible misuse of the state secrets privilege, the court declined to look past the bare assertions of the government. Barlow did not get the materials requested and lost his case.

The Bush administration recently engaged in behavior similar to, if perhaps even more aggressive than that of the Clinton administration in Barlow. Sibel Edmonds, a translator for the FBI, blew the whistle on the FBI’s translation department in 2002, claiming it was riddled with incompetence, corruption, malfeasance, and criminal behavior. Edmonds was fired from her job, and she filed suit against the FBI. She testified before Congress and the commission investigating the attacks of September 11, and much of her testimony was corroborated, with Senators Charles Grassley and Patrick Leahy, the chair and senior minority party member, respectively, of the Senate Judiciary Committee, finding her to be thoroughly credible. Attorney General John Ashcroft asserted the state secrets privilege in two cases in an effort to prevent Edmonds from publicly revealing the details of her assertions against the FBI. One claim was designed to prevent her from giving a deposition in a case filed against the Saudi Arabian government and various Saudi companies by hundreds of family members of those killed in the attacks of September 11.77 The other state secrets claim is being pursued to have the case against the FBI by Edmonds dismissed.78 Further, the Department of Justice (DOJ) succeeded in placing Edmonds under a “gag” order to prevent her from publicizing her revelations about the FBI and its translation department. In the final step of a concerted effort to prevent the details of Edmond’s story from making it to the public, in May 2004, Attorney General Ashcroft retroactively classified information and documents about Edmonds’ claims that the DOJ had delivered to Congress in 2002. Now Congress is prevented from utilizing the retroactively classified information in published testimony or committee reports. The purpose of these efforts to close off information seems to be directed more at avoiding embarrassment and the publication of unsavory details about the FBI than at protecting the national security.

36 Barlow v. United States, 21–22.
If Congress must rely solely on executive branch intelligence agencies for information in making decisions, without any means of verifying that information, it is completely at the mercy of the president and the executive bureaucracy. Judicial deference to the privilege in cases such as *Barlow* amounts to complicity with the executive branch in undermining congressional power and responsibility. And on occasion, judicial functioning seems perhaps compromised by the perspective of secrecy that pervades executive agencies, and, therefore, may utterly fail in maintaining the separation of powers. In *In re United States*, judge Douglas Ginsburg withheld two-thirds of his dissenting opinion, stating, "Unfortunately, I am unable fully to explain my disagreement with the court . . . without discussing [classified information] and thus the bulk of this opinion will be available only to a limited readership." That limited readership included government attorneys but not plaintiff's counsel. In appealing such a ruling, 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.

**Present Use of the Privilege**

Recent use of the state secrets privilege shows a tendency on the part of the executive branch to expand the privilege to cover a wide variety of contexts. Conflict of interest is a fundamental problem afflicting the current arrangement for assertion of the privilege and the deference with which courts are required to treat such assertions. Lord Coke famously remarked, "The King cannot be judge of his own cause, therefore the case must be judged by the Lords." In this spirit, Executive Order 12,958, issued by President Clinton, commands that "in no case shall information be classified in order to . . . conceal violations of law, inefficiency, or administrative error [or to] prevent embarrassment to a person, organization, or agency."

In 1998, on the issue of disclosure raised by Executive Order 12,958, Congress debated statutory language that would allow executive branch employees to directly inform members of Congress or their staff representatives of waste, fraud, or violations of law by administrators. The Office of Legal Counsel at the DOJ opposed the language, arguing that it violated the separation of powers, and the proposed legislation failed. In the course of the debate, Senator Charles Robb asked Deputy Attorney General Randolph Moss the following hypothetical question: "If an executive branch official signed a specific, illegal

---

finding authorizing the assassination of a foreign head of state, would an executive branch employee be authorized to report the act to Congress?" In an astonishing reply, Moss essentially said no, only weakly noting that "the National Security Act require[s] reporting to Congress by the President" of violations of law. But it is unreasonable and constitutionally unsound to rely on presidents and administrators to report their own misconduct.

President George W. Bush's administration seems even more committed to secrecy and maintenance of executive power than previous administrations, and a number of key personnel have histories of involvement with the withholding of records under unusual circumstances. For example, now-Secretary of Defense Donald Rumsfeld, as both counselor to President Nixon and executive director of the Cost of Living Council, withheld documents requested by Congress in 1970 on two occasions. In both instances, Rumsfeld and Nixon claimed that a "confidential relationship" between him and the President precluded compliance with congressional requests for information. And Attorney General John Ashcroft imposed stricter guidelines concerning Freedom of Information Act requests. The previous policy, by Attorney General Janet Reno, authorized withholding information only when an agency "reasonably foresees that disclosure would be harmful [to national security]." Ashcroft's memorandum, superseding Reno's, directs agencies to withhold information where there is a "sound legal basis" to do so. Given the reach and effectiveness of the state secrets privilege, such a directive is tantamount to making disclosure of any particular piece of information subject to the idiosyncratic discretion of administrators. A "sound legal basis" for withholding information under the state secrets privilege may be manufactured for virtually any document an administrator does not want the public to see. And the impossibility and mosaic theories, coupled with the courts' demonstrated reluctance to even conduct in camera inspections of material before affirming secrecy, mean that an administrator's decision to withhold information by assertion of the state secrets privilege is virtually unreviewable.

As cases against the Bush administration wend their way through the courts, judges are beginning to see broad assertions of executive power from administrators to withhold information from the public, the courts, and Congress. In a case against Vice President Cheney to force release of documents

---

82 U.S. Congress. Senate. The Power of the President to Withhold Information, 58.
concerning meetings of the now-famous energy task force, the National Energy Development Group, Judge Emmet G. Sullivan found Bush administration claims of privilege to “reflect what appears to be a problematic and unprecedented assertion, even in the face of contrary precedent, of Executive power.”

Sullivan then took note of a pattern of behavior on the part of Bush administration attorneys: “The fact that the government has stubbornly refused to acknowledge the existing controlling law in at least two cases, does not strike this Court as a coincidence. One or two isolated mis-citations or misleading interpretations of precedent are forgivable mistakes of busy counsel, but a consistent pattern of misconstruing precedent presents a much more serious concern.” Notwithstanding this chilly reception by the federal judiciary of Bush’s claims of executive privilege, all seven of the known Bush administration formal assertions of the state secrets privilege that have so far been considered by courts have been successful. Indeed, recent cases indicate that Bush administration lawyers are using the privilege with offhanded abandon. In one case, DOJ attorneys raised the privilege on 245 separate occasions, yet failed to follow through and meet the formal criteria prescribed in Reynolds for invocation of the privilege. This conduct indicates that the administration may be asserting the privilege to prevent discovery or disclosure of information even in cases in which the privilege is not warranted.

Undaunted by mounting criticism, Bush issued an order in November 2001 with far-reaching implications for modifying procedures under the Presidential Records Act. Executive Order 13,233 extends the power to assert the state secrets privilege to former presidents to prevent disclosure of information generated during their presidencies. There, Bush stated that the “President’s constitutionally based privileges subsume privileges for records that reflect: military, diplomatic, or national security secrets (the state secrets privilege) . . .”, and that “the former President independently retains the right to assert [these] constitutionally based privileges.”

This is a power heretofore unrecognized either in courts or politics. In Nixon v. Administrator of General Services, the U.S. Supreme Court was ambivalent on the point of whether a former president could assert the so-called presidential communication privilege. Justice William Brennan, writing for the Court, found that despite strong arguments weighing against it, there is at least

\[89\] Ibid., 64–65, n.14.
\[91\] Int’l Action Ctr. v. United States.
\[93\] Ibid., Sec. 3(d)(1)(ii).
a weak power in former executives to assert the “communication” privilege. But the Court found it clear and uncontested that the “very specific privilege protecting against disclosure of state secrets . . . may be asserted only by an incumbent President.” When questioned about the Order, President Bush appeared to confirm the unprecedented reach of the privilege: “[The Order] lays out a procedure that . . . is fair for past Presidents . . . a process that I think will enable historians to do their job and at the same time protect state secrets.”

The clear implication of this statement is that even former presidents may assert the state secrets privilege to protect against disclosure of documents from their administrations, regardless of Supreme Court precedent to the contrary.

Richard Nixon fought to the end of his life, and his heirs continued the fight on his behalf, to control the process by which his tapes and other records would be preserved and stored. Unsuccessful in asserting the state secrets privilege to prevent disclosure of embarrassing and damaging information, Nixon shifted his attack, attempting to limit the material released and to control the form in which it was released. The protracted litigation, combined with lack of full cooperation from the National Archives, has had the effects of limited access and continuing secrecy with regard to the Nixon tapes. If President Bush is successful in reasserting the state secrets privilege to cover presidential records, however, the access problems will become insurmountable, and the ongoing disputes over when and how the archival records of past presidents can be researched will be eclipsed by the threshold question of whether anyone may see them at all without a former president’s consent.

Just as the current administration’s stance threatens to unsettle the presidential records secrecy question, so too does it complicate the oft-raised matter of the continued publication of the Foreign Relations of the United States (FRUS), a documentary history of U.S. foreign relations. President Reagan sought to limit publication of the volumes in this series, to the dismay of historians and archivists, who rely on it as a critical research source for understanding the history of American foreign policy. Although the FRUS was already subject to a thirty-year publication delay, ostensibly for reasons of state secrecy, Reagan issued Executive Order 12,356 in 1982, which required “protection of information that ‘alone, or in the context of other information’ could cause damage to national security.” The wording here seems calculated to import the mosaic theory into decisions concerning FRUS publication. When the Advisory Committee complained about “overclassification” with regard to FRUS, the State Department changed the composition of the Committee “to dilute the voice of its historian members.”

96 Ibid., 192.
The Bush administration also relies on the state secrets doctrine to buttress its decision to allow for secret military tribunals to prosecute foreign terrorists. Anticipating that information brought into evidence in order to convict terrorists may oftentimes be classified, the military order establishing the tribunals mandates that trials are to be closed to outside observers and that all issues of fact and law are to be determined by the tribunal, rather than by a jury. The Order directs that consideration against disclosure of state secrets will regulate "the conduct, closure of, and access to proceedings" and that this secrecy extends to "pretrial, trial, and post-trial procedures, modes of proof, issuance of process, and qualifications of attorneys."^7

And President Bush recently designated the Secretaries of Agriculture and Health and Human Services, and the chief administrator of the Environmental Protection Agency as eligible to "classify information originally as 'Secret.'" And the Office of Science and Technology Policy now has "top secret" original classification authority. This means that more administrative and bureaucratic activities will be put beyond the reach of courts and the public, because the state secrets privilege will be available to the heads of these departments to protect material they now have the authority to classify. Even if we assume that the classification authority for these department heads is indeed necessary, such authority obviously expands the discretionary power of administrators to exclude documents from public access.

Finally, our own attempts to obtain policies governing assertion of the state secrets privilege met with failure, inasmuch as there appear to be no policy guidelines on the use of the privilege in any major department or agency of the executive branch. Freedom of Information Act requests to some three dozen agencies and their various subcomponents yielded nothing in the way of documentation of guidance for use of the privilege. Any limitations on assertion of the privilege appear to be self-imposed by the individual agencies, and use of the privilege seems to be carried out ad hoc at the discretion of department heads and their assistants. Perhaps the general feeling of administrators concerning the privilege was summed up in a Department of the Navy memorandum: it concluded that "there is nothing but good news about the state secrets privilege" as a tool to prevent disclosure of information.^98

The current structure of the state secrets privilege virtually guarantees that its assertion in any particular case will be successful and that the costs for abuse of the privilege will be minimal or nonexistent. The existence of such an effective tool of executive power, combined with the attacks of September 11, 2001 and their aftermath, provides a ready context for understanding the impulse of the Bush administration to expand the use of the privilege to prevent scrutiny and information gathering by Congress, the judiciary, and the public. But with increased use comes also the suspicion that the privilege may be more easily and


frequently abused to thwart oversight and to protect illicit behavior. Both the Congress and the courts have the duty to oversee the use of the privilege and to take measures to prevent its misuse. But the courts, because the privilege is of judicial origin, are responsible for taking the first concrete and measured steps to check the reach of the privilege, especially where that reach threatens to undermine the constitutional balance of power and to invade public interests.*

* This article is part of a larger project by Weaver and Pallitto to perform a comprehensive legal analysis of presidential secrecy powers.
Copyright of Political Science Quarterly is the property of Academy of Political Science and its content may not be copied or emailed to multiple sites or posted to a listserv without the copyright holder's express written permission. However, users may print, download, or email articles for individual use.