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The Yale Law Journal - Forum: Protecting National Security or Covering Up Malfeasance: The Modern State Secrets Privilege and Its Alternatives

Nicole Hallett

Several cases concerning the National Security Agency (NSA) surveillance program have now reached the courts of appeals. In these cases, the government invoked the state secrets privilege in its motions to dismiss, and in both cases it lost at the district court level. The courts below tiptoed around the impenetrable state secrets doctrine by deciding that enough information about the NSA surveillance program existed in the public sphere that the plaintiffs could proceed without revealing any secret information. This attempt to circumvent the state secrets privilege has thus far proven unsuccessful on appeal. However, the decisions skirt the real issue pervading these cases and many other 9/11-related civil liberties cases—the fact that the state secrets privilege is outdated, misused, and out of step with the executive excesses of the current Bush Administration.

The modern state secrets privilege was first articulated by the Supreme Court in *United States v. Reynolds* as a way to safeguard information that would be harmful to national security if disclosed. Since then the lower courts have universally interpreted it to be an absolute privilege—once properly invoked, the government can refuse to disclose any piece of evidence it deems “secret.” In the decades after *Reynolds* was decided, the government rarely invoked the privilege. The alarming [frequency with which the Bush Administration has invoked the privilege after the September 11 terrorist attacks](#) should lead legal scholars and the courts to reexamine the state secrets privilege. More specifically, we should look to the experiences of our democratic allies, who have all abandoned the absolute privilege in favor of a privilege that balances national security with the public interest in the adjudication of constitutional claims.

For example, the Supreme Court decision in *Reynolds* was taken largely from the British case, *Duncan v. Cammell*, which announced the equivalent crown privilege as conferring absolute immunity from suit. However, the crown privilege in the United Kingdom has since evolved into a balancing test. In *Conway v. Rimmer*, the House of Lords announced that “[u]nless the detriment to the public interest threatened by production is so great that no other consideration should prevail, the court must weigh the interests of justice against the possible harm to the public interest.”

Canada, too, has adopted a balancing approach in applying its crown privilege, which it has codified in sections 37 and 38 of the Canada Evidence Act. If a judge determines that the disclosure of evidence represents a risk to national security, the judge “may by order, after considering both the public interest in disclosure and the form of and conditions to disclosure that are most likely to limit any injury to international relations or national defence or national security resulting from disclosure, authorize the disclosure.”

The Canadian courts have made clear that the judge may order disclosure even when he or she determines that a risk to national security exists. In *Ribic v. Canada (Attorney General)*, the Canadian Federal Court of Appeal explained that “[u]pon a finding that disclosure of the sensitive information would result in injury, the judge then moves to the final stage of the inquiry which consists in determining whether the public interest in disclosure outweighs in importance the public interest in non-disclosure.” Australia and Ireland have adopted almost identical privileges.

Indeed, even countries that have confronted prolonged terrorist threats have moved away from an absolute privilege and toward utilizing a balancing test. For instance, Spain’s High Court ordered disclosure of classified documents in a series of three cases in which the relatives of suspected terrorists slain in counterterrorism operations brought suit against the government alleging improper conduct. The Court held that the constitutional guarantees of the “right to obtain effective protection from judges and courts in the exercise of their rights and legitimate interests” and “the certainty that the rule of law shall prevail, the accountability of public authorities, and the prohibition of arbitrary action of public authorities” should take precedence over the state’s security interests.

Finally, in Israel, a country that has faced a persistent and deadly terrorist threat for most of its existence, the equivalent national security privilege is similarly subject to a balancing test. Israeli courts show a strong inclination to proceed with the adjudication of claims in which the government has asserted the national security privilege. In *Public Committee Against Torture in Israel v. Israel*, the [Israeli Supreme Court openly considered challenges to various methods of coercive interrogation used by the General Security Service](#). While recognizing the substantial national security concerns involved, the Court refused to allow the privilege to “[consign \[Israel’s\] fight against terrorism to the twilight shadows of the law](#).”

All of these countries employ special procedures, such as *in camera* proceedings and security protocols, to minimize the risk to national security. Their experiences show that it is possible to safeguard national security while at the same time allowing constitutional claims, such as those at issue in the NSA wiretapping cases, to be adjudicated. The shift away from an absolute privilege illustrates the growing awareness among our democratic allies that the public interest must be construed to encompass more than national security. The government’s privilege only extends to cases in which its invocation will safeguard the public interest interpreted broadly, taking into account risk to national security as well as other factors such as the importance of protecting individual rights and liberties.

Moreover, these countries have implicitly recognized that an absolute privilege encourages government abuse. An absolute privilege provides no check on executive power, which inevitably leads to the misuse of the privilege by governments wanting to evade liability. Thus, an absolute privilege strikes at the heart of the principles underlying the American separation of powers doctrine. Courts play a critical role in the U.S. system by providing an external check on executive discretion so that governments must think more carefully about when to invoke the privilege and—perhaps more importantly—about the secret programs of questionable legality that have landed them in court in the first place.

The Bush Administration has perfected the art of invoking the state secrets privilege and now invokes it as a matter of course in most post-9/11 civil liberties cases. In another series of cases involving the controversial extraordinary rendition program, in which terrorist suspects are secretly rendered to countries, such as Morocco, Syria, and Egypt, to be tortured, the government has thus far successfully invoked the state secrets privilege in every instance. The appalling result is that the government has evaded judicial review of a program that implicates our most fundamental rights and has received almost universal condemnation both domestically and abroad. A state secrets privilege that permits this kind of governmental malfeasance to escape judicial review is inconsistent with our system of justice.

Ironically, *Reynolds*, the case that birthed the modern state secrets privilege, turns out to be the perfect example of its hazards. In that case, three widows sued the Air Force for the deaths of their husbands in a B-29 bomber crash. The government refused to disclose the accident reports, citing national security concerns. In 2000, the reports were declassified and were [discovered to contain no national security information](#). They did, however, contain evidence that a chronic maintenance problem had made the plane unsafe for flight.

We should not have to wait fifty years for the facts surrounding the NSA surveillance program to come out. The courts—and perhaps Congress—should revisit *Reynolds*. We need a new state secrets privilege, one that balances national security and the public interest in the protection of our constitutional rights and liberties.

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