No. 20-827

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

ZAYN AL-ABIDIN MUHAMMAD HUSAYN, AKA ABU ZUBAYDAH, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF FORMER FEDERAL JUDGES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

MEAGHAN VERGOW
(*Counsel of Record)*
GRACE LEEPER
ANNA MOHAN
O'MELVENY & MYERS LLP
1625 Eye Street, NW
Washington, DC 20036
(202) 383-5300
mvergow@omm.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes

Other Authorities

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

INTEREST OF *AMICI*[1]

Amici are former Article III judges whose experiences on the bench convince them that the judicial role in reviewing the state secrets privilege is vital to the rule of law, and that the Judiciary is competent to evaluate executive assertions of the privilege.

Amici seek to participate in this case out of concern that the unbridled deference sought by the government would prevent the Judiciary from performing its critical constitutional role. History teaches that judges are well-equipped to evaluate assertions of privilege in a national security context with an appropriate level of deference—and that limiting review of privilege claims can lead to costly mistakes. *Amici* respectfully submit that they can lend the Court a unique perspective on the Judiciary's responsibility to carefully review an executive claim that a case implicates state secrets and cannot be litigated.

SUMMARY OF ARGUMENT

I. The Judiciary has a long constitutional tradition of reviewing executive action, even where national security is implicated.

A. The Judiciary serves a central role in checking unlawful action taken by the executive branch. The exercise of judicial review is essential to preserving

---

[1] Counsel for *amici* state that no counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel made any monetary contribution intended to fund the preparation or submission of this brief. Sup. Ct. R. 37.6. All parties have consented to the filing of this brief. Sup. Ct. R. 37.3(a).

the rule of law, including—perhaps especially—when the executive claims to be acting in the Nation's security interests. The Founders specifically designed our tripartite system to avert the reactionary solutions to difficult problems that are possible when power is concentrated in one branch—and history reminds that blind judicial deference to asserted national security prerogatives can come at the expense of the personal constitutional rights that are fundamental to our Nation's values.

B. Examples of this central historical function abound. Since the treason trial of Aaron Burr in 1807, courts have considered, in a variety of circumstances, and with appropriate deference, whether the Executive's bid for secrecy is credible and justified. Usually, the answer is yes. But it is the constitutionally ordained role of the Judiciary to review the claim of privilege—and the existence of that review itself guards against the potential for abuse that would result if the Judiciary had no meaningful role at all.

II. Judicial review of assertions of the state secrets privilege has practical importance.

A. Absent review, the Executive has an inherent (and entirely rational) incentive to assert the privilege aggressively, even in circumstances when the law would say it is unavailable. History provides many examples of Executive overreaching, including in *United States v. Reynolds*, 345 U.S. 1 (1953), the seminal case on the subject, where the secret preserved by the privilege was revealed, years later, to be no more than the negligence of governmental actors. Ex-

ecutive branch actors have confirmed the government's propensity for excessive or simply erroneous assertions of confidentiality.

The stakes on both sides can be high. When serious national security matters are at risk of exposure, the Executive's judgment merits deference. But the state secrets privilege can empower the Executive to extinguish even meritorious claims, and with them the plaintiff's substantive rights. Our system of checks and balances ensures that this heavy burden is not unilaterally imposed on litigants without a legitimate basis—helping in turn to preserve the legitimacy of our governmental institutions.

B. Courts have the institutional competence and experience to evaluate claims of privilege and to guard against the improper disclosure of sensitive information. They can consider the government's justification for invoking the privilege *in camera* and *ex parte*. Without second-guessing the government's national security judgment, courts can evaluate whether the government's claim of privilege is plausible or incredible. And courts can employ procedures that have been developed to accommodate national security concerns without insulating executive judgments from judicial review altogether. They may implement protective orders and security protocols that facilitate sharing of information with opposing counsel without risking improper disclosure, for example, or—when even that much disclosure is too much—they can employ other approaches to preserve a measure of adversarial testing of claims. Courts have used procedures like these to handle classified information in criminal

cases, to assess the lawfulness of electronic surveillance, and to determine whether the government may lawfully withhold agency records under the Freedom of Information Act. Even when a court determines that material is privileged for national security reasons, it can craft alternatives to disclosure of the privileged information, in appropriate circumstances.

The judgments may not always be easy. National security and civil liberties can be fitful bedfellows at times. But judges have a proven ability to perform their limited review conscientiously, ensuring that it is always the Nation's interests—and not its government's errors—that are kept safe.

ARGUMENT

I. THE JUDICIARY HAS HISTORICALLY PROVIDED A CRITICAL CHECK ON EXECUTIVE ACTION, EVEN WHERE NATIONAL SECURITY IS IMPLICATED

From the founding, it has been the role of the Judiciary to enforce the rule of law—including against the excesses of the executive branch. Cases involving military, diplomatic or national security implicate special concerns, to be sure. But courts have always evaluated executive claims in those contexts as well, affording respect to executive determinations when necessary while ensuring that executive judgments are not wholly insulated from review.

A. The Judiciary Has Historically Served As A Check On Unlawful Action By The Executive Branch

1. a. The fundamental principle that "[n]o man in this country is so high that he is above the law," *United States v. Lee*, 106 U.S. 196, 220 (1882)—that "[a]ll the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it," *id.*—is essential to the rule of law. *See, e.g.*, Diane P. Wood, *The Rule of Law in Times of Stress*, 70 U. Chi. L. Rev. 455, 457 (2003) (critical to the rule of law is that "there is no one in a society governed by law who is above the law or immune from some form of legal constraint"); Michel Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy,* 74 S. Cal. L. Rev. 1307, 1313 (2001) (contrasting the rule of law with the rule of men, which "connotes unrestrained and potentially arbitrary personal rule by an unconstrained and perhaps unpredictable ruler"); Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse,* 97 Colum. L. Rev. 1, 9 (1997) (defining as one of the essential elements of the rule of law the supremacy of legal authority, even over government officials).

The Judiciary's role as a check on the excesses of the Executive was integral to the rule-of-law framework adopted at the country's beginnings. Indeed, among the Declaration of Independence's list of grievances was that the King had "made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries." The Declaration of Independence para. 11 (U.S. 1776). "[A]n independent judiciary, free of executive oppression,

was regarded by the American revolutionaries as essential to a free society." Thomas I. Vanaskie, *The Independence and Responsibility of the Federal Judiciary*, 46 Vill. L. Rev. 745, 748-49 (2001).

One can scarcely identify a Founder or a Framer without finding an accompanying admonition that under our system of separation of powers, the Judiciary must serve as a check on the other branches and an impartial defender of liberty. Take John Adams: The judicial power, said Adams, "ought to be distinct from both the legislative and executive, and independent upon both, so that it may be a check upon both." John Adams, On Government, in The Works of John Adams 181, 198 (C. Adams ed., 4th ed. 1851-56) (quoted in Charles Gardner Geyh, *The Origins and History of Federal Judicial Independence*, in A.B.A. Comm'n on Separation of Powers and Judicial Independence, An Independent Judiciary app. A at 67, 69 (1997)). Or Alexander Hamilton, who considered it essential that "the Judiciary remain[] truly distinct from both the legislature and the executive." The Federalist No. 78, p. 466 (C. Rossiter ed. 1961) (A. Hamilton). As Hamilton put it, quoting Montesquieu, "there is no liberty if the power of judging be not separated from the legislative and Executive powers." *Id.* (quoting 1 Montesquieu, Spirit of Laws 181).

b. Our constitutional system of checks and balances forswears unquestioning deference to the Executive. That is so even in the sphere of national security, where the Executive's "predictive judgments" are "delicate, complex, and involve large elements of prophecy," *Trump v. Hawaii*, 138 S. Ct. 2392, 2421-22

(2018). While national security judgments merit deference, deference does not mean blind acquiescence. *See id.* at 2418-19 (acknowledging that there is "judicial inquiry"—albeit circumscribed—even when decisions implicate "relations with foreign powers" (quotation omitted)). The Judiciary cannot abdicate its duty, regardless of whether the Executive's actions are undertaken to protect national security, *see Ziglar v. Abbasi*, 137 S. Ct. 1843, 1862 (2017) ("[N]ational-security concerns" are not "a talisman used to ward off inconvenient claims—a 'label' used to 'cover a multitude of sins.'" (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 523 (1985)); *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 646 (1952) (Jackson, J., concurring) ("No penance would ever expiate the sin against free government of holding that a President can escape control of executive powers by law through assuming his military role."), or whether those actions are undertaken in times of war or peace, *see Hamdi v. Rumsfeld*, 542 U.S. 507, 535-37 (2004) ("We have long … made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."); *Ex parte Milligan*, 71 U.S. 2, 120-21 (1866) ("The Constitution of the United States is a law for rulers and people, equally in war and peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.").

In short, this Court's "precedents, old and new, make clear that concerns of national security and foreign relations do not warrant abdication of the judicial role." *Holder v. Humanitarian L. Project*, 561 U.S. 1, 34 (2010). This is the beauty of the tripartite system: The Constitution "protects us from our own

best intentions" by "divid[ing] power ... among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." *Printz v. United States,* 521 U.S. 898, 933 (1997) (quoting *New York v. United States,* 505 U.S. 144, 187 (1992)).

2. This Court need only look to its own history for a reminder of the consequences of uncritical deference in the national security context. The infamous particulars of *Korematsu v. United States*, 323 U.S. 214 (1944) hardly need retelling: The Court rejected a constitutional challenge to a World War II era military order which led to the removal and incarceration of all individuals of Japanese ancestry living on the West Coast. Recognizing that "legal restrictions which curtail the civil rights of a single racial group are immediately suspect," the Court nevertheless deferred to the government's claim that the order was justified by military necessity. *Id.* at 216, 218-19. The government's invocation of national security was ostensibly backed by a report issued by Lieutenant General John L. DeWitt, from which the Court concluded that "there were disloyal [Japanese Americans], whose number and strength could not be precisely and quickly ascertained." *Id.* at 218. "There was evidence of disloyalty on the part of some," the Court reasoned, and "the military authorities considered that the need for action was great, and time was short." *Id.* at 223-24.

The Court declined to probe these justifications at all, despite several Justices' skepticism towards the

DeWitt Report. In dissent, Justice Murphy acknowledged that "[t]he scope of … discretion" granted to the executive branch in this context "must, as a matter of necessity and common sense, be wide," but concluded that "like other claims conflicting with the asserted constitutional rights of the individual, the military claim must subject itself to the judicial process of having its reasonableness determined and its conflicts with other interests reconciled." *Id.* at 234 (Murphy, J., dissenting). In his view, the DeWitt Report did not meet this modest standard, amounting to "a plea of military necessity that has neither substance nor support." *Id.*

Justice Jackson, too, dissented. "How does the Court know," he asked, "that these orders have a reasonable basis in necessity?" *Id.* at 245 (Jackson, J., dissenting). He pointed out that the DeWitt Report was the subject of "sharp controversy as to [its] credibility," but that "the Court, having no real evidence before it, ha[d] no choice but to accept General DeWitt's own unsworn, self-serving statement, untested by any cross-examination, that what he did was reasonable." *Id.*

As it turns out, the dissenters' skepticism was prescient. Decades after *Korematsu*, a Congressional commission and newly discovered government records revealed not only that intelligence contradicted the claim that the internment of Japanese Americans was justified by military necessity, but also that the government knew as much when it offered that justification. The Commission unanimously concluded that "at the time of … implementing military orders,

there was substantial credible evidence from a number of federal civilian and military agencies contradicting the report of General DeWitt that military necessity justified exclusion and internment of all persons of Japanese ancestry." *Korematsu v. United States*, 584 F. Supp. 1406, 1416 (N.D. Cal. 1984). Moreover, documents revealed that "the government knowingly withheld information from the courts when they were considering the critical question of military necessity." *Id.* at 1417.

With the benefit of hindsight, *Korematsu* "stands as a constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees." *Id.* at 1420. Executive actors promise to support and defend the Constitution—but some of our deepest national disappointments have occurred when the Judiciary failed to hold the Executive accountable to that promise.

B. Courts Have A Long Tradition Of Evaluating Executive Assertions Of Privilege In The National Security Context

Consistent with the Judiciary's role in our constitutional system, courts have a long history of scrutinizing executive assertions of the need for secrecy to protect national security.

1. In 1807, Chief Justice John Marshall presided over the treason trial of Aaron Burr. In preparation for trial, Burr moved for a subpoena *duces tecum* that would require President Thomas Jefferson to produce correspondence between the President and Burr's co-conspirator, James Wilkinson. *See Trump v. Vance*, 140 S. Ct. 2412, 2422 (2020) (describing the Burr

trial). The prosecution opposed the request, arguing that the letter "might contain state secrets, which could not be divulged without endangering the national safety." *United States v. Burr*, 25 F. Cas. 30, 31 (C.C.D. Va. 1807).

Chief Justice Marshall declined to quash the subpoena based solely on the prosecution's speculation that the correspondence contained state secrets. Marshall recognized that the correspondence might very well contain information "the disclosure of which would endanger the public safety" and explained that he would suppress that information "if it be not immediately essentially applicable to the point." *Id.* at 37. He nevertheless emphasized that any such information was not yet "before the court" and would have its "due consideration on the return of the subpoena." *Id.*

Before the return issued, however, Marshall rejected the prosecution's core legal theory, acquitting Burr of the treason charge. *Vance*, 140 S. Ct. at 2423. When the prosecution proceeded to charge Burr with a misdemeanor based on the same conduct, Burr renewed his request for the correspondence between Wilkinson and the President. *See id.* This time, the prosecution said that they would produce the correspondence but that there were certain parts that they believed should be withheld as public secrets. *United States v. Burr*, 25 F. Cas. 187, 190 (C.C.D. Va. 1807).

Marshall again acknowledged that there might be circumstances in which the President would need to withhold documents from public view. But he emphasized the role of the court in reviewing those assertions. If the President sought to withhold a paper,

Marshall explained, he would need to "state the particular reasons" for doing so. *Id.* at 192. The court would afford "full force to those reasons" and would weigh them against "the affidavit of the accused" before deciding whether to compel disclosure. *Id.* In other words, while the court would pay "all proper respect" to the reasons the President offered for withholding information, *id.*, "the ultimate decision [whether to compel disclosure] remained with the court," *Nixon v. Sirica*, 487 F.2d 700, 710 (D.C. Cir. 1973).

2. Since the Burr trial, courts have continued to reassert their role in reviewing claims of executive privilege where military and national security secrets are concerned. *See, e.g.*, *Firth Sterling Steel Co. v. Bethlehem Steel Co.*, 199 F. 353 (E.D. Pa. 1912) (involving weapons blueprints); *Pollen v. Ford Instrument Co.*, 26 F. Supp. 583 (E.D.N.Y. 1939) (drawings showing construction of range keepers sold to Navy were privileged because disclosure would be detrimental to the national defense); *Bank Line Ltd. v. United States*, 68 F. Supp. 587, 588 (S.D.N.Y. 1946) ("no reasons of national security" involved in record of Navy Board of Investigation report); *Cresmer v. United States*, 9 F.R.D. 203 (E.D.N.Y. 1949) (Navy Board of Investigation reports were discoverable because they did not contain military secrets).

a. In *United States v. Reynolds*, 345 U.S. 1 (1953)—the seminal state secrets case—this Court emphasized the importance of judicial supervision and the abuses that would result were the Judiciary to abdicate that role.

There, three civilian observers were killed when a B-29 bomber crashed while testing secret military equipment. The observers' widows brought suit against the government under the Federal Tort Claims Act and sought as part of discovery the accident investigation report from the crash. The government refused to produce the report—even to the court—arguing that it could not do so without "seriously hampering national security." *Id.* at 5.

This Court rejected the government's argument "that the executive department heads have power to withhold any documents in their custody from judicial view if they deem it to be in the public interest." *Id.* at 6. "Judicial control over the evidence in a case," the Court stressed, "cannot be abdicated to the caprice of executive officers." *Id.* at 9-10. Rather, "[t]he court itself must determine whether the circumstances are appropriate for the claim of privilege." *Id.* at 8. In the end, it is "the court," not the Executive, that needs to be "satisfied that military secrets are at stake." *Id.* at 11. To hold otherwise would amount to an impermissible "abandonment of judicial control" and "lead to intolerable abuses." *Id.* at 8.

That reasoning proved prophetic. Years after the government claimed that producing the accident report would "seriously hamper[] national security, *id.* at 5, the children of the original plaintiffs filed a Freedom of Information Act (FOIA) request to obtain the report. A review of that report revealed no classified or sensitive national-security information, but rather only "that the crash and resulting deaths were caused by ordinary negligence." Shayana Kadidal, *The State Secrets Privilege and Executive Misconduct*, Jurist F.

(May 30, 2006); *see also* Garry Wills, *Why the Government Can Legally Lie,* 56 N.Y. Rev. of Books 32, 33 (2009) (report contained no "details of any secret project the plane was involved in," but instead "a horror story of incompetence, bungling, and tragic error"). We know now "that the goal of the government in claiming the privilege in *Reynolds* was to avoid liability and embarrassment." William G. Weaver & Robert M. Pallitto, *State Secrets and Executive Power*, 120 Pol. Sci. Q. 85, 99 (2005); *accord Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1094 n.1 (9th Cir. 2010) ("Even in *Reynolds*, avoidance of embarrassment—not preservation of state secrets—appears to have motivated the Executive's invocation of the privilege.").

b. Twenty years after the *Reynolds* decision, the Court reaffirmed that it is the Judiciary's constitutional role to evaluate executive claims of the need for secrecy to protect national security. In *United States v. New York Times Co.*, 328 F. Supp. 324 (S.D.N.Y. 1971), the government sought to enjoin the publication of a detailed Department of Defense history of United States involvement in Vietnam known as the Pentagon Papers, arguing that their publication would be detrimental to national security. In support of its position, the government elicited testimony from representatives of the Department of State, Department of Defense, and the Joint Chiefs of Staff. That testimony, however, "did not convince [the district court] that the publication of these historical documents would seriously breach the national security." *Id.* at 330. Because "no cogent reasons were advanced as to why these documents ... would vitally affect the

security of the Nation[,]" the district court declined to issue a permanent injunction preventing their publication. *Id.* Again, this Court acknowledged that it is the role of the Judiciary to determine whether the Executive has satisfied its burden of justifying a proposed need for secrecy. Because the government "had not met [its] burden" of justifying the prior restraint sought, this Court affirmed. *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam).

That decision turned out to be correct. As Erwin Griswold, the former Solicitor General, commented eighteen years later: "I have never seen any trace of a threat to the national security from the publication [of the Pentagon Papers]. Indeed, I have never seen it even suggested that there was such an actual threat." Hon. Robert D. Sack, Hon. John D. Bates, Douglas Letter, & Ben Wizner, *The Philip D. Reed Lecture Series: The State Secrets Privilege and Access to Justice: What Is the Proper Balance?*, 80 Fordham L. Rev. 1, 9 (2011). Instead, Griswold considered the government's actions in that case an attempt to avoid embarrassment. "It quickly becomes apparent to any person who has considerable experience with classified material," he explained, "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." Erwin N. Griswold, *Secrets Not Worth Keeping: The Courts and Classified Information*, Wash. Post (Feb. 15, 1989).

c. Following the September 11, 2001 terrorist attacks, courts began considering executive claims of privilege in the context of the war on terror. *See*

Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 Fordham L. Rev. 1931, 1941 (2007). Despite resolving those claims differently, courts consistently recognized, as Chief Justice Marshall did, that the ultimate decision whether a privilege applies lies with courts, not the Executive. *See, e.g.*, *El-Masri v. United States*, 479 F.3d 296, 304-05 (4th Cir. 2007) (finding material privileged but making clear that the *Reynolds* Court left "the Judiciary firmly in control of deciding whether an executive assertion of the state secrets privilege is valid"); *Hepting v. AT & T Corp.*, 439 F. Supp. 2d 974, 995 (N.D. Cal. 2006) ("While the court recognizes and respects the executive's constitutional duty to protect the nation from threats, the court also takes seriously its constitutional duty to adjudicate the disputes that come before it.… To defer to a blanket assertion of secrecy here would be to abdicate that duty, particularly because the very subject matter of this litigation has been so publicly aired." (quotation and citation omitted)).[2]

[2] The United States is not unique in preserving a judicial role in scrutinizing claims of Executive privilege; nearly every common law jurisdiction has done so. *See, e.g.*, *Duncan v. Cammell Laird & Co.*, [1942] 1 All E.R. 587; *Robinson v. South Australia* (No. 2), [1931] All E.R. 333 (P.C.); *Gagnon v. Quebec Secs. Comm'n*, [1965] 50 D.L.R.2d 329 (1964); *Bruce v. Waldron*, [1963] Vict.L.R. 3; *Corbett v. Soc. Sec. Comm'n*, [1962] N.Z.L.R. 878; *Amar Chand Butail v. Union of India*, [1965] 1 India S.Ct. 243.

II. THE JUDICIARY CAN, AND SHOULD, CAREFULLY REVIEW EXECUTIVE ASSERTIONS OF THE STATE SECRETS PRIVILEGE

There is good reason for this historical tradition. Incentives for the Executive to assert privilege broadly in the national security context, a history of over-classification of records as confidential, and the simple risk of error combine to create an environment in which the Judiciary's prophylactic role is crucial to ensuring that the Executive does not exceed its own constitutional prerogative. Moreover, because the privilege can be used to curtail or terminate litigation, courts must take care that the privilege is applied only where and to the extent necessary. Courts have developed myriad procedures to confidentially review privilege claims and address national security concerns, while minimizing the risk of potentially harmful disclosures of national security information.

A. Structural Factors Amplify The Need For Judicial Review Of Assertions Of The State Secrets Privilege

1. Affording judicial deference to the Executive in the state secrets privilege context presumes that the privilege will "not … be lightly invoked," *Reynolds*, 345 U.S. at 7—that the Executive will impartially apply its relative expertise on national security when invoking the privilege. But the prospect of judicial review itself helps secure that outcome: without any check at all, the Executive has an inherent incentive (and the freedom) to assert the privilege in circumstances when it should be unavailable.

a. This is not to say that all, or even most, undue assertions of the privilege are in bad faith. In some ways, it is entirely rational that the branch most likely to be held to account for national security outcomes would use all tools available to it. But precisely because 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." *Hamdi*, 542 U.S. at 545 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment). Just as "[t]hose who work for the House of Representatives or the Senate might well be expected to aggrandize the powers of Congress," we should expect "[g]enerous interpretations of the president's prerogatives" from government actors asserting the state secrets privilege, when national security is ostensibly at risk. Cass R. Sunstein, *National Security, Liberty, and the D.C. Circuit*, 73 Geo. Wash. L. Rev. 693, 696-97 (2005).

Aggressive use of the state secrets privilege should thus be expected. "[I]f 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." Weaver & Pallitto, *supra*, at 101. Put differently, "[i]t is hardly surprising that such an effective tool would tempt presidents to use it with increasing frequency and in a variety of

circumstances." *Id.* at 102; *accord* Michael H. Page, *Judging Without the Facts: A Schematic for Reviewing State Secrets Privilege Claims*, 93 Cornell L. Rev. 1243, 1273-75 (2008) (outlining these conflict-of-interest concerns); D. A. Jeremy Telman, *Our Very Privileged Executive: Why the Judiciary Can (and Should) Fix the State Secrets Privilege*, 80 Temp. L. Rev. 499, 510-12 (2007) (same); Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 Admin. L. Rev. 131, 156 (2006) (same). Courts' near-universal deference to the Executive in this context already gives the Executive an incentive to push the boundaries of the privilege. To circumscribe the judicial role still further would invite abuse and permit the government to avoid scrutiny of subjects that may not meaningfully implicate state secrets at all.

b. An over-inclusive conception of the state secrets privilege thus provides "a convenient vehicle through which an executive official can conceal misdeeds, prevent liability, or simply avoid public embarrassment." Page, *supra*, at 1273. *United States v. Reynolds*, 345 U.S. 1 (1953), and the Pentagon Papers case were not isolated incidents. *See supra* at 12-15. The same purpose to avoid embarrassment, not national harm, appears to have been at work in *Edmonds v. U.S. Department of Justice*, 323 F. Supp. 2d 65, 72 (D.D.C. 2004), *aff'd* 161 F. App'x 6 (D.C. Cir. 2005), in which a translator hired by the FBI blew the whistle on alleged incompetence in the translation department and was subsequently fired. The government successfully argued that the state secrets privilege barred

her suit, although commentators suggest that the invocation of the privilege "seem[ed] to be directed more at avoiding embarrassment and the publication of unsavory details about the FBI than at protecting the national security." Weaver & Pallitto, *supra*, at 106. One of Edmonds's claims, for example, was that the government was sending translators to the Guantanamo Bay detention facilities that did not speak the language they were purportedly translating. *See* Kadidal, *supra.*

c. The government itself has confirmed the Executive's predilection for overly aggressive or simply erroneous assertions of confidentiality. Just as Solicitor General Erwin Griswold warned, a report issued in 1997 by the Commission on Protecting and Reducing Government Secrecy, headed by Senator Daniel Patrick Moynihan, concluded that "the classification system, … is used too often to deny the public an understanding of the policymaking process, rather than for the necessary protection of intelligence activities." *Report of the Commission on Protecting and Reducing Government Secrecy,* S. Rep. No. 105-2. 105th Cong., 1st sess., 1997, xxi. In one particularly ironic example, "[e]ven 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." Weaver & Pallitto, *supra*, at 87.

2. The Judiciary's oversight role is important for an additional reason: The operation of the privilege can be "fatal to the underlying case … rendering a plaintiff unable to establish a *prima facie* case and without a remedy for the violation of her rights." *Terkel v. AT & T Corp.*, 441 F. Supp. 2d 899, 908 (N.D.

Ill. 2006) (citing *Ellsberg v. Mitchell,* 709 F.2d 51, 56 (D.C. Cir. 1983)). Indeed, the "government has dramatically increased" its use of "motions to dismiss lawsuits on the basis of state secrets privilege." Fuchs, *supra*, at 134.

The government has moved for pre-discovery dismissal on state secrets grounds in a variety of legal contexts—including, for example, in cases involving claims for religious discrimination*, see Tenenbaum v. Simonini*, 372 F.3d 776, 777 (6th Cir. 2004) (affirming dismissal "[b]ecause the state secrets doctrine … deprives Defendants of a valid defense to the [plaintiffs'] claims"); racial discrimination, *see Sterling v. Tenet*, 416 F.3d 338, 345 (4th Cir. 2005) (holding that "materials necessary for pressing [plaintiff's] Title VII claim or defending against it are likely to result in inappropriate disclosure of state secrets"); wrongful termination, *see Edmonds*, 323 F. Supp. 2d at 79 (holding that plaintiff was "unable to prove the prima facie elements of each of her claims without the disclosure of privileged information"); warrantless wiretapping, *see Terkel*, 441 F. Supp. 2d at 918 (dismissing where "the state secrets privilege covers any disclosures that affirm or deny the activities alleged in the complaint"); and torture and unlawful detention*, see El-Masri*, 479 F.3d at 309 (upholding dismissal because prima facie case "could be made only with evidence that exposes how the CIA organizes, staffs, and supervises its most sensitive intelligence operations").

In considering these motions, courts have recognized the gravity and problematic nature of such dismissals, noting that "[d]ismissal of a suit, and the consequent denial of a forum without giving the plaintiff

her day in court … is … draconian," *In re U.S.*, 872 F.2d 472, 477 (D.C. Cir. 1989), acting to "eliminate [a plaintiff's] substantive rights from the outset," *In re Sealed Case*, 494 F.3d 139, 151 (D.C. Cir. 2007). The result is to preclude judicial review entirely over potentially meritorious claims, such that "application [of the privilege] often trumps what we ordinarily consider to be due process of law." *Jeppesen Dataplan,* 614 F.3d at 1093-94 (Hawkins, J., dissenting). The upshot is that the Judiciary must, even when deferring to the Executive's judgment in this context, proceed with caution—ensuring that the privilege is validly invoked, and that the existence of privileged information cannot be accommodated in the litigation of the case.

B. Courts Have Developed The Tools Necessary To Evaluate Assertions Of The State Secrets Privilege

Courts are fully equipped to independently evaluate executive assertions of the need for secrecy while minimizing the risk that any potentially harmful information is disclosed. They have a variety of tools they can deploy—depending on the nature of the case, its procedural posture, and the particular concerns that are implicated—to protect against the improper or inadvertent disclosure of sensitive information. These procedures have largely been successful—"in our history, it is hard to find even a single case in which judicial protection of freedom seriously damaged national security." Sunstein, *supra*, at 702; *cf.* James Madison, Remarks at the Virginia Ratification Convention (June 20, 1788), in 3 Jonathan Elliott, *Debates on the Federal Constitution* 531, 535 (1836)

("Were I to select a power which might be given with confidence, it would be judicial power.").

1. To start, courts can review information pertinent to the claim of privilege *in camera* and *ex parte*. *See, e.g.*, *Ellsberg*, 709 F.2d at 59 n.37 ("When a litigant must lose if the claim is upheld and the government's assertions are dubious in view of the nature of the information requested and the circumstances surrounding the case, careful *in camera* examination of the material is not only appropriate, but obligatory." (internal citations omitted)); *see also Jeppensen Data-Plan*, 614 F.3d 1070 (en banc court reviewed *in camera*, *ex parte* the documents at issue); *El-Masri*, 479 F.3d at 305 ("in some situations, a court may conduct an *in camera* examination of the actual information sought to be protected, in order to ascertain that the criteria set forth in *Reynolds* are fulfilled"). *In camera* and *ex parte* review of the privilege claim preserves the constitutional role of judges as a check on the Executive, while preventing potentially damaging disclosures of sensitive information to the other side or to the public.

Congress has codified *in camera* and *ex parte* review procedures in several statutes implicating national security information. The Foreign Intelligence Surveillance Act (FISA), for example, governs the use of information obtained through electronic surveillance. *See* 50 U.S.C. § 1806. FISA mandates that whenever the government intends to "use or disclose" information obtained through electronic surveillance against the subject of that surveillance, the government must notify both the court and the subject. *Id.* § 1806(c), (d). The subject may then move to suppress

the evidence on the ground that the surveillance was unlawfully conducted or otherwise seek to obtain access to the evidence at issue herself. *See id.* § 1806(e), (f). The Attorney General can file an affidavit in response, attesting that disclosure of the information "would harm the national security of the United States." *Id.* § 1806(f). At that point, a "United States district court ... review[s] *in camera* and *ex parte*" the surveillance application, the order authorizing the surveillance, and any other relevant materials, and determines based on those materials whether the surveillance "was lawfully authorized and conducted." *Id.*

The Classified Information Procedures Act (CIPA) and FOIA also establish mechanisms for *in camera* and *ex parte* review. CIPA authorizes the court alone to inspect classified material where the Attorney General claims that broader disclosure of that material will damage national security. *See* 18 U.S.C. app. 3 § 4; *see id.* § 6(c)(2). FOIA contains a national security exemption, which permits an agency to withhold documents that are (i) "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy" and (ii) "in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552 (b)(1). When a requestor challenges an agency's decision to withhold documents under that exemption, the court may review the agency records *in camera* to determine de novo whether the exemption applies. *Id.* § 552(a)(4)(B).

2. Courts can also evaluate whether the particular claim of privilege can be accommodated without terminating a case altogether. Where, as here, the government asserts the privilege in response to the opposing party's request for discovery, for example, courts can enter protective orders and establish security procedures that allow for sharing of sensitive information with opposing counsel while ensuring that it is not disclosed more broadly. Congress has recognized as much, codifying these security procedures in statutes including FISA (which explicitly empowers courts to disclose information to the non-governmental party under such procedures where "necessary to make an accurate determination of the legality of the surveillance," 50 U.S.C. § 1806(f)) and CIPA (which likewise permits disclosure of classified information to defendants and defense counsel where necessary to protect the criminal defendant's due process rights, *see* 18 U.S.C. app. 3 § 3).

3. Where disclosure to opposing counsel is untenable, courts have other ways to manage the involvement of sensitive material. In *In re U.S. Department of Defense*, 848 F.2d 232 (D.C. Cir. 1988), for example, the Department of Defense sought to withhold under FOIA's national-security exemption 14,000 pages of documents related to attempts to rescue United States hostages in Iran in 1980. Neither the court's clerks nor opposing counsel were cleared to access the classified information implicated. *Id.* at 234. Accordingly, the court chose to appoint a special master—"a person who holds, or has recently held, sufficient clearance to have access to the documents"—to de-

velop a representative sample of the documents at issue and "summariz[e] to the Court the arguments that each party has made, or could make with respect to the exemptions claimed." *Id.* This approach, the court explained, would "preserve[] and indeed enhance[]" the court's Article III role while ensuring appropriate levels of control over sensitive documents. *Id.*

In affirming the district court's order appointing the master, the D.C. Circuit explained that the appointment was particularly appropriate in light of the lack of "impartial expert witnesses or other features of the adversary process ... to assist [the court] in making his decision about disclosure" of the documents. *Id.* at 236; *cf.* Fed. R. Civ. P. 53 advisory committee note ("such masters may prove useful when some special expertise is desired"). The district court's decision to appoint a master with the appropriate security clearance, moreover, "show[ed] commendable sensitivity to the importance of confining the number of persons privy to the documents in question." 848 F.2d at 238. After the master's appointment, the government ultimately agreed to release a significant number of the pages originally deemed exempt from disclosure under FOIA. *See Examining the State Secrets Privilege: Protecting National Security While Preserving Accountability Before the S. Comm. on the Judiciary*, 110th Cong. (2008) 10 (statement of Hon. Patricia M. Wald, Former Chief Judge, U.S. Court of Appeals for the D.C. Circuit).[3]

---

[3] At least one court has also considered appointing an expert under Federal Rule of Evidence 706 "to assist the court in determining whether disclosing particular evidence would create a

4. If a state secret is implicated in a case, courts are also able to evaluate whether there is an alternative to or substitute for that information that will allow the case to proceed without it. In *Reynolds*, for example, this Court emphasized that there was "nothing to suggest that the electronic equipment" being tested "had any causal connection" with the crash of the military aircraft. 345 U.S. at 11. Thus, the Court reasoned, it should have been possible for the plaintiffs "to adduce the essential facts as to causation without resort to material touching upon military secrets." *Id.* Indeed, the government had offered the plaintiffs a "reasonable opportunity to do just that," by "formally offer[ing] to make the surviving crew members available for examination." *Id.* The plaintiffs could have accepted that offer and proceeded with their case absent classified information. *See id.* ; *see also In re Sealed Case*, 494 F.3d at 141 (plaintiff could establish a prima facie *Bivens* claim without privileged information); *Mohamed v. Holder*, 2015 WL 4394958, at *2 (E.D. Va. July 16, 2015) (any claimed privileged information was not relevant to plaintiff's procedural due process claims concerning the No Fly List).

Where witnesses are not available, as in *Reynolds*, courts can work with the government to "disentangle sensitive information from non-sensitive information" or craft a non-privileged substitute version of the evidence. *In re Sealed Case*, 494 F.3d at 153; *see also Examining the State Secrets Privilege*, *supra*, at 215 (statement of William H. Webster Submitted to the

---

'reasonable danger' of harming national security." *Hepting*, 439 F. Supp. 2d at 1010.

Senate Judiciary Committee). CIPA expressly contemplates such procedures in the criminal context. In particular, CIPA authorizes the government to move to introduce a "summary of the specific classified information" or "a statement admitting relevant facts that the specific classified information would tend to prove." 18 U.S.C. app. 3 § 6(c)(1). The substitute or summary is permitted so long as it "provide[s] the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information." *Id.*; *see also id.* § 8(b) (allowing for introduction of redacted documents). Similar procedures can be used in civil cases if the court determines that a particular document implicates a state secret. *See, e.g.*, *In re Sealed Case*, 494 F.3d at 154 ("[N]othing in this opinion forecloses a determination by the district court that some of the protective measures in CIPA ... which applies in criminal cases, would be appropriate."); *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 539 (E.D. Va. 2006) ("special procedures, such as clearing defense counsel for access to classified information and the application of ... CIPA could be, and indeed have been, used effectively in appropriate circumstances in other cases").

5. The various tools available to courts for managing national security privilege claims confirm that the Judiciary is competent to review such claims. As William H. Webster, a former Director of the FBI, former Director of the CIA, and former federal judge put it, "judges can and should be trusted with sensitive information" and "are fully competent to perform an independent review of executive branch assertions of

the state secrets privilege." *Examining the State Secrets Privilege*, *supra*, at 214 (statement of William H. Webster Submitted to the Senate Judiciary Committee). "Judges are well-qualified to review evidence purportedly subject to the privilege and make appropriate decisions as to whether disclosure of such information likely to harm our national security." *Id.*

Indeed, "[i]t is judges, more so than executive branch officials, who are best qualified to balance the risks of disclosing evidence with the interests of justice." *Id.* at 215.

CONCLUSION

The Court should uphold the Ninth Circuit's decision.

Respectfully submitted,

MEAGHAN VERGOW
(*Counsel of Record)*
GRACE LEEPER
ANNA MOHAN
O'MELVENY & MYERS LLP
1625 Eye Street, NW
Washington, DC 20036
(202) 383-5300
mvergow@omm.com

August 20, 2021

APPENDIX

APPENDIX: LIST OF *AMICI CURIAE*

The Honorable Mark W. Bennett
United States District Judge for the Northern District of Iowa from 1994 to 2019

The Honorable James T. Giles
United States District Judge for the Eastern District of Pennsylvania from 1979 to 2008

The Honorable Stephen M. Orlofsky
United States Magistrate Judge for the District of New Jersey from 1976 to 1980
United States District Judge for the District of New Jersey from 1996 to 2003

The Honorable Thomas I. Vanaskie
United States District Judge for the Middle District of Pennsylvania from 1994 to 2010
United States Circuit Judge for the Third Circuit Court of Appeals from 2010 to 2018

The Honorable T. John Ward
United States District Judge for the Eastern District of Texas from 1999 to 2011