

# FROM CROWN PRIVILEGE TO STATE SECRETS<sup>1</sup>

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## ABSTRACT

*The state secrets privilege is the most formidable evidentiary privilege available to the United States government. Available only to the executive branch, it is used to protect national security information from disclosure during litigation, and is habitually acquiesced to by courts. Once invoked, the privilege prevents covered material from being put into evidence that touches sensitive matters of national security. It is apparent that this privilege is subject to abuse by the executive branch to shield activities and personnel from judicial scrutiny and legal inquiries for reasons other than to protect national security. The privilege derives from British and Scottish doctrines of Crown Privilege that allow government to withhold evidence from legal proceedings to protect the public interest. The derivation of the state secrets privilege from the tradition of Crown Privilege has never been thoroughly explored. This article traces the influence of Crown Privilege in the development and evolution of the state secrets doctrine in the United States.*

## KEYWORDS

*Secrecy, State Secrets, Crown Privilege*

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<sup>1</sup> This article is dedicated to the wonderful and important work of Steven Aftergood for the Federation of American Scientists and his Project on Government Secrecy, from 1991-2021 (<https://fas.org/issues/government-secrecy/>).

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“That the king’s little-finger should be heavier to them than the loins of the law.”<sup>3</sup>

— Thomas Wentworth, 1<sup>st</sup> Earl of Strafford

“Shall every subordinate in the department have access to the secret, and not the presiding officer of justice?”

— John H. Wigmore<sup>4</sup>

## I. INTRODUCTION

In a 1998 hearing, Senator John Kerry asked Deputy Attorney General Randolph Moss if a President signed a specific, classified, illegal finding authorizing the assassination of a foreign head of state, would an Executive branch employee be authorized to report the act to law enforcement or members of Congress. Moss’s astonishing reply was that federal employees would not be authorized to report the crime, implying that anyone who did so would be subject to removal or criminal prosecution.<sup>5</sup> It is a truism that in democracies the people’s effectiveness in managing their elected officials is contingent on the availability of accurate knowledge of what they are doing in their official duties. Yet the United States is a country besieged by secrecy: warrantless electronic surveillance,<sup>6</sup> U.S. kidnapping of foreign nationals and rendition to torture,<sup>7</sup> U.S. held detainees kept in secret and out of court reach,<sup>8</sup> unparalleled levels of classified information,<sup>9</sup> retreat from the

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<sup>3</sup> Quoted in 3 *Howell’s State Trials*, “The Trial of Thomas, Earl of Strafford, Lord Lieutenant of Ireland, for High Treason” 1381, at 1421.

<sup>4</sup> 8 JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 2379 (3d ed. 1940).

<sup>5</sup> *Disclosure of Classified Information to Congress*: Select Committee on Intelligence. Hearing 105-729. 105th Cong., 2d Sess. (1998)

<sup>6</sup> Title VII, Section 702 of the Foreign Intelligence Surveillance Act (FISA), *Procedures for Targeting Certain Persons Outside the United States Other Than United States Persons* (50 U.S.C. sec. 1881a) §702 (Reauthorized 2019) provides for surveillance of foreign nationals for intelligence purposes.

<sup>7</sup> “Extraordinary rendition” is a euphemism. It is not rendition at all, since there is no legal process used or implicated. It is kidnapping and transfer of people deemed terrorists to third parties, who then torture those kidnapped to obtain information concerning terrorist operations, personnel, methods, and activities. *Zubaydah v. United States* (595 U.S. \_\_\_\_ (2022)) is the most recent case to come to broad national attention. The U.S. Carried out renditions to torture during the early 2000s, and there is no evidence of recent use of “extraordinary rendition.”

<sup>8</sup> See report of the Senate Select Committee on Intelligence: *Committee Study of the Central Intelligence Agency’s Detention and Interrogation Program* (S. Rep. No. 113-288, (2014) and *Zubaydah v. U.S.* 20-827 (2022)

<sup>9</sup> See, e.g., *Statement of J. William Leonard, Former Director, Information Security Oversight Office*. He noted: “[I]n the years since 9/11, we have seen successive administrations lay claim to new and novel authorities and to often wrap these claims in classification. This can amount to unchecked executive power...” Committee on Oversight and Government Reform (House) 114<sup>th</sup> Cong. 2d. Sess. December 7 (2016) (No. 114-174) (<https://www.govinfo.gov/content/pkg/CHRG-114hhrg26177/html/CHRG-114hhrg26177.htm>)

Freedom of Information Act,<sup>10</sup> retaliation to silence whistleblowers for attempting to report embarrassing information or illegal activities,<sup>11</sup> the use of secret evidence against criminal defendants,<sup>12</sup> refusal to release information concerning extrajudicial killings by the U.S. that target U.S. citizens,<sup>13</sup> and the refusal to release even unclassified information.<sup>14</sup> Various statutes, legal tools, and administrative procedures promise to make large expanses of governmental activity open to inspection. Yet these may all be swept away through the incantation of classification power that withdraws information from public access at the application of a label. And that label is talismanic. It assures that material will not be subjected to judicial inspection or production to triers of fact, regardless of court, litigant, or public need for that material or the severity of the matters addressed. There is also an element of “magical thinking,” as in the infamous reassertion of classification of the Pentagon Papers even after they had been published in *The New York Times*.<sup>15</sup> 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.”<sup>16</sup>

Recently, in a culminating decision to a seventy-year journey of judicial self-abnegation, the U.S. Supreme Court found that publicly available information vetted by governments, attested to by participants in torture, and reported by the most respected news organizations in the world, is inadmissible in the face of government assertion of the state secrets privilege.<sup>17</sup> Information available at the corner bodega news stand, and undeniable as a matter of fact, is unavailable to a trier of fact in suit where the plaintiff truthfully and accurately claims illegal torture at the hands of the United States government.<sup>18</sup> The Court held that the state secrets privilege may exclude evidence at trial “even if [the information is] already made public through

<sup>10</sup> For a recent lament, see *Undermining the FOIA: Less Information, Less Oversight* EDITOR & PUBLISHER, Oct. 31, 2022. (<https://www.editorandpublisher.com/stories/undermining-the-foia-less-information-less-oversight,240237>)

<sup>11</sup> For example, see Department of Homeland Security reporting on whistleblower investigations: <https://www.oig.dhs.gov/reports/whistleblower-retaliation-reports-of-investigation>.

<sup>12</sup> The 1996 Antiterrorism and Effective Death Penalty Act established a special court to hear confidential evidence in deportation cases. The Classified Information Procedures Act preserves defendants’ rights while protecting classified information in criminal trials.

<sup>13</sup> Abdulrahman al-Awlaki, sixteen at the time of his death, was killed by a U.S. drone strike in Lebanon in 2014. Awlaki’s father was similarly killed two weeks earlier in Yemen. The younger al-Awlaki is not known to be a terrorist, and government officials claimed he was not the target of the strike. His eight-year-old half-sister died in a raid ordered by President Trump in 2017 in Yemen.

<sup>14</sup> See Department of Defense Instruction 5200.48 CONTROLLED UNCLASSIFIED INFORMATION (CUI) (March 6, 2020).

<sup>15</sup> *New York Times v. United States*, 403 U.S. 713 (1971).

<sup>16</sup> FROM MAX WEBER: ESSAYS IN SOCIOLOGY 233 (H.H. Gerth & C. Wright Mills, trans., eds. & Introduction, Oxford U.P., 1946).

<sup>17</sup> *Zubaydah v. U.S.* 595 U.S. \_\_\_\_ (2022).

<sup>18</sup> Confirmatory sources include a Senate Select Committee report, testimony of former employees for the U.S. Government, and findings by the European Court of Human Rights. See, slip opinion, *U.S. v. Zubaydah*, No. 20–827 at p.3.

unofficial sources.”<sup>19</sup> This decision calls to mind doctrines of “official truth” in systems of government that are far from the spirit of our Constitution and founding principles of the United States. This is an extraordinary result in a democracy that constitutionally affirms that the truth cannot be confiscated from the public by government edict.

In addition to a remarkable demeaning of judicial responsibility and authority, the decision is a dangerous surrender of law to executive power. At the use of a classification stamp by the humblest executive branch employee or member of the military, information is withdrawn from judicial availability and justice is defeated. As Justice Robert Jackson noted in another case involving executive power, “the principle lies about like a loaded weapon, ready for the hand of any authority that can bring forward a plausible claim of an urgent need.”<sup>20</sup>

The terrorist attacks of September 11th sped up the shift toward greater executive branch secrecy that had its origins decades ago. Richard Nixon, of course, is infamous for his secret, and illegal activities: the Huston Plan,<sup>21</sup> Watergate, “enemies of the state” list,<sup>22</sup> and the warrantless surveillance of people on that list. No account would be complete without at least mentioning Richard Nixon’s infamous dictum said to interviewer David Frost, “When the President does it, that means that it is not illegal.”<sup>23</sup> David Cole noted that this dictum met an update with George W. Bush and became “when the Commander-in-Chief does it, it is not illegal.”<sup>24</sup> Presidents and the executive branch historically engage in warrantless surveillance and wiretap of citizens.<sup>25</sup> Nixon was in the transition era between a personal presidential agenda executed by a few trusted advisers and an institutionalized network of executive secrecy fueled by vast resources.

Post-Nixonian efforts to reign in presidential actions and subject them to greater oversight resulted in the establishment of the intelligence oversight committees in Congress<sup>26</sup>, the enactment of the Foreign Intelligence Surveillance Act,<sup>27</sup> and aggressive congressional investigations that revealed embarrassing executive branch

<sup>19</sup> *U.S. v. Zubaydah*, No. 20–827 slip opinion at p.3.

<sup>20</sup> *Korematsu v. United States* 323 U.S. 214, at 246 (Jackson, J. dissenting).

<sup>21</sup> “The Huston Plan,” named for its author Tom Huston, outlined “domestic security” actions authorized by President Richard Nixon that included “surreptitious entry – breaking and entering in effect – on specified categories of targets” (*Conservative Architect of Security Plan: Tom Charles Huston*, N. Y. TIMES, May 24 1973, p. 34). Notably, Huston said the National Security Agency backed the plan (*NSA Backed ‘Huston Plan’ for Illegal Intelligence Activities*, WASH. POST, March 3, 1975, front page).

<sup>22</sup> A list of 120 people classed as “Political Opponents” singled out for plans of harassment and retribution for perceived harms done to Nixon (*See Enemies list.info “The Complete, Annotated Nixon’s Enemies List”*) <https://www.enemieslist.info/list1.php>.

<sup>23</sup> Interview by David Frost, May 19, 1977.

<sup>24</sup> David Cole, 13 WASH. & LEE J.C.R. & SOC. JUST. 1, pages 1-2 (2006)

<sup>25</sup> For nearly a century Presidents and their executive branch agencies have wiretapped subjects without warrant. See Elizabeth B. Bazan & Jennifer K. Elsea, *Presidential Authority to Conduct Warrantless Electronic Surveillance to Gather Foreign Intelligence Information* (Congressional Research Service, Jan. 5, 2006).

<sup>26</sup> Senate Select Committee on Intelligence Responsibilities and Activities grew out of the “Church Committee” in 1975, and H.R. 658 created the House Permanent Select Committee on Intelligence in 1977.

<sup>27</sup> 50 U.S.C. ch. 36.

activity.<sup>28</sup> Yet the adversary was no longer a cabal of errant presidential associates, but an extensive bureaucratic enterprise allied by an interest in maintenance of secrecy. Presidents had powerful means at their disposal to shield themselves from what was frequently characterized as an encroachment on constitutionally allocated presidential powers.<sup>29</sup> Since the 1970s the entire intelligence and investigative apparatus of the United States has been shifting in alliance with presidential power.

Louis Fisher once commented that the separation of powers between Congress and the President was probably less than that between the President and the bureaucracy. But in matters of national security the bureaucracy and the presidency found their friendship. Over time, as the opaque areas of government expand, administrators and bureaucrats find themselves utilizing presidential privileges and cover in proliferating ways to prevent oversight functions by Congress and the courts. The attacks of September 11, 2001 provided a great deal of legitimate reason to reconfigure responsibility and changes to U.S. security committed to the executive branch.

In areas where secrecy is the ordination of power, bureaucrats are better served by cossetting themselves to theories of secrecy that revolve around presidential authority to withhold information. In the last several decades both the bureaucracy and the institution of the presidency have coinciding powerful interests in the maintenance of secrecy.<sup>30</sup> The executive branch has many means for preventing the disclosure of information to courts, Congress and the public. But in the arsenal of tools available to presidents to keep secrets, the state secrets privilege stands above all else. This privilege, the most powerful available to the President, descends from British monarchical prerogative. It is crown power imported into United States law in response to cold war era needs to shield military and intelligence information.

Presidents initially resorted to the privilege sparingly yet “every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes.”<sup>31</sup> The “repetitions” were few until the late 1970s, but since that time use of the privilege expanded.<sup>32</sup> A common law evidentiary doctrine, it appears at first to be a rather unremarkable device. This is deceptive, for it is the firewall that allows the President and administrative agencies to engage in secret activities with confidence that what they do will remain secret.

<sup>28</sup> For example, Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (The Church Committee) in 1975. The full text of the report is available at: [https://archive.org/stream/finalreportofsel01unit/finalreportofsel01unit\\_djvu.txt](https://archive.org/stream/finalreportofsel01unit/finalreportofsel01unit_djvu.txt)

<sup>29</sup> See, Office of Legal Counsel memoranda: *Common Legislative Encroachments on Executive Branch Authority* (July 27, 1989); *The Constitutional Separation of Powers between the President and Congress* (May 7, 1996).

<sup>30</sup> The now discontinued blog, “Secrecy News,” for The Federation of American Scientists, carried out comprehensive coverage of government secrecy activity and policy, as well as engaging in incisive analysis of the government penchant to make as little information as possible available to the public. Steven Aftergood was single-handedly responsible for this blog. It was, and still is, a wonderful resource. The entries and associated files remain available online at [fas.org](http://fas.org).

<sup>31</sup> *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J. dissenting).

<sup>32</sup> See, e.g., *Restoring the Rule of Law*, Hearing Before the Subcommittee on the Constitution of the Committee on the Judiciary, United States Senate, One Hundred Tenth Congress, Second Session, Sept. 16, 2008.

The privilege rarely fails or meets with substantial judicial scrutiny, and it developed into a serious threat to traditional constitutional understandings and balance of powers between the branches of government.<sup>33</sup> It is also the envy of nongovernmental defendants who sometimes try to invoke the privilege absent executive branch authorization. AT&T, for example, sought to invoke the privilege before the Vermont Public Service Board. The company acknowledged the privilege is for the executive branch to assert, but argued that notification to the Board “that the information [sought] has a security classification should mandate the same end.”<sup>34</sup>

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. Concerning the few times assertion failed, two cases were an obvious misuse of the privilege to protect unclassified Department of Commerce information under the administration of Ronald Reagan.<sup>35</sup> In a third case, *Yang v. Reno*,<sup>36</sup> the court found that the privilege had been incorrectly asserted but indicated that it would be upheld on remedy of the pro forma mistakes.<sup>37</sup> In *Halpern v. United States*,<sup>38</sup> a court of appeals found that an action under the Invention Secrecy Act of 1951<sup>39</sup> could conceivably go forward at an in camera trial and noted that “we are not convinced that [such a trial is] undesirable or unfeasible.”<sup>40</sup> But the *Halpern* court

<sup>33</sup> In canvassing the reported cases on use of the privilege, it has only ultimately failed on four occasions. Two cases concerned an obvious misuse of the privilege to protect unclassified Department of Commerce information under the administration of Ronald Reagan (*Republic Steel v. United States*, 3 C.I.T. 117 (1982); *U.S. Steel v. United States*, 6 C.I.T. 182 (1982)). In a third case, *Yang v. Reno*, 157 F.R.D. 625 (M.D. Penn. 1993), the court found that the privilege had been incorrectly asserted (*Id.*, at 633), but indicated that the privilege would be upheld on remedy of the pro forma mistakes. (*Id.*, at 635). In *Halpern v. United States* a court of appeals found that an action under the Invention Secrecy Act of 1951 (35 U.S.C. 181 et seq.) could conceivably go forward at an *in camera* trial and noted that “we are not convinced that [such a trial is] undesirable or unfeasible” (*Id.*, at 43). But the *Halpern* court reached further: “The assertion by the United States of its privilege with respect to state secrets is . . . governed by similar considerations [as discussed concerning a secret trial under the Invention Secrecy Act]. Congress has created rights which it has authorized federal district courts to try. Inevitably, by their very nature, the trial of cases involving patent applications placed under a secrecy order will always involve matters within the scope of this privilege. Unless Congress has created rights which are completely illusory, existing only at the mercy of government officials, the act must be viewed as waiving the privilege. Of course, any such waiver is dependent upon the availability and adequacy of other methods of protecting the overriding interest of national security during the course of a trial.” (*Id.*, at 43). But this precedent has never been utilized in any other case concerning the privilege.

<sup>34</sup> 2006 Vt. PUC LEXIS 155 Vermont Public Service Board September 18, 2006, Order Entered Docket No. 7193

<sup>35</sup> *Republic Steel v. United States*, 3 C.I.T. 117 (1982); *U.S. Steel v. United States*, 6 C.I.T. 182 (1982).

<sup>36</sup> *Supra*, note 33.

<sup>37</sup> *Id.* at 635.

<sup>38</sup> 258 F.2d 36 (2d Cir. 1958).

<sup>39</sup> 35 U.S.C. 181 et seq.

<sup>40</sup> *Halpern*, *supra* note 38, at 43.

reached further, ordering a secret trial on patent rights.<sup>41</sup> The *Halpern* precedent is orphaned, and no other court has ordered a similar remedy.

Unlike executive privilege and the deliberative process privilege or other powers to withhold information from courts, Congress and the public, the state secrets privilege is absolute, and is not balanced against demonstrated need by litigants for the requested information.<sup>42</sup> The only provision for secrecy found in the Constitution allows Congress to withhold information from the published record of its activities (Art. I, §5), and with respect to the Executive branch the Constitution is completely silent about secrecy. Yet Presidents, beginning with Washington, have asserted a privilege to withhold information from Congress and the public, and have been consistently vague about the grounds for exercising this secrecy.<sup>43</sup>

Unlike executive privilege and the deliberative process privilege or other powers to withhold information from courts, Congress, and the public, courts treat the state secrets privilege as absolute: it is not balanced against demonstrated need by litigants for requested information.<sup>44</sup> It is frequently characterized as an ancient privilege<sup>45</sup> with roots deep in Anglo-American law, but the formal legal recognition

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<sup>41</sup> *Id.*

<sup>42</sup> For example: *Trulock v. Wen Ho Lee*, 66 Fed. Appx. 472, 475-76 (4th Cir. 2003) (“The privilege is absolute, ‘rendering the information unavailable’”). *In re Under Seal*, 945 F.2d 1285, 1287 n.2 (4th Cir. 1991)(“the privilege renders the information unavailable regardless of the other party’s need in furtherance of the action”); *McDonnell Douglas Corp. v. United States*, 323 F.3d 1006, 1021 (Fed. Cir. 2003) (“The privilege is absolute, and ‘no competing public or private interest can be advanced to compel disclosure of information found to be protected by a claim of privilege’.”); *Landry v. FDIC*, 340 U.S. App. D.C. 237, 248 (D.C. Cir. 2000) (“We note that decisions involving the more sensitive and absolute privilege for state and military secrets. . .”); *Doe v. Tenet*, 329 F.3d 1135, 1152 (9th Cir. 2003) (“The state secrets privilege is an absolute privilege and cannot be overcome by a showing of necessity.”).

<sup>43</sup> Thomas Jefferson’s account of a discussion in a cabinet meeting called by President Washington concerning a House committee’s request for information relating to General St. Claire’s campaign against Native Americans noted the following:

[The President] ought to communicate such papers as the public good would permit, and ought to refuse those, the disclosure of which would injure the public: consequently were to exercise a discretion.

Jefferson also observed that the request is improperly made by Congress directly to the “Head of a Department.” The request should be made addressed to the President. (1 THE WRITINGS OF THOMAS JEFFERSON 303 (Lipscomb ed., 1905).

<sup>44</sup> For example: *McDonnell Douglas Corp. v. United States*, 323 F.3d 1006, 1021 (Fed. Cir. 2003) (“The privilege is absolute, and ‘no competing public or private interest can be advanced to compel disclosure of information found to be protected by a claim of privilege’.”); *Landry v. FDIC*, 340 U.S. App. D.C. 237, 248 (D.C. Cir. 2000) (“We note that decisions involving the more sensitive and absolute privilege for state and military secrets. . .”); *Doe v. Tenet*, 329 F.3d 1135, 1152 (9th Cir. 2003) (“The state secrets privilege is an absolute privilege and cannot be overcome by a showing of necessity.”); see cases cited in note 41.

<sup>45</sup> Wright and Graham note that “this supposed antiquity is itself a justification for the state secrets privilege,” but also say that statements proclaiming the privilege as ancient and “‘universally recognized’. . . [are] hyperbole [that] inspires skepticism, particularly

of the privilege in the United States is little more than seventy years old.<sup>46</sup> It has never been authorized or modified by statute,<sup>47</sup> and relies only on the common law for its support.<sup>48</sup> In recent decades the privilege has risen in importance and frequency of use<sup>49</sup> and is resorted to by presidents and administrators to not only protect national security information but to also prevent disclosure of embarrassing material or evidence of government criminal activity.<sup>50</sup> For example, President George W. Bush used the privilege to stymie legal action against the government concerning National Security Agency warrantless surveillance of United States citizens,<sup>51</sup> to stop Title VII discrimination suits against intelligence agencies,<sup>52</sup> to prevent information escaping about the kidnapping and rendition of foreign nationals to torture,<sup>53</sup> and a host of other matters.

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when . . . that historically the privilege has been seldom invoked.” FEDERAL PRACTICE AND PROCEDURE, § 5663 *Policy of the Privileges*.

<sup>46</sup> The privilege was adopted and a procedure for its assertion prescribed by the U.S. Supreme Court in *United States v. Reynolds*, 345 U.S. 1 (1953).

<sup>47</sup> A congressional effort to bring the rule under statutory control in 1973 failed. See Wright and Graham, *supra* note 44, *Rejected Rule 509 of the Federal Rules of Evidence*.

<sup>48</sup> See, e.g., *Trulock v. Wen Ho Lee*, *supra* note 41, at 475, (“Under the common law state secrets privilege, the government may prevent disclosure of information in a lawsuit. . .”); *Kasza v. Browner*, 133 F.3d 1159, 1167 (9th Cir. 2003) (“ . . . the state secrets privilege is an evidentiary privilege rooted in federal common law”); *In re U.S.*, 277 U.S. App. D.C. 37, 39 (“The state secrets privilege is a common law evidentiary rule”).

<sup>49</sup> See L. FISHER, IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE REYNOLDS CASE 245 (2006); A. Frost, *The State Secrets Privilege and Separation of Powers*, 75 FORDHAM L. REV. 1931 (March 2007); M. Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131 (2006) 133-36; W. Weaver & R. Pallitto, *State Secrets and Executive Power*, 120 POL. SCI. Q. 85, 101-02 (2005). Compare these claims with R. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. W. L.R. 1249 (2007), at 1299-1301.

<sup>50</sup> See, e.g., *Barlow v. United States*, Cong. Reference no. 98-887X (Court of Federal Claims 2000); *Halkin v. Helms*, 598 F. 2d 1 (D.C. Cir. 1979); *Maxwell v. First National Bank of Maryland*, 143 F.R.D. 590 (Dist. Maryland 1991); *Molerio v. Federal Bureau of Investigation*, 749 F.2d 815 (D.C. Cir. 1984); *Patterson v. FBI*, 893 F.2d 595 (3d Cir. 1990); *Tilden v. Tenet*, 140 F. Supp 2d 623 (E.D. Virginia 2000).

<sup>51</sup> *Hepting v. AT&T Corp.*, 671 F.3d 881 (2011). The government enlisted the private telecommunications companies to surveil U.S. citizens without warrant for national security purposes. The sole issue before the court was the constitutionality of § 802 of the Foreign Intelligence Surveillance Act (“FISA”), 50 U.S.C. § 1885a, which allows for immunity for telecommunication companies in carrying out authorized surveillance. The court found the activities constitutional.

<sup>52</sup> *Sterling v. Tenet*, 416 F.3d 338 (4th Cir. 2005), cert. denied *sub nom.* *Sterling v. Goss*, 126 S. Ct. 1052 (2006).

<sup>53</sup> See *Arar v. Ashcroft* 414 F. Supp. 2d 250, 287 (E.D.N.Y. 2006), Memorandum in Support of the United States’ Assertion of State Secrets Privilege, C.A. No. 04-CV-249-DGT-VVP (E.D. N.Y.) January 18, 2005; *El Masri v. Tenet* (E.D. Va. 2006) 1:05-cv-01417-TSE-TRJ, Statement of Interest, Assertion of A Formal Claim of State Secrets Privilege by United States Of America, March 8, 2006 (Document 17); *Mohammed v. Jeppeson Dataplan Inc.* 614 F.3d 1070 (2010), where suit under the Alien Tort Statute for kidnapping and rendition to torture of suspected terrorists is dismissed after assertion of the state secrets privilege. Bob Overby, the director of Jeppesen’s “Trip Planning Service” openly and publicly referred to rendition transportation as “torture flights” at

President Barack Obama was no more timid in asserting the privilege. In a case of mistaken identity, Khalid el Masri, a German car salesman, was arrested at the Serbian-Macedonian border, delivered to the CIA, which beat, drugged, and delivered him to Afghanistan. There he was sodomized, further beaten, and subjected to other demeaning and inhumane treatment. After U.S. personnel realized their mistake, el Masri was released on a bucolic hilltop in Albania.<sup>54</sup> His case against the United States was dismissed on assertion of the state secrets privilege. In contrast, a unanimous ruling by the European Court of Human Rights found that el Masri's rights had been violated and confirmed his account of his kidnapping and torture.<sup>55</sup> The el Masri case is but one example of numerous extrajudicial acts of government officials during the Obama years.<sup>56</sup>

More recently, the 9<sup>th</sup> circuit considered if the Foreign Intelligence Surveillance act displaced the state secrets privilege with respect to electronic surveillance.<sup>57</sup> The 9<sup>th</sup> Circuit found that "Congress intended FISA to displace the state secrets privilege and its dismissal remedy with respect to electronic surveillance."<sup>58</sup> The U.S. Supreme Court reversed this decision, holding that FISA did not alter or displace the availability of the state secrets privilege.<sup>59</sup>

In practical terms, the state secrets privilege never fails; in no case has a court ordered the disclosure of classified material in a public proceeding, even if the reasons for classifying the material are quite dubious.<sup>60</sup> The privilege is coextensive with at least all material classified "secret" or above<sup>61</sup> and since the

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"Breakfast Club" meetings for new employees. And an instructor informed employee trainees that "We do spook flights." (Declaration of Sean Belcher ([https://www.aclunc.org/docs/Government\\_Surveillance/Rendition/Declaration\\_of\\_Seán\\_Belcher.pdf](https://www.aclunc.org/docs/Government_Surveillance/Rendition/Declaration_of_Seán_Belcher.pdf))).

<sup>54</sup> Case of *El-Masri v. The Former Yugoslav Republic of Macedonia* (Dec.13, 2012) (Application 39730/09).

<sup>55</sup> The Munich, Germany, prosecutor's office investigated the El-Masri abduction and filed arrest warrants against 13 CIA agents. See *Abuse of State Secrecy and National Security: Obstacles to Parliamentary and Judicial Scrutiny of Human Rights Violations*, Committee on Legal Affairs and Human Rights Council of Europe (2010), at p. 7.

<sup>56</sup> See, e.g., *Obama's Covert Drone War in Numbers: Ten Times More Strikes Than Bush*, <https://www.thebureauinvestigates.com/stories/2017-01-17/obamas-covert-drone-war-in-numbers-ten-times-more-strikes-than-bush>.

<sup>57</sup> *Fazaga v. FBI* (<https://cdn.ca9.uscourts.gov/datastore/opinions/2020/07/20/12-56867.pdf#page=47>).

<sup>58</sup> *Id.* at 74.

<sup>59</sup> 20-828 FBI v. Fazaga (03/04/2022)

<sup>60</sup> Assertion of the privilege has failed on several occasions, but courts did not order the production of material that the executive branch claimed to be properly classified national security information. Failure of the privilege happens in three circumstances: 1) The information sought is not truly classified (see, *supra* note 3.); 2) The privilege is not correctly asserted (e.g. *Yang v. Reno* 157 F.R.D. 625 (M.D. Penn 1993); *Int'l Action Ctr. v. United States*, 2002 U.S. Dist. LEXIS 16874 (D.D.C. 2002)); 3) A trial may still proceed without the requested information and without endangering national security. This last circumstance is a "failure" of the privilege only in the sense that the executive branch's stated intention on assertion of the privilege is to stop litigation of the case altogether. See, e.g., *Hepting*, *supra* note 50, at 4.

<sup>61</sup> The three categories of classification, "confidential," "secret", and "top secret" are promulgated in executive orders (See, e.g. Executive Order 12958). On occasion courts have been skeptical of the claim that information classified as "confidential" is so sensitive as not to be producible in court (see, *supra*, note 3). Virtually all classification decisions

common belief is that the President has plenary power to control the classification of national security information, qualification of material for the privilege is in the exclusive control of the President and the executive branch.<sup>62</sup> But classification of information is not a prerequisite to assertion of the privilege. Indeed, the privilege is successfully invoked to prevent the disclosure of unclassified information, even when that information is in the hands of nongovernmental third parties, including private citizens.<sup>63</sup> The privilege is employed mainly to shut down litigation, not merely to withdraw sensitive information from the trial process; few cases survive after invocation of the privilege.<sup>64</sup>

There is a maturing body of literature concerning use of the privilege, but there is little describing origins and development of the privilege. When judges feel compelled or inspired to reach for historical justifications and antecedents for the privilege, they often refer to the treason case of Aaron Burr.<sup>65</sup> Until recently, judges also relied on the 1874 case of *Totten v. United States*, but in 2005 the U.S. Supreme Court put that idea to rest in a unanimous decision, holding that *Totten* did not implicate the state secrets privilege.<sup>66</sup> Other than allegedly in *Burr*, there is no case that squarely takes up the privilege in the United States before the 1953 decision in *United States v. Reynolds*.<sup>67</sup> As explained below, it is incorrect to view

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are made in accordance with executive orders (less than two percent of classification decisions are made pursuant to statute), and “national security information” is a term of art referring to information specifically classified according to executive order. Information classified according to statute is generally scientific in nature. For example, “Restricted Data” is information classified in accordance with the *Atomic Energy Act of 1954* (42 U.S.C. § 2011 et seq.), and patent application information may be classified under the *Invention Secrecy Act* (35 U.S.C. § 181).

<sup>62</sup> The state secrets privilege has never been claimed by any governmental entity outside of the executive branch. While theoretically it may be possible for Congress or the courts to assert the privilege in litigation, it seems very unlikely to ever occur in practice.

<sup>63</sup> See, e.g., *Burnett v. Al Baraka*, 323 F. Supp. 2d 82 (D.D.C. 2004); *Maxwell v. First Nat. Bank*, 143 F.R.D. 590 (D. Md. 1991); See also section IV(c) *infra*.)

<sup>64</sup> In nearly every case, assertion of the privilege puts an end to litigation. But in *Ellsberg v. Mitchell*, 709 F.2d 51 (D.C. Cir 1983) and the cases of *Hepting* (note 50, *supra*) and *ACLU v. National Security Agency*, 06-CV-10204 (E.D. Mich. 2006) plaintiffs have been allowed to continue their actions despite assertions of the privilege. In those cases, the plaintiffs were allowed to continue their actions because of public disclosures by the government concerning the complained of surveillance programs. The government deprived itself of the advantage of the privilege by publicly admitting the activity that formed the basis of the suits.

<sup>65</sup> See, e.g., *Gravel v. United States*, 408 U.S. 606, 644 (1972) (Justice Douglas Dissenting); *United States v. Reynolds*, 345 U.S. 1, 8 (1953); *In re Sealed Case*, 326 U.S. App. D.C. 276, 285-86, 298, 301 (1997).

<sup>66</sup> *Totten v. United States*, 92 U.S. 105 (1875); *Tenet v. Doe*, 544 U.S. 1, 10 (2005) (“There is, in short, no basis for respondents’ and the Court of Appeals’ view that the *Totten* bar has been reduced to an example of the state secrets privilege.”); See discussion of *Totten* below.

<sup>67</sup> 345 U.S. 1 (1953). In *Firth v. Bethlehem Steel*, 199 F. 353 (E.D. Penn. 1912) a federal district court allowed 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. In *D.C. v. Bakersmith*, 18 App. D.C. 574 (D.C. Cir. 1901), the government asserted that “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

*Burr* as a precursor of the privilege.

Other than scant comments by U.S. judges and commentators and unsubstantiated assertions over the centuries, there has been little attention paid to the beginnings of state secrets doctrine; beginnings found in English and Scottish Law.<sup>68</sup> The descent of the privilege is not found in the U.S. Constitution or early decisions of the U.S. judiciary, but in the *Prerogativa Regis* of England. Indeed, the privilege sprang upon the United States fully mature in the *Reynolds* case, which relied on English precedent to provide a historical dimension and justification for the privilege. If the proximity of the privilege to unaccountable divine right of monarchs caused any discomfort for the Supreme Court in *Reynolds*, it is not noticeable. And up to the present, the federal judiciary has shown a regard for this extraordinary privilege that defies simple explanation.

## II. ARCANA IMPERII

*[A]rcana imperii* [mysteries of state]. . . like the mysteries of the *bona dea*, was not suffered to be pried into by any but such as were initiated in its service: because perhaps the exertion of the one, like the solemnities of the other, would not bear the inspection of a rational and sober enquiry.

— William Blackstone<sup>69</sup>

### A. ORIGINS IN CROWN PREROGATIVE

It is simply assumed or asserted by U.S. commentators, with little or no discussion, that the privilege had its origins in crown prerogatives in England, which certainly appears to be correct.<sup>70</sup> But the mode of origin is instructive and provides a different color to the background of the privilege than one might expect. Seventeenth century

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subordinate officers are in general treated as secrets of State,” but the court did not reach this objection. And in *King v. U.S.*, 112 F. 988 (5th Cir. 1902), 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: “[W]e 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 state secrets” (at 996).

<sup>68</sup> Though McShane notes: “[T]here is a general paucity of comment, both judicially and academically, on the relationship between crown privilege and the prerogative.” F. McShane, *Crown Privilege in Scotland: The Demerits of Disharmony Part I*, 1992 JUD. REV. No. 3, 256, 265.

<sup>69</sup> WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND, 237-38 (London: A. Strahan & W. Woodfall, 12<sup>th</sup> ed. 1793).

<sup>70</sup> See, e.g., C. S. EMDEN, DOCUMENTS PRIVILEGED IN THE PUBLIC INTEREST, 39 L.Q. R. 476, 476-77 (1023) (Crown privilege “can, no doubt, be traced to the prerogative right to prevent the disclosure of state secrets”) (1923); *Conway v. Rimmer* [1967] 2 All. E.R. 1260, 1263 (“Crown privilege is one of the prerogatives of the Crown.”); But see *Rogers v. Sec’y of State for the Home Dept.* [1973] A.C. 388, 407 (“The right to demand that admissible evidence be withheld from, or inadmissible evidence adduced to, the courts is not one of the prerogatives of the Crown.”)

public discussions of the privilege centered on crown prerogative to detain citizens in custody without showing cause. In the turbulent regime of Charles I we see the beginning of a theoretical foundation for crown privilege. Prior to Charles I there is little evidence of discussion of crown power to prevent disclosure of secrets of state. Such a power certainly was not open to serious question, and it is only with Charles' claims that prisoners could be held at prerogative for unexplained reasons that crown power to withhold information became controversial.

Prerogatives were claimed by the crown to be beyond the reach of law, and the crown, as the "fountain of justice," was said by a fiction to always act in the public interest.<sup>71</sup> William Blackstone defined the term "prerogative" as that which is "out of the ordinary course of the common law" and refers to "those [powers] which [the crown] enjoys alone . . . and not to those which [it] enjoys in common with any of [its] subjects."<sup>72</sup> Of course, when prerogative-based acts infringed on citizen liberty or property rights, Parliament and judges often clashed with the crown. But the power to withhold information was at the core of crown prerogatives. It was a power not available to other actors, served to protect the most important functions of the state, and was claimed to be necessary to secure the public interest.

The theoretical basis for judicial refusal to order the disclosure of requested information always was, and continues to be, preservation of the public interest. As Matthew Bacon noted in a standard text on law in the seventeenth century, "it hath been established as a rule, that all prerogatives must be for the advantages and good of the people, otherwise they ought not be allowed by the law."<sup>73</sup> No prerogative relies on this maxim more than crown privilege, for the basis of its assertion is that it is necessary for the efficient functioning of the government or even the continued existence of the state. Despite its importance and its centrality to proper functioning of government, the prerogative of crown privilege was not generally discussed or recognized in early works and compilations concerning royal prerogatives. For example, nothing in the *Prerogativa Regis*<sup>74</sup> relates to a privilege to protect information or secrets of state, and none of the standard law texts of the seventeenth or eighteenth centuries cite to a prerogative against disclosure of information or the protection of state secrets. Nevertheless, Sir Edward Coke notes in *The Institutes* that the third clause of oath for Privy Councilors states that:

[H]e shall keep secret the king's counsell, and all that shall be commoned by way of counsell in the same, without that he shall common it, publish it, or discover it by word, writing, or in any otherwise to any person out of the same Councell, or to any of the same Councell, if it touch him, or if he be party thereof.<sup>75</sup>

<sup>71</sup> For example: "[W]hen a statute is made pro bono publico, and the King (as the head of the commonwealth, and the fountain of justice and mercy,) is by the whole realm trusted with it." January 1, 1616 (77 E.R. 465, 7 Co. Rep. 36 King's Bench Div. Penal Statutes)

<sup>72</sup> BLACKSTONE, 1 COMMENTARIES, *supra* note 69, at 232.

<sup>73</sup> MATTHEW BACON, A NEW ABRIDGEMENT OF THE LAW 149 (London: E. & R. Nutt, & R. Gosling, 1736).

<sup>74</sup> 17 Edw. II, Stat. 1 (1324).

<sup>75</sup> EDWARD COKE, THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND – CONCERNING THE JURISDICTION OF COURTS 54 (London (M. Flesher for W. Lee & D. Pakeman: 1644).

The lack of commentary concerning crown power to withhold information may be indicative of the inability to imagine that such a prerogative would ever give rise to contention, and the apparent infrequency of its need to be exercised.

Comments with respect to the plenary power of the Crown to control official information indicate that it had a wide range, if not completely acceded to. Nathaniel Bacon noted in one case that “It may be the great Lords thought the Mysteries of State too sacred to be debated before the vulgar, lest they should grow into curiosity.”<sup>76</sup> And in 1571, Queen Elizabeth I warned members of Parliament that “they should do well to meddle with no matters of State, but such as should be propounded unto them, and to occupy themselves in other matters, concerning the Common-Wealth.”<sup>77</sup> Likewise, James I in 1620 told Parliament: “We discharge you to meddle with Matters of Government or Mysteries of State”<sup>78</sup> and lectured Parliament and public in a proclamation:

... forasmuch as it comes to Our eares, by common report, That there is at this time a more licentious passage of lavish discourse, and bold Censure in matters of State, then hath been heretofore, or is fit to be suffered, Wee have thought it necessary, by the advice of Our Privie Councill, to give forewarning unto Our loving Subjects, of this excesse and presumption; And straitly to command them and evry of them, from the highest to the lowest, to take heede, how they intermeddle by Penne, or Speech, with causes of State, and secrets of Empire, either at home, or abroad, but containe themselves within that modest and reverent regard, of matters above their reach and calling, that to good and dutifull Subjects appertaineth.<sup>79</sup>

Matters came to a head in 1628 when Charles imprisoned subjects who refused to lend money to the Crown to prosecute war.

### B. THE AFFAIRS OF 1628

The earliest contentious discussions of crown privilege grew out of parliamentary and legal contretemps concerning the crown’s power to detain citizens without showing legal cause for such detention. Although it is difficult to determine the extent, since cases were sporadic, at least some judges in the time of Charles I, and of course the King himself, believed courts could only acquire jurisdiction to bail prisoners or rule in habeas corpus through the state production of a legal cause for

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<sup>76</sup> NATHANIEL BACON, AN HISTORICAL AND POLITICAL DISCOURSE OF THE LAWS AND GOVERNMENT OF ENGLAND, FROM THE FIRST TIMES TO THE END OF THE REIGN OF QUEEN ELIZABETH 176 (London: 1739).

<sup>77</sup> *Journal of the House of Lords*, April 4, 1571, in *The Journals of all the Parliaments During the Reign of Queen Elizabeth* 136-145 (1682), <http://www.british-history.ac.uk/report.aspx?compid=43682>, accessed: Jan. 12, 2023.

<sup>78</sup> *2 Proceedings and Debates of the House of Commons in 1620 and 1621*, 326. (Oxford: Clarendon Press, 1766).

<sup>79</sup> 1 STUART ROYAL PROCLAMATIONS 495-96, (James F. Larkin & Paul F. Hughes, eds., 1973).

the detention of the prisoner in question. If the crown refused to show cause for a prisoner's detention it was argued by the crown, and seemingly accepted in law, that courts had no jurisdiction with which to act in the matter.

For example, Coke reports in the *Case of the Lords Presidents of Wales and York* that the court stated "the defendants, by law, may in all courts plead to the jurisdiction of the court, but how can they do so when no man can possibly know what jurisdiction they have: concerning matters of state, which are *arcana imperii*, it is meet they should be kept *sub sigillo concilii* [under seal; in strict confidence] and in secret."<sup>80</sup> And in *Ruswell's Case*, King's Bench held "that a return that one is committed per *Mandatum Privati Concilii Domini Regis* [by order of King's Council] was good enough, without returning any Cause; for it is not fit that Arcana Imperii should be disclosed."<sup>81</sup> But Coke had divided opinions on this matter,<sup>82</sup> noting:

God forbid they should not be known to them, who are to be judged by them: but the keeping them in such secrecy bewrayeth, that the Council are afraid that they would not be justified if they were known; and it was concluded again, misera servitus ubi jus aut vagum aut incertum. [It is miserable slavery where the law is vague or uncertain].<sup>83</sup>

And over eighty years prior to the disputes of 1628, *Binck's Case* took up detention for felony and for matters of state.<sup>84</sup> The court concluded that since the felony charge was first listed, all that followed must be of lesser seriousness, and therefore the defendant, if bailable on the felony, must also be bailable under charges concerning matters of state. The *Binck's* court seemed to take the strict line that a failure to return cause for detention allowed judges sole discretion to determine bail. This principle was reaffirmed in *Codd v. Turback*<sup>85</sup> a mere twelve years before the great debate began around crown-ordered detentions in *Darnel's Case*.<sup>86</sup> There, the court found that "By the law of God, none ought to be imprisoned, but with the cause expressed in the return of his imprisonment, as appeareth in the Acts of the Apostles."<sup>87</sup>

<sup>80</sup> 12 Co. Rep. 50, 53 (Circa 1607). Coke provides no date for the case, but Cuthbert Pepper referred to in the case as Attorney in Court of Wards, was appointed to that position by James I on July 9, 1607 (*Calendar of State Papers Domestic Series: James I, 1603-1610*, Vol. 28: July-December, 1607, entry for July 9. (M. Green, ed., 1857)). Pepper was dead by August 11, 1608 (Id., Vol. 35, July-August 1608, entry for August 11).

<sup>81</sup> 3 *Journal of the House of Lords* 753, 1620-1628, April 19, 1628.

<sup>82</sup> See note 54 *infra* and associated text.

<sup>83</sup> *The Case of the Lord Presidents of Wales and York* 12 Co. Rep. 50, at 53 (Circa 1607).

<sup>84</sup> 35 H. 8, Rot. 33 (1544).

<sup>85</sup> 81 Eng. Rep. 94 (L.B. 1616).

<sup>86</sup> 3 How. St. Tr. 1 (1627).

<sup>87</sup> 81 Eng. Rep. 94 (K.B. 1616). The biblical reference seems to be to Acts 25:16-27. When Paul is arrested, Festus explains that "it is not the custom of the Romans to give up any man, before that the accused have the accusers face to face, and have had opportunity to make his defense concerning the matter laid against him. . . [I]t seemeth to me unreasonable, in sending a prisoner, not withal to signify the charges against him."

In addition, *Magna Carta* and subsequent petitions by Parliament showed crown acquiescence to the claim that no subject could be detained without showing cause in law. Paragraph 39 of the Great Charter states: “No freemen shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land.” And in 1363 the crown tacitly admitted that it had no legal authority to order detentions by special directive. Parliament in that year petitioned Edward III “that the great Charter, and the Charter of the Forest, and other Statutes made in his time, and the time of his Progenitors, for the profit of him, and his Commonalty, be well and firmly kept; and put in due execution, without putting disturbance, or making arrest contrary to them by special command, or in other manner.”<sup>88</sup> The King did not object to the petition; his silence interpreted as assent.<sup>89</sup>

But Charles I put this matter into hot debate after he ordered the detention of subjects who refused to loan the crown money to prosecute war. In *Darnel’s Case*, detainees of the crown sought relief in habeas corpus cum causa.<sup>90</sup> The detainees claimed that courts could acquire jurisdiction over cases where subjects are detained “*per speciale mandatum Domini Regis* [by special order of the King],” and that imprisonment under such an order without further, particular cause shown “was too general, and uncertain; for that it was not manifest, what kind of command that was.”<sup>91</sup> They further claimed that “Nothing passes from the Crown without matter of record,” and one could not be imprisoned or continued in prison on the mere verbal command of the King; action in trespass would lie against those executing such command.<sup>92</sup> In response to these challenges the Attorney General particularly seized on the duty and prerogative of the crown to prevent the disclosure of state secrets:

The King often commits, and shews no cause: if he does express the cause, indeed to be either for suspicion of felony, coining, or the like, the court might deliver the prisoner, though it was per *speciale mandatum Domini Regis*, because there is no secret in these cases; for with the warrant, he sends the cause of the commitment: but if there was no cause expressed, that court always remanded them. It was intended, there was matter of state, and that it was not ripe, or time for it to appear. . . there were *Arcana Imperii*, which subjects were not to pry into. If the King committed a subject, and expressed no cause, it was not to be inferred from thence, there was no cause for his commitment: the course has always been, to say there was no cause expressed, and therefore the matter was not yet ripe; and thereupon the courts of justice have always rested satisfied, and would not search into it. In this case, the King was to be trusted: it was not to be presumed, he would do anything that was not for the good of the kingdom.<sup>93</sup>

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<sup>88</sup> 36 Edw. III Rot. Parliament No. 9.

<sup>89</sup> *Id.*

<sup>90</sup> 3 How. St. Tr. 59 (1628).

<sup>91</sup> T. Salmon, *A Critical Review of the State Trials*, 79 (London: 1735).

<sup>92</sup> *Id.* at 81.

<sup>93</sup> *Id.* at 83 (emphasis added).

The Attorney General further showed that Lord Coke, who now argued against the King, was of a different mind when he was a judge on King's Bench. There, he and his colleagues held that "it had been resolved, that the cause need not be disclosed, being *per mandatum concilii* as *Arcana Regni* [mysteries of the crown]."<sup>94</sup> Expanding on this point, the Attorney General ventured that "Explanations would hazard an encroachment on [royal] prerogative,"<sup>95</sup> and "That if a man was committed by the commandment of the King, he was not to be delivered by a habeas corpus in that court, for they knew not the cause of his imprisonment."<sup>96</sup> The specific hypothetical cited in support of these contentions concerned protection of state secrets:

If a King employ an ambassador to a Foreign Country or State, with instructions for his Negotiation, and he pursue not his instructions, whereby dishonour and damage may ensue to the Kingdom, is not this committable? And yet the particular of his instruction, and the manner of his miscarrying, is not fit to be declared to his Keeper, or by him to be certified to the Judges, where it is to be opened and debated in the presence of a great audience. I therefore conclude, for offences against the State in case of State Government, the King and his Council have lawful power to punish by imprisonment, without shewing particular cause, where it may tend to the disclosing of the secrets of State Government.<sup>97</sup>

Yet Ashley demonstrated a keen grasp of the dilemma presented by a state secrets privilege, and captured this problem in his advice to the Lords in Parliament:

I conceive it to be a question too high to be determined by any legal decision; for it must needs be a hard case of contention when the conqueror must sit down with irreparable loss; as in this case [*Darnel's case*], if the subject prevail, liberty but loses the benefit of that state government, without which a monarchy may too soon become an anarchy; or, if the state prevail, it gains absolute sovereignty, but loses the subjects not their subjection, for obedience we must yield, though nothing be left us but prayers and tears; but it loses the best part of them, which is their affections, whereby sovereignty is established, and the crown firmly fixt on his royal head. Between two such extremes, there is no way to moderate, but to find a medium for accommodation of the difference, which is not for me to prescribe, but humbly to move your lordships, to whom I submit it.<sup>98</sup>

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<sup>94</sup> *Id.* at 86.

<sup>95</sup> *Id.* at 94.

<sup>96</sup> *Id.* at 84.

<sup>97</sup> 3 *Journal of House of Lords*, April 19, 1628, 759 (1802). The events of 1628 invite comparison with the actions of the Bush administration post 9/11, but a general discussion of this matter is beyond the scope of this article. As with the actions by Charles I it is also true that the Bush administration knowingly held innocent people in custody without access to counsel or legal process.

<sup>98</sup> *Id.*

Crown abuse of the doctrine of reasons of state to detain subjects was recognized early on, with Sir Benjamin Rudyard reportedly declaiming in 1628 that “As for Intrinsecal Power and Reason of State, they were matters in the clouds, where he [Rudyard] desired to leave them: only as to reason of state he would say, that in the latitude it had been used, it had eaten out, not only the laws, but all the religion of Christendom.”<sup>99</sup> And some 50 years after the events of 1628, Sir Harbottle Grimstone noted: “For matters of State, it is convenient that the person committed should be restrained; but if so, he is not to be buried alive, to have no man come at him. How then can he get his Habeas Corpus, or prepare for his defence?”<sup>100</sup>

The crass reasons for detention in *Darnel’s Case* were incompatible with the grand claim that matters of state justified the King’s power to detain subjects without return of cause to the courts in response to habeas claims. It was apparent to all that Darnel and others were being held for the purpose to extort money out of the wealthy to finance unpopular wars and to serve as an example to others who might contemplate refusal to give over funds.

### C. DEVELOPMENT OF THE PRIVILEGE POST-1628

In the *Petition of Right of 1628*, Charles grudgingly accepted the claim that arrests and detentions without showing legal cause were beyond the crown’s power. But once the problem of disclosure of matters of state was separated from warrantless detention, the English courts generally adopted a position of virtually unfettered deference to crown claims – frequently noticing the continuation of prerogative power in matters concerning refusal to disclose information regarding matters of state.

In the 1688 *Trial of the Seven Bishops*, the court refused to require a witness to testify as to the events of a Privy Council meeting.<sup>101</sup> And in *Layer’s Case*, counsel for a defendant charged with high treason insisted on having minutes of a Privy Council meeting read into the record in open court. Lord Chief Justice Pratt noted that “I . . . asked Mr. Attorney General, whether he thought fit to consent to it; and without his consent we are of opinion, that they cannot be read . . . You cannot read the minutes taken against the king, because these matters are not ripe yet, nor to be discovered to the world.”<sup>102</sup> In *R. v. Watson* a public official was asked to testify as to the accuracy of a plan of the Tower of London, which had been purchased from a public vendor. Lord Ellenborough thought “It might be attended with public mischief to examine an officer of the tower as to the accuracy of such a plan.”<sup>103</sup>

In *Bishop Atterbury’s Case*, the defendant attempted to examine crown employees who had opened and deciphered inculpatory encrypted communications. But the crown resisted, and the Lords found that such testimony would be “inconsistent with the public safety.”<sup>104</sup> The path was not always so clear for the assertion of privilege, and in some cases witnesses were made to answer, and

<sup>99</sup> Note 51, *supra*, at 91.

<sup>100</sup> 4 *Grey’s Debates of the House of Commons* 273 (1769).

<sup>101</sup> 12 *How. St. Tr.* 183, 309-11 (1688).

<sup>102</sup> 16 *How. St. Tr.* 94, 223-24 (1722).

<sup>103</sup> 32 *How. St. Tr.* 1, 389 (1817).

<sup>104</sup> 16 *How. St. Tr.* 323, 495 (1723).

documents were ordered produced. For example, in *The Earl of Strafford's Trial* in the House of Lords, accounts of statements Strafford made in Privy Council were allowed into evidence, prompting Lord Clarendon to opine:

The ruin that this last act [of producing this testimony] brought to the King was irreparable; for . . . it was [a] matter of horror to the counsellors to find that they might be arraigned for every rash, every inconsiderate, every imperious expression or word they had used there; and so made them more engaged to servile applications. It banished forever all future freedom from that board and those persons from whom his Majesty was to expect advice in his greatest streights; all men satisfying themselves "that they were no more obliged to deliver their opinions there freely, when they might be impeached in another place for so doing."<sup>105</sup>

In *The Trial of Maha Rajah Nundocomar*, the court called in a secretary to Governor General Warren Hastings in India to produce 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."<sup>106</sup> 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 [evidence in the hands of the state] should be produced, when in favour of a criminal, justice when against him."<sup>107</sup> 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.<sup>108</sup>

In *Moodaly v Moreton and East India Co.*, the East India Company refused to give over documents, with the court noting that "The defendant demurred [that they] were sovereigns of the territory; that they could not be sued; that it might be attended with bad consequences, in a political view, to discover their secrets."<sup>109</sup> This case was not a suit at law, but an action for discovery to determine just which entity should be sued for breach of contract. The East India Company argued not only that they were sovereign, but employees were sworn to secrecy and could not be compelled to divulge secrets of the Crown. Master of the Rolls Sir Lloyd Kenyon agreed that the East India Company exercised sovereign power, but he decided to:

[P]ut the East India Company and the defendant Moodaly upon the same footing. In ordinary cases, it is usual for this Court to grant discovery, auxiliary to a Court of law, and to grant commissions to examine witnesses. It hath been said, that the East India Company

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<sup>105</sup> 3 *How. St. Tr.* 1351, 1442-43 (1640). Of course, the mischief identified by Lord Clarendon is more in line with theories of modern executive privilege than with the fear surrounding publication of state secrets.

<sup>106</sup> 20 *How. St. Tr.* 923, 1057 (1775).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> 21 E.R. 425 (1785).

have a sovereign power: Be it so; but they may contract in a civil capacity: It cannot be denied but in a civil capacity they may be sued: in the case now before the Court, they entered into a private contract; if they break their contract, they are liable to answer for it.<sup>110</sup>

Yet discounting the odd exception, English courts uniformly accepted assertions of crown privilege with little inclination to investigate the grounds of those assertions. The claims of privilege were not differentiated as to their compelling natures or underlying facts, and the English courts adopted an extremely deferential response to those claims – most often treating the claims as conclusive on the courts.<sup>111</sup> Judges approached matters of state secrets the same as matters concerning confidentiality of informer identities, or allegedly defamatory reports generated by government officials, or any other reason cited by the crown in support of withholding. The standard that developed, which was not much of a standard at all, was whether the disclosure of the requested documents would damage the “public interest.”<sup>112</sup>

The apogee of reasoning concerning crown privilege came in three cases, only one of them a case concerning state secrets proper. In *Home v. Bentinck* a military officer sued a member of a commission of inquiry in defamation. The plaintiff requested production of the commission report. Defendant’s attorney traced the privilege to prerogative rights of the crown, noting:

By the common law, the king has, by his prerogative, the command of the army . . . and [if] proceedings appear necessary for the due discipline of the army, the king has a right to direct what he thinks proper. This is no more than the exercise of other prerogatives in the affairs of state, in all matters relating to affairs abroad and at home. . . The king, then, though restrained in a certain degree

<sup>110</sup> *Id.* at 427.

<sup>111</sup> *Ankin v. London and North Eastern Rwy.*, 1 K.B. 527 [1930] (1929) (ministerial objection to production of a class of documents based in public interest is conclusive upon courts.); *Asiatic Petroleum Co., Ltd. v. Anglo-Persian Oil Co., Ltd.*, 1 K.B. [1916] 822 (1916) (Foundation of the rule of privilege is that production is contrary to the public interest, not that the documents are of an official or confidential nature.); *Attorney-General v. New Castle-Upon-Tyne Corp.*, 66 N.S. 593 (1897) (The crown is not bound to give discovery.); *Beatson v. Skene*, 5 H. & H. 838, 853 (1860) (Question of whether or not production would damage public interest is not for the judiciary to decide, but for the head of the department in possession of the document); *In re La Scociété Les Affréteurs Réunis and the Shipping Controller*, 3 K.B. 1921 1 (Crown may not be ordered to make an affidavit of documents for which it claims privilege.). See also the ill-fated Crown Proceedings Act of 1927, where cl. 20(7) would have made objection to production of a document by a minister “final and conclusive” on the courts. The 1947 *Crown Proceedings Act* failed to provide a statutory ground for crown privilege, stating only that any common law rule for withholding documents survives the Act (Ch. 44, §28 (1)(b)). This failure mirrors the failure of the United States to bring the state secrets privilege under statutory control (See *Wright and Graham*, Rejected Rule 509 of the Federal Rules of Evidence).

<sup>112</sup> This standard is recounted in numerous cases and treatises, though at least one respected commentator on evidence in English law believed the privilege too broad and unrestrained as applied by English judges. J.P. Taylor, 1 *A Treatise on the Law of Evidence as Administered in England and Ireland* 612-14, 9<sup>th</sup> ed. (1895).

from exercising that full control, which a despotic commander would have in a foreign country . . . has the direction of issuing such orders as he pleases . . . provided they be not contrary to the Mutiny Act or the common law.<sup>113</sup>

Chief Justice Dallas, writing for the Court of Exchequer, did not directly touch on the issue of prerogative, but did say that “upon the broad principle of state policy and public convenience, and upon the principle of all the cases cited” that the privilege should apply.<sup>114</sup>

Some judges concluded that the judiciary had an affirmative duty to assert privilege for the crown even when there was no ministerial objection made to the production of documents.<sup>115</sup> In *Anderson v. Hamilton*, for example, Lord Ellenborough declined to allow “secrets of state to be taken out of the hands of her majesty’s confidential servants.”<sup>116</sup> Other judges in the Kingdom, though, chafed against such a gift of power to the ministerial branches of government. In *Gugy v. Maguire* government asserted the privilege after a Provincial Secretary’s refusal to produce a report of a superintendent of police. Judge Mondelet strongly objected to the assertion of the privilege and specifically the line of reasoning in *Bentinck*:

I cannot, I ought not, for a moment, as a judge living and administering justice under constitutional institutions, admit such a monstrous doctrine – a doctrine which prostrates to the ground that liberty, that protection to life, honour, property, and to civil and religious liberty, which this country has so much right to boast of, too valuable to be thus thrown away and scattered to the four winds of Heaven! A doctrine which reduces the judge on the Bench to an automaton, who, like the statue of Don Juan, will bend at the bidding of any reckless politician, whatever shade of politics or party spirit, it may be his misfortune to be tainted with, or of any unprincipled member of society . . . who is desirous of, or has interest in being screened, or of screening others, from the responsibility his misdeeds have subjected them to. If that doctrine be law, or rather, were law, it would be appalling. It would be such that no one would feel himself secure. I cannot, I must not assent to it. It is not law. It is unconstitutional. It is tyrannical. It is monstrous.<sup>117</sup>

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<sup>113</sup> 2 B. & B. 130, 150-151 (1820).

<sup>114</sup> *Id.* at 164.

<sup>115</sup> See *Hennessy v. Wright*, 31 Q.B. 509, 518-19 (1888) (Judge must prevent disclosure of messages between governor of a colony and the Secretary of State in absence of objection by responsible crown minister) (Also holding that “official letters are not receivable in evidence,” at 520); *Little v. Smith*, 9 D. 737, 740 (1847) (“I think the Crown is not entitled to give up the [precognition] without an express judgment of the Court, even if the Crown sees no objection.”); *Stace v. Griffith*, Law Rep. 2 P.C. 420, 425 (1869) (Lord Chelmsford found he was required to determine, before contents of a letter was admitted into evidence, “that it was not an official communication”).

<sup>116</sup> 2 B. & B. 156 (1816 case from Middlesex sittings after Hilary term, reported as a note in *Home v. Bentinck*, note 112 *supra*.)

<sup>117</sup> *Gugy v. Maguire*, 13 Low. Can. 33, 38 (1863), quoted in 5 J. Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* 197 (§2379) (1923).

The most expansive explanations concerning crown privilege after *Bentinck* came in *Beatson v. Skene* and *Duncan v. Cammel, Laird*.<sup>118</sup> In *Beatson*, Chief Baron Pollock, in a speech for a unanimous panel of Law Lords, found: “We are of 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 the individual interest of a suitor in a court of justice.”<sup>119</sup> Then Pollock took up the crucial question of who is to have the final say on what constitutes the “public interest.” He concluded that:

The judge would be unable to determine [the question of public interest] without ascertaining what the document was, and why the publication of it would be injurious to the public service – an inquiry which cannot take place in private, and which taking place in public may do all the mischief which it is proposed to guard against. It appears to us, therefore, 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; and if he is in attendance and states that in his opinion the production of the document would be injurious to the public service, we think the Judge ought not to compel the production of it.<sup>120</sup>

The opinion in *Beatson* was the controlling decision concerning crown privilege until the Law Lords took the matter up again in *Duncan v. Cammel, Laird*, a decision made during the darkest days of World War II.<sup>121</sup> There, relatives of sailors killed in the sinking of the submarine *Thetis*, sued the submarine’s manufacturer and requested production of design documents and other papers. Quoting *Attorney General v. New-Castle-Upon-Tyne*, the court noted “The law is that the Crown is entitled to full discovery, and that the subject as against the Crown is not... That is a prerogative of the Crown, part of the law of England, and we must administer it as we find it.”<sup>122</sup> In reaffirming the bright lines announced by Pollock in *Beatson*, the court found that “The reasons given by Pollock C.B., by Lord Dunedin and by Lord Kinnear cannot be gainsaid.”<sup>123</sup> The decision went on to approvingly quote

<sup>118</sup> *Duncan v. Cammel Laird* ([1942] A.C. 624; *Beatson v. Skene* (157 Eng. Rep. 1415 Exch. Div. 1860).

<sup>119</sup> 5 H. & N. 838, 853 (1860). *Beatson* has been cited a single time by U.S. Federal courts (*Kaiser Aluminum and Chemical Corp. v. U.S.* (141 Ct. Cl. 38 (1958)), where the court refused to order production of contract negotiation documents when the government asserted executive privilege (at 49)).

<sup>120</sup> *Id.* (emphasis added). The concerns cited by Pollock mirror the way the state secrets privilege is treated by U.S. courts. Judges show great deference to the privilege and rarely order evidence produced for in camera inspection by the court. In a rare decision the Ninth Circuit reversed a decision in a case, saying the district court should have ordered in camera review of litigant-requested material (*Federal Bureau of Investigation v. Fazaga* 916 F.3d 1202 (9th Cir. 2019)). The Supreme Court reversed this decision (Slip opinion 20-828 *FBI v. Fazaga*)

<sup>121</sup> *Supra*, note 117.

<sup>122</sup> [1897] 2 Q.B. 384, 395.

<sup>123</sup> *Supra*, note 117, at 641. Reliance on Lord Dunedin is misplaced. See discussion at \_\_ *infra*.

Lord Parker's observation in *The Zamora*, that "Those who are responsible for the national security must be the sole judges of what the national security requires."<sup>124</sup>

The *Duncan* court noted that "the argument before us proceeded on the assumption that there was no recorded decision of this House on the subject. . . This, however, is not so."<sup>125</sup> The law lords then leaned heavily on the case of *Earl v. Vass* for the proposition that ministers may not be compelled to produce documents when claiming a public interest exception.<sup>126</sup> As related below, the decision in *Vass* was wrong. Thus, in an apparent effort to grasp support for their position the lords in *Duncan* misunderstood *Vass*, and in the process simply gained an incorrect understanding of Scottish law on the matter of crown privilege. While not precisely causing ruinous effects for either Scottish law or American law, the decision in *Duncan* did have some influence on the Court in *Reynolds*, if for no other reason than the mistaken representation that Scottish law and English law were in agreement on the subject of ministerial power to withhold documents. The spirit of *Duncan* broadly informed the Court's decision in *Reynolds*, but it is a spirit founded on a mistake – and that mistake is still with us.

#### D. DIVERGENCE BETWEEN SCOTTISH AND ENGLISH LAW

Scottish law developed in quite a different manner to that in England concerning crown privilege.<sup>127</sup> The law of the two countries diverged substantially on the issue of ministerial power to withhold papers, and that divergence, through an unfortunate set of mistakes, was overlooked by the law lords in *Duncan*. Two cases beguiled English courts into a thorough misunderstanding of Scottish law with respect to crown privilege. First is *Earl v. Vass*, discussed above. *Vass* is hardly a stout decision to rest on for the proposition that ministerial decisions are conclusive on courts. Lord Eldon, L.C., sat alone in the case, and counsel for Vass put in no argument, so the matter was heard *ex parte*. Lord Eldon consulted with Lord Chief Justice Charles Abbott concerning the matter, even though Abbott had no expertise in the law of Scotland. Eldon also once expressed the extreme position that "the Crown cannot waive the right to withhold documents."<sup>128</sup> Finally, he made reference to English cases such as *Home v. Bentinck*, so it is unsurprising that his decision was at variance with Scots law.

Despite the clear direction of the opinion, a close read of *Vass* reveals no holding that compelled production of documents under a public interest objection

<sup>124</sup> *Id.*, quoting *The Zamora*, [1916] 2 A.C. 77, 107.

<sup>125</sup> *Supra*, note 120, at 627

<sup>126</sup> 1 *Shaw's App.* (1822) 229.

<sup>127</sup> For one thing, it is still a *crown privilege* in Scotland and has not evolved into a form similar to English law's "public interest exception," which is broader in its application. Although the term "public interest exception" is used interchangeably with crown privilege in Scotland, neither term has applied to any entity beyond the national government or the Lord Advocate. See e.g. *W.P. v. Tayside Regional Council*, 1989 S.L.T. 345, 347 (1989); *Whitehall v. Whitehall*, 1 Div. 98, 99 (1956) (To accept the broad claims associated with the public interest exception "would be to go far along the road towards subordinating the Courts of Justice to the policy of the Executive, and to regulating the extent to which justice could be done by the limits within which that policy would permit it to be done. This has never been the law of Scotland").

<sup>128</sup> *Henderson v. Robertson*, (15 D. 292) (1853).

is beyond court power. Indeed, Eldon is careful to stay within the facts of the case and does not venture to make large statements about the finality of ministerial objections to production of papers. Eldon did discuss the “principle laid down” in *Bentinck*, stating that “because it is against public policy that you should be compelled to produce instruments and papers . . . it must shut out the possibility of the public receiving any information as to a person’s fitness to be appointed to an office.”<sup>129</sup> Yet on the edge of declaring ministerial objections as conclusive on the courts, Eldon does not quite make that claim. Perhaps he felt some uneasiness with making such a declaration with respect to the law of Scotland, and that uneasiness would be well founded. In Scotland, the rule has always been that judges are the final authority in determination of crown privilege claims, and Scottish courts have shown little patience with transparent efforts to shield the government from embarrassment, liability, or investigation.<sup>130</sup> Indeed, Viscount Symonds wrote in *Glasgow v. Central Land Board* that “it is in fact a repugnant task for those who are charged with the administration of justice to determine the rights of parties with something less than the full knowledge of all the material facts and documents. . . . But that such may be [the judge’s] task is beyond all question.”<sup>131</sup>

Second, English judges relied on the decision in *Admiralty v. Aberdeen Steam Trawling and Fishing Co.*<sup>132</sup> Courts incorrectly used *Aberdeen* to support the proposition that English and Scottish courts were in alignment on the finality of ministerial certificates in asserting crown privilege. Lord Dunedin did write in *Aberdeen* that,

It seems to me that if a public department comes forward and says that the production of a document is detrimental to the public service, it is a very strong step indeed for the court to overrule that statement by the department. The Lord Ordinary has thought that it is better that he should determine the question.<sup>133</sup>

Yet, Lord Dunedin went on to say in language that is remarkably like modern U.S. judicial deference to claims of national security:

I do not there agree with him, because the question of whether the publication of a document is or is not detrimental to the public service depends so much upon the various points of view from which it may be regarded, and I do not think that the court is in possession of these various points of view. In other words, I think that, sitting as judges without other assistance, we might think that

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<sup>129</sup> Note 125, *supra*, at 237.

<sup>130</sup> See, e.g., *Glasgow v. Central Land Board*, 1956 S.C. (H. L.) 1, 11 (“[T]here always has been and is now in the law of Scotland an inherent power of the Court to override the Crown’s objection to produce documents on the ground that it would injure the public interest to do so”); *Higgins v. Burton*, 1968 S.L.T. (Notes) 52 (“[A]s is well known, courts in Scotland have always refused to be bound by a Minister’s Certificate, and its effect depends on the discretion of the Court”).

<sup>131</sup> *Glasgow* (note 129) at p. 9.

<sup>132</sup> 1909 S.C. 335.

<sup>133</sup> *Id.* at 337.

something was innocuous, which the better informed officials of the public department might think was noxious. Hence, I think the question is really one for the department, and not for your Lordships.<sup>134</sup>

Citing to Lord Dunedin, the *Duncan* court found that in *Aberdeen* “the Inner House of the Court of Session, overruling Lord Johnston, insisted that the view of the government department was final.”<sup>135</sup> But Lord President Dunedin also backed the idea that “The crown in Scotland is . . . in the same position as a subject with regard to diligence for the recovery of documents: with this distinction, that as public policy is always a ground for the court refusing to order production of documents, that ground is available to the crown more readily than to a private citizen.”<sup>136</sup>

It could hardly be the case that Dunedin held both the position claimed in *Duncan* and the position that the crown’s advantage in claiming privilege was merely an easier resort to the public policy exception. Dunedin plainly stated the law of Scotland in *Dowgray v. Gilmour*, where he wrote “the Court has, no doubt, the right to order the Lord Advocate or anyone else, to produce documents.”<sup>137</sup> The *Duncan* court came to the wrong conclusion about the decision in *Aberdeen*. Perhaps because they already believed the legal systems of Scotland and England were aligned on this issue, they simply saw what they expected to see. Contrary to *Duncan*, the law of Scotland has never been in alignment with England in respect to crown privilege.

Beginning early in the 18<sup>th</sup> century, Scottish courts granted compulsion of production against ministerial objections. In the 1727 case of *Stevens v. Dundas* the court allowed a diligence against the crown requiring the production of an information in spite of the Lord Advocate’s unwillingness to release the document.<sup>138</sup> And in *Leven v. Board of Excise* the court granted a diligence for records in the face of objections that the “documents called for had come into their hands in their public capacity, they were bound to decline undergoing any examination on the subject.”<sup>139</sup> The court in *Leven v. Young*, in an unequivocal statement, observed in 1818 that “It is not to be understood that the court have any doubt of their power to compel any haver to produce evidence. [It is for the court to] decide if a document is to be produced.”<sup>140</sup>

One scholar observed that by the middle of the nineteenth century “the ‘ends of justice’ were explicitly recognized as being a relevant consideration in determining

<sup>134</sup> *Id.* at 340.

<sup>135</sup> *Duncan*, note 79 *supra*, at 639.

<sup>136</sup> *Encyclopedia of the Laws of Scotland*, 340 (1928). A “diligence” in Scottish law is a mechanism of enforcement in civil litigation.

<sup>137</sup> 14 S.L.T. 906, 909 (1907).

<sup>138</sup> 19 W.M. Morison, DECISIONS OF THE COURT OF SESSIONS 7905 (1804). There is little information available concerning this case, but it is interesting that the Lord Advocate, Sir Robert Dundas, is referred to in the case as the “King’s Advocate,” thereby more clearly tying the decision to one against the crown (“A party, upon a signed information, as guilty of forgery, being committed to prison by the King’s Advocate . . . thereupon, he insisted against the King’s Advocate to exhibit the information, which the Lords found the Advocate obliged to do”).

<sup>139</sup> 17 FACULTY DECISIONS (1812-1814), No. 165 (First Division 1814).

<sup>140</sup> 1 Murray 350, 370 (1818).

whether a public interest objection to production should be overruled.”<sup>141</sup> Scottish courts adopted a balancing approach to determine rulings concerning the assertion of crown privilege, an approach expressly rejected by the weight of English authority on the matter. As discussed above, in England the power of conclusory objection to production of papers to preserve the public interest lodged in the minister raising the objection. This is substantially both a transfer of judicial power to ministers, and an abdication of the courts in a broad area of evidentiary discovery. Balancing is also contrary to the state secrets privilege as adopted by the United States, where it is an “absolute” privilege that applies without fail when properly asserted.<sup>142</sup>

Under Scottish law, the need of the requesting party was weighed against the claim of public interest; though it should be noted that this was usually not treated as a level playing field. In various expressions of the necessity needed to overcome a claim of privilege, Scottish courts required “great and overwhelming necessity,”<sup>143</sup> “an exceptional case,”<sup>144</sup> “an appropriate exceptional case,”<sup>145</sup> or something much less.<sup>146</sup> The meanings of those phrases are left unexamined, and judges proceeded on a case-by-case basis in determining the deference to give to assertions of crown privilege. From this record it is a reasonable conclusion that courts in Scotland retained final authority on the assertion of a crown privilege or public interest objection.

*Duncan* was an incorrect pronouncement of foreign law in an English appeal by a judge who admittedly sought advice from another English judge (and not even a Scottish law expert) in a case concerning a failed weapons system during the height of war. Perhaps under the circumstances a strict and careful review of the law gave way to perceived exigencies of the moment. It was bad law that eventually

<sup>141</sup> F. McShane, note 67 *supra*, at 265. McShane made this observation in part based on the holding of Lord Hope, the Lord Justice-Clerk, who pondered compelling production of a precognition in an action for wrongful imprisonment (“I am not prepared to say, that there is no case in which the Court would not, when it was necessary for the ends of justice [to] order production of a precognition.” *Donald v. Hart*, 6 D. 1255, 1255-1256 (1844)).

<sup>142</sup> Note 4, *supra*.

<sup>143</sup> *Donald v. Hart*, note 139, *supra*. The Crown admitted in this case that at least in Scotland that courts may compel production of documents “where some great and overwhelming necessity was made out.” (F. McShane, note 67, *supra*, at 265). See also *Arthur v. Lindsay*, 22 R. 417, 420 (1895), opinion of Lord President Robertson (considering what “great and overwhelming necessity” means and concluding that ministerial certificates of withholding are almost always controlling). But see *Wotherspoon v. H.M. Advocate*, 1999 S.L.T. 664, 665 H.C.J., finding that “It was in the public interest that . . . investigations and precognitions should be confidential and that evidence should not be led of their contents save in the case of some great and overwhelming necessity. The sheriff refused the defence motion because he took the view, as he put it, that there were no unusual or strong circumstances or great and overwhelming necessity which would permit the court to waive the highly confidential rule which attaches to Crown precognitions.” Yet the court went on to note that “We think it right to record that we are not persuaded that the sheriff’s reasoning was sound.” The sheriff acceded to the contention that withholding of documents is subject to approval by the court.

<sup>144</sup> *Henderson v. M’Gown*, 1916 S.C. 821, 825.

<sup>145</sup> *Rogers v. Orr*, 1939 S.L.T. 403, 406 (Opinion of Lord President Normand).

<sup>146</sup> See note 92, *infra*.

suffered the fate it deserved. *Glasgow and Conway v. Rimmer*<sup>147</sup> dismantled Duncan both as a matter of Scottish law and English law. *Glasgow* is the most complete treatment of the law of crown privilege in Scotland, and it put to rest any notion that the law of Scotland and England agreed on the matter of public interest privilege.

In *Glasgow*, “[T]he debate upon this appeal has largely been whether the law of Scotland in respect of an objection to recovery of documents on the ground of public interest was determined by the decision of this House in Duncan’s case.”<sup>148</sup> As a preliminary matter, the lords noted that “[I]t would be clearly improper for this House to treat the law of Scotland as finally determined by a decision upon an English appeal unless the case arose upon the interpretation of a statute common to both countries.”<sup>149</sup> In other words, Scottish common law matters and statutes not replicated in English law are to be left to Scottish courts. In a capitulating statement by the Law Lords, at least so far as the vanities of *Duncan* are concerned, the Lords noted: “It may be that the existence of an inherent power in the Court of Scotland provides an ultimate safeguard of justice in that country which is denied to a litigant in England. If so, this House sitting as the final Court of Appeal from the Courts of Scotland will be jealous to preserve it.”<sup>150</sup>

Viscount Simonds, in a speech that could hardly be more clear on this matter, said “we have had the advantage of an exhaustive examination of the relevant law from the earliest times, and it has left me in no doubt that there always has been and is now in the law of Scotland an inherent power of the Court to override the Crown’s objection to produce documents on the ground that it would injure the public interest to do so.”<sup>151</sup> Lord Norman likewise said it is “a firmly established rule that in Scotland the court has power to override objection of a Minister or head of a government department that the production of a document would be contrary to public interest.” Lord Norman added this “is not a phantom power” and that “in the last resort it is a real, though imperfect, safeguard of justice.”<sup>152</sup>

Lord Keith closed by referring to opinions by the eminent Lord Kinnear and Lord Dunedin. These two lords “had in mind at the same time the existence of an overriding power in the Court [i.e. a power to ignore ministerial objections].”<sup>153</sup> He noted that “it is a very strong step indeed for the Court to overrule that statement by the Department,” yet “[w]e must either say that it is a good ground of objection, or we must overrule it altogether.”<sup>154</sup>

In short, there may have been differences over time as to the need required to overcome a claim of crown privilege, but the settled law of Scotland is that determination of applicability of the privilege is left to the discretion of the court and not the minister claiming the privilege. This judicial independence on matters of state secrets is completely ignored by the Supreme Court in *Reynolds*.

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<sup>147</sup> [1968] A.C. 910 (H.L.).

<sup>148</sup> *Glasgow v. Central Land Board*, 1956 S.C. (H. L.) 1, 8-9.

<sup>149</sup> *Id.* at 9-10.

<sup>150</sup> *Id.* at 11.

<sup>151</sup> *Id.* at 11.

<sup>152</sup> *Id.* at 16.

<sup>153</sup> *Id.* at 24

<sup>154</sup> *Id.*

### III. TRANSITION TO UNITED STATES LAW

“If you determine that we be deprived of the benefit of important written or oral evidence by the introduction of this State secrecy, you lay, without intending it, the foundation for a system of oppression.”

-- Mr. Botts to Chief Justice John Marshall  
in the trial of Aaron Burr.<sup>155</sup>

What is clear from the history concerning the handling of matters of state secrets by English courts is that the thread of prerogative is present in a nearly unbroken sequence over four centuries of court decisions. The crown’s power to withhold information regarding matters of state is based on unreviewable prerogative rights, a trust reposed in the king and queen, and deference to ministerial power to determine what is in the public interest. As one attorney noted to the U.S. Supreme Court in 1836, “the prerogative of the king has been cherished by [English] judicial authority.”<sup>156</sup> There is no concept in the United States Constitution for a power outside of law or for executive action that is immune to judicial examination of its lawfulness by right of an inherent, constitutionally undefined power.

English courts acted chiefly as arms of the executive branch, especially in matters concerning ministerial duties of the government, until the power of the crown gradually began to be supplanted. The Act of Settlement of 1701 envisioned a more defined separation of powers and sought to free both Parliament and judges from crown influence.<sup>157</sup> Judges were to hold their offices during good behavior and were not removable at crown discretion. But the judiciary in England now fell prey to the centralized power of Parliament rather than that of the crown, and by the nineteenth century Parliament “exercised the ultimate authority over the whole judicial system.”<sup>158</sup> The judges “moved from being lions under the throne to being lions under the mace.”<sup>159</sup> As barrister Robert Stevens noted:

The judges in the common law courts were political appointees; the Chief Justices of these courts were expected to support the government and were often given peerages for that very purpose. They also sometimes sat in the Cabinet. The chief judge in the equity courts was the Lord Chancellor, who presided in the House of Lords in its legislative sittings and again sat in the Cabinet. It was not an arrangement likely to develop a system which saw the courts as an independent arm of government.<sup>160</sup>

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<sup>155</sup> *Aaron Burr’s Trial*, Robertson’s Reports II at 517 (1807).

<sup>156</sup> *Brent v. President and Directors of the Bank of Washington*, 35 U.S. 596, 609 (1836).

<sup>157</sup> 12 & 13 WILL. 3 C. 2. Clause 3 of the Act in part states: “. . . judges commissions be made *quamdiu se bene gesserint* [so long as they perform their duties properly], and their salaries ascertained and established; but upon the address of both Houses of Parliament it may be lawful to remove them.”

<sup>158</sup> F.J.C. Hearnshaw, *Review of Principles of British Constitutional Law* by Cecil S. Emden, 7 J. COMP. LEGISLATION & INTERN’L L., 3d Ser., No. 4, 265, 266 (1925).

<sup>159</sup> R. Stevens, *Reform in Haste and Repent at Leisure: Iolanthe, the Lord High Executioner and Brave New World*, 24 LEG. STUDIES 2004, 1, 4.

<sup>160</sup> *Id.* at 2-3.

In the United States, courts are not lions under the throne or the mace but are an independent and coequal branch of government. The opinions in *Beatson* and *Duncan* were predictable results of settled principles in a law and constitution that is not ours, but their importation into United States law by the U.S. Supreme Court in *Reynolds* jars with our Constitution and our history of an independent judiciary. It creates a power in the executive that derives from the prerogatives of kingship. This is accomplished with a seeming lack of understanding of the origins of crown privilege and how those origins conflict with the founding spirit and our Constitution. The *Reynolds* decision exhibits a lack of thorough consideration of the effects of the decision that is unbecoming the gravity of the principles involved and the attendant consequences. In argument before the Massachusetts Supreme Court, a Mr. Parsons captured the difference between the two constitutions in noting that:

In England, prerogative is the cause of one against the whole. Here, it is the cause of all against one. In the first case, the feelings and vices, as well as the virtues, are enlisted against it; in the last in favour of it. And, therefore, here, it is of more importance that the judicial courts should take care that the claim of prerogative should be more strictly watched.<sup>161</sup>

An important feature of the development of crown privilege is that little precedent in the area concerns true state secrets: information that would compromise national security if exposed. To be sure, justification for the privilege often referred to the necessity to protect the state, but there are few instances where such a justification was directly relevant to the cause at hand. In all of English history up to the time of *Reynolds* there amounts to only two cases where one can say without embarrassment that a true state secret was involved. Those cases are *Duncan*<sup>162</sup> and *Watson*.<sup>163</sup> And in *Duncan*, as noted, the law lords simply were mistaken about the application of crown privilege in Scottish law.

In the law of England there was no more a formed doctrine concerning a state secrets privilege than there was in the United States, yet the *Reynolds* court acted as if it were otherwise. The Supreme Court confused the broad expanse of the prerogative tradition and public interest immunity as a basis for the narrow evidentiary exception for true state secrets that it sought in the *Reynolds* opinion. We have no tradition or legal bases in support of prerogative rights, and to the extent English deference to Divine Right has influenced our decisions at law we have gone off course. The United States, up until recently, has shown little sustained inclination toward broad public interest immunity such as that found in England.<sup>164</sup>

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<sup>161</sup> *Martin v. Commonwealth*, 1 Mass. 347, 356 (1805).

<sup>162</sup> *Supra* note 79.

<sup>163</sup> *Supra* note 63.

<sup>164</sup> It is a plausible claim that the federal government now has what amounts to a public interest immunity privilege. The proliferation of rubrics such as “sensitive but unclassified,” secret hearings and dockets, general opacity of government agencies since 9/11, and judicial willingness to limit access arguably lead to the functional equivalent of a broad public interest immunity.

There is nothing in the way of state secrets jurisprudence in the United States prior to the *Reynolds* decisions, despite persistent claims to the contrary.<sup>165</sup> Just as the *Reynolds* Court looked to English crown privilege and saw a coherent doctrine importable into United States law without controversy and little need of discussion, judges also see nonexistent precedent for the holding in *Reynolds* in U.S. law. The very lack of precedent seems to impel judges to insist on inventing what is not there. Perhaps with Littleton's Rule concerning the preeminence of precedence in English law that "what never was, never ought to be," or something similar in mind, judges simply needed to invent a historical jurisprudence of state secrets.<sup>166</sup>

Unlike England, the United States had no crown privilege or public interest immunity, so that when *Reynolds* arose there was virtually no American law to draw on for not only state secrets but for a ministerial privilege of refusal of production. Even the informer's privilege, perhaps the privilege in this area with the fullest support in law, yielded relatively few cases in United States law during the nineteenth and early twentieth centuries.<sup>167</sup>

Federal courts decisions, Department of Justice briefs, scholarly articles, and amicus briefs often point to the 1807 trial of Aaron Burr<sup>168</sup> and the Supreme Court case of *Totten v. United States*,<sup>169</sup> as precedent for the state secrets privilege. A district court in 1977, for example, claimed that the privilege "can be traced as far back as Aaron Burr's trial in 1807."<sup>170</sup> In 1989, the D.C. Circuit said that although "the exact origins" of the state secrets privilege "are not certain," the privilege in the United States "has its initial roots in Aaron Burr's trial for treason."<sup>171</sup> The

<sup>165</sup> Indeed, the privilege seems to be essentially a capitulation to executive power at the dawn of the nuclear era and in the midst of fears over nuclear war.

<sup>166</sup> See *Attorney-General v. Vernon*, 23 E. R. 528, 534, 1 Vern. 369, 385 (1685) ("There is no precedent of any such suit ever brought into this court, and it is Littleton's rule *what never was, never ought to be*" (emphasis in original)); *Prodgers v. Phrazier*, 23 E. R. 268, 269, 1 Vern 9, 12 (1681) ("But the Lord Chancellor relied much upon it, that there never was any precedent of the custody of an idiot granted to a man, his executors, administrators, and assigns, as this case was: and he said what never was never ought to be; and he said that was a good reason given by Littleton on the Stat' of Marlebridge" (emphasis in original)).

<sup>167</sup> *Gray v. Pentland*, 1815 W.L. 1282, 2 Serge. & Rawle 23 (Pa. S.C. 1815) (In a case in defamation the Pennsylvania state governor refused to give the plaintiff a complaint drafted by the defendant. Justice Brackenridge noted, "As to the Governor . . . being compellable to give the deposition or writing transmitted to him . . . it cannot be done. It must be a matter within his discretion, to furnish or to refuse it; and this, on ground of *public policy*" [emphasis in original]), at \*4; *Shinglemeyer v. Wright*, 124 Mich. 230, 239, 82 N.W. 887, 890 (1900) (Letters to law enforcement claiming criminal acts on the part of others are privileged); *State v. Soper*, 16 Me. 293, 1839 WL 755 (Me.), 33 Am. Dec. 665, 4 Shep. 293 (1839) (A witness manager of a private concern may refuse to disclose names of employees who make claims that lead to a criminal investigation); *United States v. Moses* (1828); *Worthington v. Scribner*, 109 Mass. 487, 489 (1872) (In an action for malicious and false representation to the U.S. Treasury Department defendants may not be made to answer interrogatories: "The evidence is excluded, not for the protection of the witness or of the party in the particular case, but upon general grounds of public policy, because of the confidential nature of such communications").

<sup>168</sup> 25 Fed. Cas. 30 (1807); 25 Fed. Cas. 187 (1807).

<sup>169</sup> 92 U.S. 105 (1876).

<sup>170</sup> *Jabara v. Kelley*, 75 F.R.D. 475, 483 (D. Mich. 1977).

<sup>171</sup> *In re United States*, 872 F.2d 472, 474-75 (D.C. Cir. 1989).

uncertainty referred to is perhaps gentle recognition of the stark reality that there is little in the way of law to buttress a provenance for the privilege in United States. In the *Reynolds* case, the Justice Department's brief to the Supreme Court also cited Burr's trial as an apt precedent.<sup>172</sup>

Despite discussion of state secrets, the Burr trial is not a state secrets case, and the court was not called upon to rule on any claim concerning disclosure of secrets. Although the trial threatened to involve questions concerning state secrets, the Jefferson administration ultimately not only did not withhold documents but Jefferson himself took a personal and active interest in making sure that all pertinent documents would be made available to the court.<sup>173</sup> And other matters in the case potentially concerning state secrets were likewise resolved without legal decision. Justice John Marshall, writing in his capacity as circuit judge, noted that on the matter of withholding for state secrets "it need only be said that the question does not occur at this time."<sup>174</sup>

As for *Totten*, the Supreme Court in *Reynolds* cited to the case for the claim that "the privilege against revealing military secrets . . . is well established in the law of evidence."<sup>175</sup> The idea may have been well established but the law of the matter most certainly was not settled nor even subject to any significant level of discussion. To be charitable, the court's labored claims have little to back them up. Other federal court decisions, Justice Department briefs, scholarly articles, and amicus briefs also cite *Totten* as a legitimate precedent for the state secrets privilege.<sup>176</sup> *Totten* is a problematic basis for the state secrets privilege. The case concerned nothing beyond a discrete category of unenforceable contracts. Little may be extracted from the law of this narrowly defined case to justify the application of its principles to the entire field of military secrets, national security, and foreign affairs. If *Totten* had such a broad reach, then it would have all but replaced the state secrets privilege. *Totten* is a jurisdictional bar; when it applies it demands dismissal of the case on the pleadings. Yet commentators still refer to it as a case in the line of state secrets jurisprudence.<sup>177</sup>

These historical examples are misleading for two reasons. First, they instill the false sense that the law of the privilege is ancient and therefore compelling for that reason if nothing else. But there is no law of the privilege in this country

<sup>172</sup> Brief for the United States, *United States v. Reynolds*, No. 21, U.S. Supreme Court, October Term, 1952, at 10-11. See also *Edmonds v. U.S. Dept. of Justice*, 323 F. Supp. 2d 65, 70 (D.D.C. 2004); *Ellsberg v. Mitchell*, 709 F.2d 51, 56 n.21 (D.C. Cir. 1983); Brief of Amicus Curiae Professor Robert M. Chesney in Support of Reversal, *Hepting v. AT&T Corp.*, Nos. 06-17132 and 06-17137 (9th Cir. March 16, 2007), at 5-6.

<sup>173</sup> 11 THE WRITINGS OF THOMAS JEFFERSON 241 (Thomas Jefferson Memorial Association of the United States, 1904).

<sup>174</sup> *United States v. Burr*, 25 Fed. Cas. 30, 37 (D.C.D. Va. 1807). See also LOUIS FISHER, IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE REYNOLDS CASE 212-20 (2006).

<sup>175</sup> *Supra* note 28, at 6-7.

<sup>176</sup> See e.g. *Edmonds v. U.S. Dept. of Justice*, 323 F. Supp. 2d 65, 71; Petition for a Writ of Certiorari, *Tenet v. Doe*, No. 03-1395, U.S. Supreme Court, April 6, 2004, at 17-18; Chesney Brief, *supra* note 169, at 6-7.

<sup>177</sup> See the excellent analysis of Jeremy Teleman in *On the Conflation of the State Secrets Privilege and the Totten Doctrine*, American University National Security Law Brief, Vol. 3, Issue 1, Article 2.

prior to *Reynolds*. The privilege was unilluminated by United States law. Second, reliance on an historical ground diverts attention from the truly important question concerning the privilege. No one doubts there is a privilege against disclosure of state secrets that would imperil U.S. interests, intelligence information, or sources and methods of intelligence collection. The doubt is in by whom and by what means the privilege should apply. A privilege left solely to the judgment of the executive branch is liable to abuse, and history bears this out. It does no good for the executive branch and its sympathizers to point to common law history for support of great judicial deference on this score, for what evidence there is in the common law points to a judicially rigorous approach to claims of privilege. The executive branch should be put to the test and the nation deserves a judiciary that does not shrink from a duty to check misuse of a privilege that invites overreach and the capacity to hide the business of government from the people.

#### A. *BURR V. UNITED STATES*

A detailed investigation of *Burr* is unnecessary, for that has been ably accomplished by other commentators in recent years.<sup>178</sup> Burr was charged with treason for making war against the United States and inciting insurrection, and at trial he demanded letters in the possession of President Thomas Jefferson. Chief Justice John Marshall heard the case in his circuit judge capacity and had to wrestle with the question of whether he had the power to issue a subpoena for documents against President Jefferson. On the one hand, Marshall apparently feared expressing disrespect toward the office of the presidency, which probably really means a fear of being ignored if a subpoena were to issue. On the other hand, failure to issue the subpoena for documents pertinent to Burr's defense would seem as if Marshall had capitulated to executive power. In one exchange, attorney Wickham said "it is not our object to criminate the Government, but to obtain the truth. We hope that General Wilkinson will not say that his conduct has been approved by the Government, Is this a State secret?" Justice Marshall responded that "he should be sorry to require an answer which would state the opinions of the Government."<sup>179</sup> To the relief of Marshall, President Jefferson communicated his willingness to make the letters available, though he reserved "the necessary right of the president of the United States to decide, independently of all other authority, what papers coming to him as President the public interest permits to be communicated, and to whom."<sup>180</sup> The "independent of all other authority" language appears to be the first clear expression by a President of an ultra-constitutional privilege of state secrets lodged in executive power. Later in the trial, Attorney Wickham, counsel for Burr, said he had asked for the U.S. convention with the Spanish commandant, but was told it was a state secret.<sup>181</sup> Justice Marshall said he would not compel production of the convention "unless its bearing on the case can be shown."<sup>182</sup>

<sup>178</sup> B. MELTON, AARON BURR: CONSPIRACY TO TREASON (2002); See L. Fisher, *supra* note 9, Chapter 7.

<sup>179</sup> Congress of the United States, *American State Papers*, Class X, Miscellaneous Vol. 1, p. 547

<sup>180</sup> Letter read in court June 16, 1807, by George Hay. Emphasis added. Reproduced at <<http://www.law.umkc.edu/faculty/projects/ftrials/burr/burrjeffproclamation.html>>.

<sup>181</sup> Congress of the United States, *American State Papers*, Class X, Miscellaneous Vol. 1, p. 547

<sup>182</sup> *Id.*

Much has been written about Marshall's musings concerning this matter. Louis Fisher notes that Marshall and counsel at bar repeatedly referred to a privilege not to make confidential matters public, but there was no assertion that the confidential material would not be made available to the court.<sup>183</sup> Liberty at trial was taken by both sides in casting the issue of whether papers could be withheld under a privilege of state secrets. Defense counsel John Wickham incorrectly claimed that "In England, nothing is more common than for the most secret transactions to be disclosed in a court of justice."<sup>184</sup> Here he somewhat disingenuously seemed to be referring to cases concerning papers of private concerns and not papers held by the government. Attorney General Hay countered Wickham's ill-conceived statement by claiming that "We are not at liberty to dive into the secrets of the Executive Department to know what orders they give to their agents, and to proclaim those orders to the world – orders which were given for the public good."<sup>185</sup> Hay concluded that "There can be no doubt but that the public good does require that various orders of the Government should forever remain a secret."<sup>186</sup>

These statements run at the level of principle, but details often have a way of making a principle look cheap and self-serving, and so it is with Burr's trial. In an exchange bringing out facts reminiscent of events of our era, testimony revealed that General Wilkinson had a habit of taking letters deposited for post and opening them without warrant.<sup>187</sup> When defense counsel wanted to examine Wilkinson on this practice, Attorney General Hay intervened, claiming that the matter was between two citizens and irrelevant to the case at hand.<sup>188</sup> Insisting upon this line of questioning, Burr's defense claimed that the illegal acts by Wilkinson would undermine his credibility as a witness.<sup>189</sup> At the same time implying that Wilkinson acted outside of government instruction, Hay brought him back under the protection of government by making perhaps the first argument for a national security exception to the Constitution to appear in a reported case:

It has been the constant effort of the counsel on the other side to identify General Wilkinson with the Government. We have heard of the plundering of the post offices, violating oaths, and prostrating

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<sup>183</sup> Marshall realized that if he issued a subpoena to Jefferson, it might be interpreted as a sign of disrespect for the office of the presidency. Yet Marshall was more concerned that his own branch would lose respect if it failed to give an accused access to information needed his defense. *United States v. Burr* 25 Fed. Cas. 30, 37(C.C.D. Va. 1807 (Case No. 14,692d).

<sup>184</sup> *Burr's Conspiracy—Trial at Richmond*, Virginia, Miscellaneous No. 230, 10<sup>th</sup> Cong., 1<sup>st</sup> Sess., Transmitted to Congress by President Thomas Jefferson, November 23, 1807, at 545.

<sup>185</sup> Congress of the United States, American State Papers, Class X, Miscellaneous Vol. 1, p. 545.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 546.

<sup>188</sup> *Id.* at 546-47.

<sup>189</sup> These were the least of Wilkinson's moral shortcomings and legal infractions. As one historian put it "There is no particular reason. . . for supposing he was less ready to deceive his Spanish paymasters than to betray the interests of his own government." *Some Reflections on the Career of general James Wilkinson* (21 (4) MISS. VALLEY HIST. REV. 471 (1935).

private rights. Now it is asked if the Government approved of these acts. Is it decorous, is it proper, to pursue this course? They may ask questions to implicate General Wilkinson, but is it proper to endeavor to cast an imputation upon the Government? I feel no solicitude on the subject; for when all the circumstances are considered, and the real situation of that country understood, though I will not say that the measures were strictly lawful, yet I will say the exigencies of the times called for them; and that the person who held the high and responsible situation of General Wilkinson was bound to pursue the course which he did.<sup>190</sup>

In rejoinder, Wickham said:

It is not our object to criminate the Government, but to obtain the truth. We hope that General Wilkinson will not say that his conduct has been approved by the Government. Is this a State secret?<sup>191</sup>

The possibility of embarrassment so frequently an apparent motivating factor in the modern assertion of a right to withhold documents is also present in *Burr's Case*.<sup>192</sup>

In a matter directly implicating a claim of state secrets, it transpired that Wickham had asked for the convention with the Spanish Commandant, but was told by persons unidentified that the document “was a state secret.”<sup>193</sup> Wickham claimed that “no State secrets should prevent the production of every paper necessary for [Burr’s] defence,”<sup>194</sup> whereupon Marshall refused to compel production of the document “*unless its bearings on the case be shown*.”<sup>195</sup> Apparently, Marshall stood ready to compel production of a document claimed to be a state secret if it was necessary to the case for the defense.

In reflecting upon the question of how to treat a certificate from the President claiming privilege for information contained in government communications, Marshall decided that “After such a certificate from the President of the United States as has been received, I cannot direct the production of those parts of the letter, *without sufficient evidence of their being relevant to the present prosecution*.”<sup>196</sup>

While there is plenty of legal smoke in *Burr's Case*, there is no jurisprudential fire. Matters were speculated upon concerning state secrets, but nothing was ever put at issue since all potential problems in this respect were resolved without the need for decisions by Marshall. It seems Marshall thought courts had the power to order production of even secret material in the hands of the executive branch if

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<sup>190</sup> *Supra* note 184.

<sup>191</sup> *Id.* at 547.

<sup>192</sup> A fear of embarrassment is also at work in *Reynolds*, where it is now known that no state secrets were implicated in the documents requested by the plaintiffs. Documents simply showed the aircraft was negligently maintained and the Air force may have known it was not airworthy. *See* Fisher, *supra* note 9, Chapter 6.

<sup>193</sup> *Id.* at note 188.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* (emphasis supplied).

<sup>196</sup> *Id.* at 553 (emphasis supplied).

duty and justice required that. *Burr* did not establish a privilege for state secrets. Perhaps this is the reason not a single reported opinion between 1807 and the 1951 circuit court decision in *Reynolds* refers to *Burr* as support for a military or state secrets privilege. Most recently, the concurrence in *Zubaydah v. United States* by Justices Thomas and Kavanaugh improvidently cites *Burr* as a case directly in the line of state secrets jurisprudence.<sup>197</sup> But Justice Gorsuch seems to have the correct perspective on the case when he writes in his dissent that “[s]ince *Burr*, this Court has held that the Executive must do more than assert a harm to national security ‘might’ follow from producing evidence.”<sup>198</sup>

In the end, *Burr* offers little of substance to the debate concerning state secrets other than what everyone already knew: that such a privilege must exist in some form. Marshall was not called upon to decide how a privilege against state secrets would be applied in practice. *Burr* confirms only that there may be times when the security of the nation requires that government held information not come into evidence at trial.

### B. *TOTTEN V. UNITED STATES*<sup>199</sup>

The *Totten* decision makes no reference to *Burr*. Considering that courts refer to these two cases as waypoints<sup>200</sup> in an admittedly sparse history of state secrets jurisprudence, it is odd that the second post in that line would make no reference to the first. It seems unreasonable to attribute to the Court a studied or even vaguely realized jurisprudence of state secrets.

The question in *Totten* was straightforward and the U.S. Supreme Court answered that question in a mere four paragraphs. One William Lloyd made a contract with President Abraham Lincoln for espionage services during the Civil War, but the government breached the terms of payment under the contract. Lloyd’s estate sued and the Court concluded that contracts for espionage made during time of war could not be sued upon. A narrow reading of *Totten* yields the conclusion that suits for breach of payment for espionage services are a discrete category of unenforceable contracts.

Significantly, no secret information was withheld based on a claim of privilege, and the pertinent facts to litigate the claimed breach had already been publicly aired.<sup>201</sup> Mr. Justice Field wrote the headnote to the case, and identified the narrow holding as “An action cannot be maintained against the Government, in the Court of Claims, upon a contract for secret services during the war, made between the President and the claimant.”<sup>202</sup> The function of *Totten* is not to protect secret information from disclosure, but to protect the government from being dragged

<sup>197</sup> *Zubaydah*, at 142 S.Ct. 959, at 979 (2022).

<sup>198</sup> 595 U.S. at \_\_ (slip opinion page 23).

<sup>199</sup> 92 U.S. 105 (1875).

<sup>200</sup> See e.g., *Mohammed v. Jeppesen Dataplan Inc.* 563 F.3d 992 (section III B); *El Masri v. United States* 479 F.3d 296 (Section II); *Terkel v. AT&T* 441 F. Supp. 2d 899 (section C, parts 2 and 3).

<sup>201</sup> NEW YORK TIMES, Notes from the Capital, March 16, 1876.

<sup>202</sup> In modern times, that is how the Court still characterizes the case. See, e.g., *Sinochem Int’l Co. v. Malay. Int’l Shipping Corp.*, 167 L. Ed. 2d 15, 25 (2007), where *Totten* is described as, “prohibiting suits against the Government based on covert espionage agreements.”

into a public airing of what, for the time, were sordid affairs. Contemporaneous reporting on the oral argument to the Supreme Court in the case by *The New York Times*, mentions nothing of secrecy. Only two arguments on behalf of the United States were noted. First, the government claimed that the action was time barred, “inasmuch as the means which were open to the spy to send information were also open to him through which to collect his pay, and he did not avail himself of the opportunities as they presented themselves.”<sup>203</sup> Second, the government agreed with the reasoning of the Court of Claims “that there was no power” to remedy the breach “without the appropriation” of funds made specifically for the contracted purpose, and that “such a contract made no case for a suit in that Court.”<sup>204</sup> It appears that the issue of secrecy concerning either documents or testimony was not briefed or argued in the case.

In its opinion, the Court apparently introduced the question of secrecy *sua sponte*, noting that “Both employer and agent must have understood that the lips of the other were to be forever sealed respecting the relation of either to the matter.”<sup>205</sup> And that “The secrecy which such contracts impose precludes any action for their enforcement. The publicity produced by an action would itself be a breach of a contract of that kind, and thus defeat a recovery.”<sup>206</sup> These are odd things to say if the case truly concerned state secrets.

First, as noted, much about the case had already been made public and there appeared to be little concern with secrecy either on the part of the Court of Claims or on the part of counsel for the government. Second, it is wrong to say that both the government and Lloyd “must have understood that the lips of the other were to be forever sealed.” There was no law at the time that would have prevented Lloyd from publicizing an account of his espionage activities during the Civil War. Indeed, others had done exactly that.<sup>207</sup> It might also be a fair resort to recouping money not paid by the government on contract by selling lurid stories to the press. Lloyd’s lips were only sealed because by the time of the appeal to the Supreme Court he was dead. Finally, it makes little sense to say that suing on a contract for espionage services is itself a breach of the contract when the Court concludes that the contract itself may not be sued upon for breach.

There is no language in *Totten* that indicates a broader scope for executive secrecy powers beyond application to espionage contracts. It is unlikely that the *Totten* Court meant to announce a general power of the President to withhold documents from courts in such a short, unbriefed opinion. But that is now apparently the position of some presidential administrations.<sup>208</sup> *Totten* did note that “[i]t may

<sup>203</sup> See *supra* note 137.

<sup>204</sup> *Id.* The Court of Claims did not publish an opinion stating its reasons for dismissal of the action. It only reports: “For services under contract with the President of the United States as secret agent of the United States in the States in rebellion, from July 13, 1861, to June 5, 1865. Dismissed.” 9 Ct. Cl. 506 (1873).

<sup>205</sup> *Supra* note 134, at 106.

<sup>206</sup> *Id.* at 107. Emphasis added.

<sup>207</sup> See, e.g., B. BOYD, *BELLE BOYD IN CAMP AND PRISON* (1865); T. Conrad, *A CONFEDERATE SPY: A STORY OF THE CIVIL WAR* (1892); S. EDMONDS, *MEMOIRS OF A SOLDIER, NURSE, AND SPY: A WOMAN’S ADVENTURES IN THE UNION ARMY* (1865); R. Greenhow, *MY IMPRISONMENT AND THE FIRST YEAR OF ABOLITION RULE AT WASHINGTON* (1863).

<sup>208</sup> *Memorandum of the United States in Support of the Military and State Secrets Privilege and Motion to Dismiss, Hepting v. AT&T*, C-06-0672-VRW, No. 124-1, at 8, 15.

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, and respecting which it will not allow the confidence to be violated.”<sup>209</sup> But the reference here is to confidentiality and not secrecy or a constitutional power of the President to withhold information from disclosure. This is made clear by the sentence immediately following the above quote, which provides examples of the types of confidentiality the Court had in mind: “On this principle, suits cannot be maintained which would require a disclosure of the confidences of the confessional, or those between husband and wife, or of communications by a client to his counsel for professional advice, or of a patient to his physician for a similar purpose.”<sup>210</sup> And in veering the decision back to the issue of secret contracts, the Court concludes in the closing sentence of the opinion that “much greater reason exists for the application of the principle to cases of contract for secret services with the government, as the existence of a contract of that kind is itself a fact not to be disclosed.”<sup>211</sup> *Totten* is not a state secrets case.

Despite these apparent limits of the ruling, some administrations have claimed that the Totten Bar requires dismissal of various actions against the United States. The administration of George W. Bush argued *Totten* should bar actions relative to warrantless electronic surveillance of U.S. citizens under the theory that *Totten* extends to all cases where any kind of secret agreement is implicated.<sup>212</sup> In *Hepting v. AT&T*, a case concerning AT&T’s cooperation in a “terrorist surveillance program,” the district court considered, and rejected, the government’s reliance on *Totten*.<sup>213</sup> This rejection was not surprising considering that the plaintiff was not in contractual privity with the government, the whole world seemingly believed there was an intelligence relationship between AT&T and government, and publicly available evidence pointed to such a relationship. The government even admitted to such a relationship, and AT&T freely acknowledged that when asked by the government to cooperate in intelligence operations it does so.<sup>214</sup> In *Hepting*, to bar the case by aggrieved third parties under *Totten* based on a “secret” contractual relationship between the government and private corporations is to defeat the Fourth Amendment through a formalism one would suspect had long been dead in the law. Similarly, the Ninth Circuit rejected a *Totten* claim in *Mohammed v. Jeppeson Data Plan* since not all of the plaintiffs’ averments required reference to

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<sup>209</sup> 92 U.S. 105, at 106.

<sup>210</sup> *Id.* at 107.

<sup>211</sup> *Id.*

<sup>212</sup> See *In re NSA Tel. Rec.*, 444 F. Supp. 2d 1332 (J.P.M.L. 2006) for a list of dozens of actions against the United States alleging unconstitutional and illegal electronic surveillance of U.S. citizens. This case considered and approved consolidation of these cases in the Northern District of California. In many of these cases, the United States asserted that *Totten* barred suit. The government also seems to want the *Totten* “doctrine” to do a good deal more, arguing that whenever a matter is claimed to be clothed in national security the case should be dismissed on the pleadings. See *Hepting*, note 147 *supra*. Although courts have not quite made this leap, it is a logical step in the reinvention of the *prerogative regis* American style.

<sup>213</sup> 439 F. Supp. 2d 974, 993 (N.D. Cal. 2006).

<sup>214</sup> “AT&T Helped U.S. Spy on Internet on a Vast Scale” <https://www.nytimes.com/2015/08/16/us/politics/att-helped-nsa-spy-on-an-array-of-internet-traffic.html>

secret contracts.<sup>215</sup> In that case, foreign nationals alleged kidnap and torture by the U.S. government. The court found that since the kidnapped victims were outside the contractual agreement, *Totten* did not bar the action.<sup>216</sup> In the first sentence of the opinion the court writes:

This case requires us to address the difficult balance the state secrets doctrine strikes between fundamental principles of our liberty, including justice, transparency, accountability and national security. Although as judges we strive to honor all of these principles, there are times when exceptional circumstances create an irreconcilable conflict between them.<sup>217</sup>

With due respect to the court, it might be observed that there is no balancing, and that the times where there is an “irreconcilable conflict” is not in “exceptional circumstances” but whenever the privilege is raised.

In analyzing state secrets litigation for instances of *Totten*-based dismissals of cases there is only one instance of a dismissal where the plaintiff was not in contractual privity with the government.<sup>218</sup> In that case the Second Circuit Court of Appeals upheld dismissal of the action but reversed on the grounds for dismissal. The court held that although the action should be dismissed, the case “need not be resolved on whether judicial proceedings would necessarily divulge classified information to the public.”<sup>219</sup> Other than this orphaned district court decision there is no case law to indicate that the *Totten* Bar is applicable against a plaintiff not in privity with the government for secret contractual services.

### C. *UNITED STATES V. REYNOLDS*<sup>220</sup>

In 1948, a B-29 airplane crashed at Waycross, Georgia, and widows of three civilian victims sued the federal government under the Federal Tort Claims Act (FTCA).<sup>221</sup> The plaintiffs sought production of the official accident investigation report, whereupon the government moved to quash the motion for production claiming that disclosure of the document was protected under Air Force regulations.<sup>222</sup> The district court denied the government’s motion, finding that the FTCA had waived the claim of privilege in such cases.<sup>223</sup> When ordered by the court to produce the documents for inspection to determine if they contained privileged information the Air Force refused to comply.<sup>224</sup> The district court insisted that the government submit the accident report to the court for review,

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<sup>215</sup> *Mohamed v. Jeppesen Dataplan, Inc.*, 563 F.3d 992

<sup>216</sup> *Id.*

<sup>217</sup> 614 F.3d 1070, at 1073.

<sup>218</sup> *Hudson River Sloop Clearwater, Inc. v. Navy*, 1989 U.S. Dist. LEXIS 19034 (E.D.N.Y. 1989).

<sup>219</sup> *Id.*

<sup>220</sup> 345 U.S. 1 (1953).

<sup>221</sup> *Id.* at 2.

<sup>222</sup> *Id.* at 3.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.* at 4.

with the understanding the court would not share the document with widows of the deceased or their attorneys.<sup>225</sup>

The purpose of the review would have been to ensure that the privilege was invoked to protect state secrets, and not to avoid liability or embarrassment. We now know the report contained no secrets of state, but it did say the plane was not airworthy. Had the district court judge seen the accident report, he would have realized it contained no sensitive information and that the government had deceived him. The birth of the state secrets privilege emerges from executive branch officials making false claims to a federal district court. It would be difficult to produce an abuse that should result in more caution in court acceptance of assertion of the privilege than the facts of the case that gave it birth. In the face of government refusal to produce requested documents to the district judge to be read in his chambers, he resolved the disputed facts in favor of the three widows and moved to determination of damages.<sup>226</sup>

At the trial level the Air Force did not assert the state secrets privilege by name, but claimed that the aircraft in question was on a confidential mission.<sup>227</sup> The Government contended on appeal “that it is within the sole province of the Secretary of the Air Force to determine whether any privileged material is contained in the documents and that his determination of this question must be accepted by the district court without any independent consideration of the matter by it.”<sup>228</sup> Although the Third Circuit found that “State secrets of a diplomatic or military nature have always been privileged from disclosure in any proceeding,” *in camera* inspection by the trial judge would be sufficient to protect such secrets from disclosure while allowing the judge to determine that the privilege is correctly asserted.<sup>229</sup> It is unclear the grounds the Third Circuit had for making such a statement. One suspects at this moment, the government felt a keen urge to prevent the embarrassment that would occur if the accident report were to be produced for *in camera* inspection.

In an anemic opinion, only twelve pages long, the U.S. Supreme Court adopted the executive stance and announced a decision derived from the spirit and language of *Duncan v. Cammel, Laird*. The government would not be compelled to produce the documents for *in camera* inspection. The opinion contains astonishingly little justification considering it institutes what is in practice a doctrine of legal unreviewability for matters involving anything that might be brought under the rubric of national security. Not even the oral arguments were preserved by the Court, nor do any of the Justices’ private papers contain much useful information about the case.<sup>230</sup>

A fair assessment of the majority opinion is that the *Reynolds* decision is a shallow analysis. Even the three dissenting Justices (Black, Frankfurter, and Jackson) provided no evidence or reasoning whatsoever to support their position. Perhaps it is notable that these three dissenters disproportionately represent the sum

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<sup>225</sup> *Id.* at 5

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> *Reynolds v. United States*, 192 F.2d 987, 995-996 (1951).

<sup>229</sup> *Id.* at 996.

<sup>230</sup> Findings by Louis Fisher concerning research for his *IN THE NAME OF NATIONAL SECURITY* (Kansas U.P. 2006), Feb. 2007.

of juridical talent on the Court at the time. Yet they merely dissented “substantially for the reasons set forth” by the Third Circuit. No additional analysis or explanation is given. This thread-bare decision critically facilitated the redistribution of political and constitutional power toward the executive branch in the post WWII era. It is a redistribution of power that significantly altered the character of government. Just as modernity and the era of nuclear weapons dramatically shifted national defense power to the presidency, the Court facilitated this shift by providing the executive branch with a readymade tool to escape answering to inconvenient congressional inquiries and legal review of executive branch activities.

In perhaps an unsurprising result, the government report in the *Reynolds* case contains no secrets. It was withheld to avoid embarrassment and liability, since it related that the plane was so defective and poorly maintained that it should never have been allowed to fly.<sup>231</sup> Had the district judge and the Third Circuit seen the report, they would have decided in favor of the three widows. The district court and the Third Circuit understood the weakness of the administration’s position in refusing to allow the district judge to view the accident report in camera. Moreover, by the time the widows decided to return to the Supreme Court, the Justices understood the accident report (now public) contained no state secrets. The Court nevertheless ignored executive branch deceit and settled on an approach that emulates the results of *Duncan*. After the *Reynolds* report became public, the Court refused to revisit the case.

The Court in theory retains the power to compel production, but all parties surely now understand this to be a judicial face-saving device. If there were any doubt to this matter, the decision in *Zubaydah* put that to rest.<sup>232</sup> There the Court found publicly available information may be excluded at trial at invocation of the state secrets privilege. In the words of Justice Gorsuch:

The events in question took place two decades ago. They have long been declassified. Official reports have been published, books written, and movies made about them. Still, the government seeks to have this suit dismissed on the ground it implicates a state secret—and today the Court acquiesces in that request. . . [W]e should not pretend it will safeguard any secret.<sup>233</sup>

It is difficult to imagine anything other at work here beyond judicial embarrassment and fear of establishing a robust judicial presence in national security matters. This is at the heart of the matter. The unwillingness of the Court to signal that misuse of the label of national security for reasons outside of necessity and law will be remedied by courts has left no viable avenue to check abuse in the name of national security.

A single saving element to *Reynolds* is that while it acquiesced to a “state secrets privilege,” it specifically refused the Justice Department’s demand for a public interest exception privilege to withhold information from courts.<sup>234</sup> The Court sectioned off national security from “public interest” and perhaps thought that would contain the range of the privilege. This redeeming quality is erased when

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<sup>231</sup> See accident report pages 26a-30a.

<sup>232</sup> *Supra* note 196.

<sup>233</sup> *Id.* at 985.

<sup>234</sup> *Reynolds*, *supra* note 219, at 6.

the rubric of national security is expanded to cover a broad range of government activity. We do have a public interest exception, and it is termed “national security”: it turns out that “national security” in the modern world is multifarious and legally agile.<sup>235</sup>

Since classificatory power is solely in the hands of the executive branch, the impulse to classify out of habit rather than necessity is common.<sup>236</sup> Judges in the United States have a responsibility in determining the nature of the privileged material that English and Scottish judges did not bear. Indeed, since there were no national security interests revealed in the information requested by the plaintiffs in *Reynolds*, the motivating factor for cover-up by the Air Force was a fear of embarrassment and liability for gross negligence in maintenance of the aircraft that crashed.<sup>237</sup> This fact, when publicly revealed, should have given the Court caution in blindly acquiescing to assertions of the privilege. No such caution developed; quite the opposite, as demonstrated in *Zubaydah*. To the present, the U.S. government asserts that characterizing *Reynolds* as anything other than a valid and sincere use of the state secrets privilege is false. In a 2014 brief the government wrote: “[A]ny suggestion that the state secrets privilege assertion in [*Reynolds*] was shown to be improper after documents relevant to that assertion were later declassified. . . is incorrect. In fact, over fifty years after the assertion in *Reynolds*, federal courts reaffirmed the validity of the *Reynolds* assertion.”<sup>238</sup> The fact that courts still adhere to *Reynolds* does not mean that *Reynolds* was not a fraud on the court. It only means that the Supreme Court finds it judicially inconvenient to challenge the executive branch in the realm of national security.

Any person of any rank or position with a classification stamp may remove documentation, writings, artifacts and anything else from evidence through classification. Add to this that in the initial classification decision the costs of under-classification may be high, but there is no obvious cost to overclassification. Justices Gorsuch and Sotomayor chastised their colleagues in the lead sentence of their dissent in *Zubaydah*, writing: “There comes a point where we should not be ignorant as judges of what we know to be true as citizens. This case takes us well past that point. . . we should not pretend it will safeguard any secret.”<sup>239</sup> They state the obvious: use of the privilege is now formalistic, and courts are to take its invocation as a presidentially-determined demarcation of the limits of justiciability.

In English law, the privilege was a principle of government. As Viscount Simon wrote in *Duncan*, the case represented a “question . . . of high constitutional importance”<sup>240</sup> and noted that “[w]hen the Crown . . . is a party to a suit, it

<sup>235</sup> On June 8, 2011. The National Security Agency “heralded” the declassification of a two-century old study on cryptography translated from German. Steven Aftergood, of *Secrecy News*, noted at the time that the 1809 report was widely available on the internet.

<sup>236</sup> Noted from personal experience and observation of one of the authors.

<sup>237</sup> After the crash results became public, family members of the deceased filed a suit in action of fraud upon the court. The action has a very high bar. Plaintiff must show “(1) an intentional fraud; (2) by an officer of the court; (3) which is directed at the court itself; and (4) in fact deceives the court.” Perjury by government officials would be required to meet this bar, and the Third Circuit found the plaintiffs had not met their burden. (*Herring v. United States*, 424 F.3d 384)

<sup>238</sup> *Mohamed v. Holder* (Case No. 1:11-CV-0050) (Defendant’s Response to Court Order).

<sup>239</sup> 142 S. Ct. 959, at 985 (2022).

<sup>240</sup> *Duncan*, *supra* note 119, at 629.

cannot be required to give discovery of documents at all. . . . No special ground of objection is needed.”<sup>241</sup> Understanding of the state secrets privilege developed in *Reynolds*, by contrast, does not embrace a constitutional principle. Rather, it is a pragmatic device that works to both protect national security information and to provide courts with a way to avoid confrontation with executive branch power over claimed national security matters.<sup>242</sup> These distinctions limit the operation of the privilege, emplace the courts as the final authority as to when the privilege is correctly asserted, and transform the constitutional, principle-based privilege of English law into the pragmatic, fact-driven privilege of American law. Yet as the *Zubaydah* decision made clear, we find ourselves in a pre-Conway world of crown privilege with a presidency transformed into monarchical status through the lenses of national security and the remnants of crown privilege in the common law.

The ghost of *Duncan v. Cammel, Laird* haunts American jurisprudence, and after *Zubaydah* we have what amounts to the “class exception” as that of the pre-Conway British jurisprudence. We also find ourselves in a world where anything may be classified and put beyond the reach of law without fear of penalty. Overclassification is endemic in the federal government, and once an item is classified at “secret” level or higher, it is effectively unavailable to the judicial process without executive branch acquiescence. Over 30 years ago, former Dean of the Harvard Law School and U.S. Solicitor General Erwin Griswold wrote an op-ed for the Washington Post titled “Secrets Not Worth Keeping.”<sup>243</sup> He said what others only think: “there is very rarely any real risk to current national security from the publication of [classified] facts relating to transactions in the past, even the fairly recent past” and that classification power is greatly misused at a cost to courts and justice.

Other than the *Zubaydah* decision, it would be difficult to capture a more telling instance of this conclusion than the executive branch classification and removal of a 2014 court decision of a federal judge that had been available to the public on government servers for months.<sup>244</sup> This is a direct encroachment on judicial authority, and forces federal courts to yield to secrecy formality rather than maintain the dignity and constitutional importance of judicial independence.

Government counsel also argue before courts that it would be incorrect to put limiting principles on the privilege, including refusal to apply the privilege when invoked to protect the introduction of unclassified information. As one government attorney put it: “The privilege protects information that may appear innocuous on its face, but which in a larger context could reveal sensitive classified information.”<sup>245</sup> To accept this is to accept presidential control over justiciability whenever the executive branch wishes to assert the privilege. This ignores that the privilege is meant to be an evidentiary privilege, not an incantation to dispel legal actions. The government essentially claims that the privilege amounts to a jurisdictional bar where it is asserted. This is not what the privilege contemplates, even if that is what it has become as a matter of practice.

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<sup>241</sup> *Id.*, at 632.

<sup>242</sup> *Reynolds*, *supra* note 219, at 10.

<sup>243</sup> WASH. POST, Feb. 16, 1989 (<https://www.washingtonpost.com/archive/opinions/1989/02/15/secrets-not-worth-keeping/a115a154-4c6f-41fd-816a-112dd9908115/>)

<sup>244</sup> *Restis v. Am. Coalition Against Nuclear Iran, Inc.* 2015 U.S. Dist. LEXIS 36085

<sup>245</sup> “Court Views State Secrets Too Narrowly” Jan. 29, 2015 Secrecy News, Federation of American Scientists (<https://fas.org/blogs/secrecy/2015/01/ssp-narrow/>)

A telling example of the mire courts have slid into is that Attorneys General now make straight-faced arguments that the privilege is not limited to classified material. In *Mohamed v. Eric Holder*<sup>246</sup> Attorney General Holder claimed:

[T]he state secrets privilege in this case is not limited to certain physical documents that Plaintiff seeks to compel through discovery, but rather covers evidence and information that would be needed to litigate the claims presented in this lawsuit in whatever form it appears, i.e., whether that evidence or information is reflected in the documents at issue in discovery, in other documents, or in any testimony that might be presented to establish claims or defenses. Thus, an assessment of the privilege assertion encompasses not just the information set forth in the four corners of a particular document, but also the broader context of the privileged information which that document reflects.<sup>247</sup>

Notice that in the context of this case it meant that even unclassified and publicly available information is subject to exclusion under a state secrets claim. The Attorney General added: “[t]he privilege also protects information that may appear innocuous on its face, but which in a larger context could reveal sensitive classified information”<sup>248</sup> One might ask where the logical limit is to this kind of privilege. Attorney General Holder also complained of a judicial order that “appears to circumscribe the scope of [the government’s] assertion of the state secrets privilege... by focusing on the specific documents” sought by the Plaintiffs in discovery, and then finding those documents insufficiently sensitive to be privileged on state secrets grounds.<sup>249</sup> Government counsel added, “an assessment of the privilege assertion encompasses not just the information set forth in the four corners of a particular document, but also the broader context of the privileged information which that document reflects.”<sup>250</sup> This is a rather plain way of asking judges to forgo their Article III responsibilities in adjudicating state secrets claims.

The Attorney General then turned to Judge Trenga’s determination that 28 documents reviewed by the court *in camera* did not contain state secrets and would be made available to the plaintiff. Citing the Fourth Circuit opinion *El Masri v. U.S.*, the Attorney General states that:

[a]lthough the state secrets privilege was developed at common law, it performs a function of constitutional significance because it allows the executive branch to protect information whose secrecy is necessary to its military and foreign-affairs responsibilities. *Reynolds* itself suggested that the state secrets doctrine allowed the Court to avoid the constitutional conflict that

<sup>246</sup> *Mohamed v. Holder* (Case No. 1:11-CV-0050) (E.D. Va., Defendant’s Response to Court Order.

<sup>247</sup> *Id.* Defendant’s Response to Court Order 1:11-cv-00050-AJT-TRJ (Document 171)

<sup>248</sup> *Supra* note 245, at p. 10.

<sup>249</sup> *Id.* at p. 4.

<sup>250</sup> *Id.* at p. 3

might have arisen had the judiciary demanded that the Executive disclose highly sensitive military secrets.<sup>251</sup>

Even for state secrets jurisprudence, this is a breathtaking position. It is asking the court to find unclassified and publicly available information pertinent to the case to be excluded under a state secrets assertion. Once this threshold is passed there is no limit to the extent of the privilege. If we accept that the grounds for the privilege are based in constitutional protection of the executive branch province, then the privilege is divorced from law and review of courts and there is little outside of its potential compass.

The American state secrets privilege shares an uneven history with the doctrine of crown privilege. But the United States government successfully elided crucial distinctions between the two concepts by claiming a constitutional basis for the privilege; often alluding to, and sometimes simply declaring, that it protects the sphere of Article II powers held by the President.<sup>252</sup> The argument is that the presidency sits in a position with functional similarities to the historical British crown. *Reynolds* at first seems to hold otherwise. As the Court noted: “We have had broad propositions pressed upon us for decision . . . [These] positions have constitutional overtones which we find it unnecessary to pass upon, there being a narrower ground for decision.”<sup>253</sup> The Court here clearly alludes to the United States brief that highlights a strong privilege under crown doctrine. By denying the government’s demand for a public interest exception and refusing to treat the matter as even implicating constitutional doctrine, the Court appears to recognize the substantial differences between crown privilege and what shape an American privilege for withholding state secrets must take.

The discussion seems to involve political compromise, not legal or constitutional principle. It is about the nuts and bolts of judicial action, not the reach of Article II powers. The Court refers repeatedly to “judicial experience” and the practice and habits of judges in factually idiosyncratic settings of discovery. It speaks of “sound formula of compromise,”<sup>254</sup> weighing a plaintiff’s need for the requested material when deciding on *in camera* review, and the pursuit of alternatives to allow the case to go forward in the face of a state secrets privilege claim.

But it is also clear that the court keenly felt the anxiety of the Cold War and was not about to be out of step with the rest of the government on policies concerning national security. Perhaps this led to inadvisable judicial timidity in not only adopting tenets of crown privilege, but also in finding that where national security information is withheld the plaintiff still bears the burden of making out all the elements of a case otherwise required. The combination of these two, quite separable, features virtually guaranteed the expanded use of the privilege and the temptation to use it to protect the executive branch from unwanted scrutiny, embarrassment, and even disclosure of illegal and unconstitutional activity. The motivation for use of the privilege is not to avoid monetary liability but to avoid

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<sup>251</sup> 479 F.3d 296, at 303.

<sup>252</sup> See, e.g. *Hepting v. AT&T*, Nos. 06-17132 and 0617137, Brief for the United States (March 9, 2007), at 15 (“The state secrets privilege derives from the President’s Article II powers to conduct foreign affairs and provide for the national defense”).

<sup>253</sup> *Reynolds* at 6.

<sup>254</sup> *Id.* at 9.

exposure of national security information and, perhaps just as often, embarrassment over executive branch activities.

The whole matter would have been largely avoided had the *Reynolds* Court concluded, as did the district court and the Third Circuit, that governmental refusal to produce documents results in factual matters put at issue relevant to the documents be taken in favor of the plaintiff. The result is judicial abandonment of constitutional duties to check abuse of executive power.

The Court noted that “While claim of executive power to suppress documents is based more immediately upon [statute], the roots go much deeper. [Statutory privilege] is only a legislative recognition of an inherent executive power which is protected in the constitutional system of separation of power.”<sup>255</sup> Having put courts on notice, the opinion buttresses that warning: while “[t]he court itself must determine whether the circumstances are appropriate for the claim of privilege,” it must “do so without forcing a disclosure of the very thing the privilege is designed to protect.”<sup>256</sup> Disclosure to whom, is the important question. Is judicial review of evidence *in camera* a forced “disclosure”? No: it is at the heart of judicial duties and responsibilities. Yet, subsequent court decisions seem to indeed support the idea that “forced disclosure” includes orders of production for *in camera* inspection.<sup>257</sup> If so, courts are to strike themselves blind when the privilege is invoked. This is abdication of constitutional duties at the most consequential level. Further, the Court leaves unaddressed the unconscionable fact it was lied to by the executive branch in the very case that spawned the state secrets privilege.

The district court and the Third Circuit in *Reynolds* did not force public disclosure of the accident report. Instead, they merely insisted that the report be shared with the district judge for his independent analysis. Had that been done, the district judge would have discovered that the report contained no state secrets. While nothing concerning national security is at stake, the report did make clear that the plane was so defective it should never have been allowed to fly.<sup>258</sup> In the concluding section of the report it stated: “The aircraft is not considered to have been safe for flight because of non-compliance with technical orders.”<sup>259</sup> In a telling recommendation, the report advises “wherever feasible flight test aircraft be bailed to the commercial concern conducting the test.”<sup>260</sup> That recommendation is apparently motivated by an effort to shift liability to the bailee in case of future accidents causing tortious injury. The district court and the Third Circuit understood the need for judicial independence. The Supreme Court did not. There is nothing in the report that remotely implicates national security. The founding of the state secrets privilege in U.S. law was built on what is often a motivating factor in deploying the privilege – the effort to hide embarrassing or inculpatory information.

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<sup>255</sup> *Id.* at 6, note 9 (1953).

<sup>256</sup> *Id.* at 7.

<sup>257</sup> For example, Federal Register Vol. 68, No. 126, Part III, Tuesday, July 1, 2003 states “Nothing in this part shall be construed to authorize disclosure of state secrets to any person not authorized to receive them.” (§9.9)

<sup>258</sup> “Report of Special Investigation of Aircraft Accident Involving TB-29-100XX NO. 45-21866”, filed in court, June 22, 1953.

<sup>259</sup> Appendix to Report at 22a.

<sup>260</sup> *Id.* at 23a.

In a jagged couplet of asserting judicial power and then undercutting that power, the Supreme Court in *Reynolds* offered this reasoning: “Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers. Yet we will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case.”<sup>261</sup> Plainly stated, the Court warned that “the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.”<sup>262</sup>

It is unclear how judicial review of classified evidence jeopardizes security, when judges encounter and handle classified information in contexts other than tort suits against the government.<sup>263</sup> This is especially so in the *Reynolds* case, where the report is apparently classified as part of a coverup to avoid embarrassment and public scrutiny. In a telling state of affairs, the Justice Department provides a litigation security service for cases tried in federal courts involving contract disputes, bid protests, and patent cases that will require the production and review of classified material and evidence by court personnel and judges.<sup>264</sup> It is also unclear how the government’s position as defendant in a tort suit undermines confidence and trust in federal judges’ capacity to guard against disclosure of national security information, when that same judge may be tasked to handle the same sensitive information to settle a contract dispute.

Finally, in tilting the field heavily to the executive branch, the Court admonished that where “circumstances indicat[e] a reasonable possibility that military secrets [are] involved, there [is] certainly a sufficient showing of privilege to cut off further demand for the documents.”<sup>265</sup> This is an extraordinarily low bar and offers no guidance to lower courts. It is inconceivable that the Court did not understand the implications of such language, and those implications were certainly not lost on Presidents, the military, and government agencies.

Despite the references to pragmatism and compromise, the effect of the privilege was to instill great deference and fear in the judiciary concerning requests for material asserted to involve matters of national security. The government’s arguments relied heavily on the spirit of crown privilege and were aiming for the same conclusiveness given to ministerial withholding that obtained in English law. While it did not impose this result as clear *de jure*, it has reached that goal *de facto*.

In arguing that the principles of crown privilege should be made applicable to United States law, the government in *Reynolds* offered this position: “Great weight should also be given to the decision in *Duncan v. Cammel, Laird & Co.* . . . in which the House of Lords reached the result urged by the Government here.”<sup>266</sup>

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<sup>261</sup> *Id.* at 9-10.

<sup>262</sup> *Id.* at 10.

<sup>263</sup> For example, the Classified Information Procedures Act (18 U.S.C App. iii) directs how criminal cases are pursued where classified information is put into evidence.

<sup>264</sup> “The Litigation Security Group of the Department of Justice is a team of security specialists available to be detailed to the Court to serve as Classified Information Security Officers (CISOs) to assist in the handling and protection of classified information. These CISOs serve in a neutral capacity providing advice and assistance to the Court and the parties in the handling of classified information.” (<https://www.uscfc.uscourts.gov/sites/default/files/Classified-Case-Guidelines-Final-Version.pdf>)

<sup>265</sup> *Reynolds*, at 11.

<sup>266</sup> Brief of the United States, *United States v. Reynolds* (1953), at \*38.

The government goes on to pointedly state that “[w]e believe that all controlling governmental and judicial material, here and in England, clearly supports the view that . . . disclosure by the head of an executive department cannot be coerced.”<sup>267</sup> And finally, that in England “the sole arbiter of when the public interest so requires [withholding of documents] is the cabinet minister who heads the department to which the documents belong.”<sup>268</sup>

At this crucial juncture the government then followed the *Duncan* court in an erroneous reading of Scottish law. The brief argued:

. . . after reviewing the cases, and quoting among others the statement of Lord Kinnear in *Admiralty Commissioners v. Aberdeen Steam Trawling & Fishing Co.*, . . . – ‘A department of Government to which the exigencies of the public service are known as they cannot be known to the Court, must, in my judgment, determine a question of this kind [whether or not to withhold documents] for itself . . .’ – the Lord Chancellor states that the executive determination of privilege is conclusive on the court.<sup>269</sup>

But as we have seen, the *Duncan*, *Vass*, and *Aberdeen* courts were simply wrong in their reading of Scottish law: ministerial objections to production of documents are not conclusive on Scottish courts. *Glasgow* corrected this misreading. Such objections are certainly strong statements and not to be lightly impugned, but the decision of production is for the court. Importantly, courts in Scotland may engage in examination of underlying documents in claims of privilege if pretext, rather than national security, is suspected as the motivating reason.

Favorably quoting English law, the brief for the United States finds that “it is embarrassing to a judge that he should be informed of matters which he would much rather not hear and which make it much more difficult for him to do his duty . . . [T]he judge, who, after hearing the statements, has to pronounce sentence, may, quite unconsciously, have his judgment influenced by matters which he has no right to consider.”<sup>270</sup> What is embarrassing, and surprising, is that the Court would tolerate such condescension.

And in an unusual argument, the brief claims that crown privilege should have more forceful effect under our law than even in England:

The constitutional and public policy considerations which underlie the result in *Duncan v. Cammell, Laird & Co.*, have, we submit, even greater significance in the present case than in the English case, because the English constitution does not embody the doctrine of separation of powers and there is no extensive history of executive independence like that we have discussed in the preceding subsection. None of these difficulties would confront an English court seeking to require disclosure. Hence – contrary to the view of the court below – we think that the present case is *a fortiori*.<sup>271</sup>

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<sup>267</sup> Brief of the United States, *Reynolds v. United States* (3d Cir. 1951), at 1.

<sup>268</sup> *Supra* note 174, at \*39.

<sup>269</sup> *Id.* at \*40.

<sup>270</sup> *Id.*

<sup>271</sup> *Id.* at \*41-42.

It should be enough to note it is a bizarre claim that our Constitution, which grew out of the express rejection of monarchical power, nevertheless incorporates prerogative rights of the English crown. In addition, that incorporation is one that the judiciary should accept without question or qualm.

Finally, in an allusion to what would eventually underlie the mosaic argument,<sup>272</sup> the brief explains that:

... as the House of Lords pointed out in *Duncan*: only the department head knows the exigencies of the public service; only widely separated portions of Air Force policy can come into overt consideration in a given litigation; and the fitting together of the scattered pieces can be accomplished only in the day to day decisions of the agency.<sup>273</sup>

Courts must recognize “that only the executive is in a position to estimate the full effects of . . . disclosure[s]” and that “unless the courts are to interfere in the administration of Government, they must trust in the judgment of the appointed administrator.”<sup>274</sup> Nowhere is there a recognition of a judicial role to prevent the legal symptoms of the chronic illness of bureaucracy to engage in secrecy to avoid embarrassment and prevent exposure of incompetence, negligence, malfeasance, and illegality.

While some claim the *Reynolds* Court did not adopt the position of complete deference argued for by the government, it nonetheless arrived at that position as made clear by the *Zubaydah* decision. The Court made an unwise surrender to executive power, but contained within the British and Scottish case law it incorrectly cites are the tools of potential resurrection of oversight. It would be constitutionally impermissible, as well as an embarrassment, for the Court to surrender its power to order production of evidence. Yet so long as it could reach that functional equivalent and avoid placing courts on collision courses with claims of national security it could maintain the illusion of control.

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<sup>272</sup> The mosaic argument is often purveyed by the U.S. government to prevent disclosure of information that is unclassified, by claiming that unclassified bits of information may be assembled into an analysis that would be classifiable under existing classification guidance. The power of this position is that assembly of unclassified or benign information into complex descriptions and understanding of activities and organizations is precisely what U.S. intelligence agencies do themselves with respect to foreign powers and adversaries. This legal argument often has merit and should not be minimized or generally seen as a subterfuge to avoid production of information. One of the authors (Weaver) worked as an intelligence analyst for eight years in Europe. He engaged in intelligence gathering programs that utilized the method of assembling sophisticated understanding of intelligence targets through seemingly insignificant and disparate pieces of information. Nevertheless, the argument advanced is subject to abuse, and has within it a tempting elastic property. Yet, artificial intelligence may buttress the government argument that even unclassified information may represent a significant threat to national security. It is certainly conceivable that analysis of a vast reservoir of publicly available information may produce classified assessments of U.S. military and intelligence capabilities.

<sup>273</sup> *Supra*, note 267 at \*47.

<sup>274</sup> *Id.* at \*52.

If the Court had understood the nature of Scottish law, and that it was not in congruence with English law, it may have been humbled to adopt a different stance. It is virtually inconceivable that the Court would have adopted a position of less judicial power than that held by Scottish courts, which are at least nominally under the authority of a monarch.

English and Scottish law, *Burr*, *Totten*, and *Reynolds*, are not parts of a coherent whole concerning the origins of a state secrets privilege, and they certainly do not provide a sufficient legal foundation to accord the presidency the unaccountable power it now wields over matters claimed to concern national security. It is difficult to conclude other than that courts have simply abandoned the field of a contentious area of law by reliance on an “ancient” common law doctrine that does not exist.

#### IV. CONCLUSION

At substantial cost to constitutional values, the Supreme Court has made its share of judicial errors, in part by relying on British precedents without realizing they are not an appropriate guide for American policy. In a book published in 1936, Chief Justice Charles Evans Hughes analyzed several cases to illustrate the capacity for judicial error and the damage that comes from it. While generally praising the Court he recognized that it has “the inevitable failings of any human institution.”<sup>275</sup> He cited three “noticeable instances” where the Court “suffered severely from self-inflicted wounds,” including the *Dred Scott* case of 1857. In that decision the Court denied that a Black man could sue in federal court in order to gain freedom.<sup>276</sup> Writing for the majority, Chief Justice Roger Taney relied heavily on British precedents, suggesting that those principles were well established and fixed. He made no mention that England in 1833 had abolished slavery. In one of several dissents, Justice John McLean rejected the Court’s reliance on British precedents to justify slavery. Instead, he chose “the lights of Madison, Hamilton, and Jay, as a means of construing the Constitution in all its bearings.”<sup>277</sup> He pointed out that upon the adoption of the Constitution, or shortly thereafter, several states took steps to abolish slavery.

In an article published in 1945, Justice Robert Jackson pointed out that judges “often are not thorough or objective historians.”<sup>278</sup> Seeking constitutional principles from the nation’s founding may have broad appeal but that type of analysis can involve evidence on both sides of an issue, leading Justices to arbitrarily select one side over another. Judge J. Harvie Wilkinson II of the Fourth Circuit noted that federal judges “are neither trained nor equipped to conduct this type of inquiry.”<sup>279</sup> Judges “lifted high by the lofty promises of originalism are laid bare to the insidious temptations of personal preference.”<sup>280</sup>

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<sup>275</sup> CHARLES EVANS HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 45 (1936).

<sup>276</sup> *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

<sup>277</sup> *Id.* at 537.

<sup>278</sup> Robert H. Jackson, *Full Faith and Credit – The Lawyer’s Clause of the Constitution*, 45 COLUM. L. REV. 1, 6 (1945).

<sup>279</sup> J. HARVIE WILKINSON III, *COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNMENT* 50 (2012).

<sup>280</sup> *Id.* at 57.

In his study of judicial dependence on history, Charles Miller offered this judgment: “[T]he Supreme Court as a whole cannot indulge in historical fabrication without thereby appearing to approve the deterioration of truth as a criterion for communication in public affairs.”<sup>281</sup> When the Court commits errors in judging history, “this is seldom due to a simple misstatement of verifiable fact. Rather, the Court’s history is misleading *in its interpretation*.”<sup>282</sup>

Writing in 1965, Alfred H. Kelly described the Court’s role as constitutional historian as “if not a naked king, no better than a very ragged one. From a professional point of view, most, if not all, of its recent historical essays are very poor indeed.”<sup>283</sup> Too often Justices “reach conclusions that are plainly erroneous.”<sup>284</sup> Courts are not likely to receive reliable guidance from briefs submitted to them. Attorneys who prepare the briefs “do not attempt to present a court with balanced and impartial statements of truth. . . . The object of this process is not objective truth, historical or otherwise, but advocacy – i.e., the assertion of a client’s interest.”<sup>285</sup> In a book published in 2011, Justice John Paul Stevens wrote that “judges are merely amateur historians” whose interpretations of past events, “like their interpretations of legislative history, are often debatable and sometimes simply wrong.”<sup>286</sup>

A review of judicial decisions on state secrets underscores what is evident from other fields of constitutional law: the capacity of the Supreme Court to not only make errors but being unwilling to correct them. Nevertheless, federal judges, legal scholars, and reporters frequently describe the Supreme Court as the final word on the meaning of the Constitution. Because the Supreme Court is prone to miscalculation and error, it cannot be expected to issue the last word on constitutional issues.<sup>287</sup>

That judgment is underscored by the record of the Supreme Court in *United States v. Reynolds* (1953). To their credit, the district court and the Third Circuit in that litigation refused to accept the position of the executive branch that the accident report could be withheld from judges after the three widows went to court. Instead of taking the word of the administration, the district judge insisted that the report be submitted to him to be read *in camera* in his office. The Third Circuit agreed with his judgment. Both decisions underscored that judges have a need to make an independent judgment about the content of a document.

The Supreme Court did not understand – and as the *Zubaydah* decision makes clear, still does not understand – that fundamental value at all. It accepted the administration’s claim that the report contained state secrets. In subsequent years the *Reynolds* crash report was declassified and made public. It contains no state secrets but makes clear that the plane was so defective it should not have been

<sup>281</sup> CHARLES A. MILLER, *THE SUPREME COURT AND THE USES OF HISTORY* 195 (1969).

<sup>282</sup> *Id.*

<sup>283</sup> Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 155.

<sup>284</sup> *Id.*

<sup>285</sup> *Id.* at 155-56.

<sup>286</sup> JUSTICE JOHN PAUL STEVENS, *FIVE CHIEFS: A SUPREME COURT MEMOIR* 225-26 (2011). For further analysis of judicial capacity to analyze historical precedents, see Louis Fisher, *The Staying Power of Erroneous Dicta: From Curtiss- Wright to Zivotofsky*, 31 CONSTITUTIONAL COMMENTARY 149 (2016).

<sup>287</sup> LOUIS FISHER, *RECONSIDERING JUDICIAL FINALITY: WHY THE SUPREME COURT IS NOT THE LAST WORD ON THE CONSTITUTION* (2019).

allowed to fly. With that fact in mind, the widows and their attorneys repeatedly made efforts to bring the issue to the Supreme Court so that it would have an opportunity to publicly acknowledge that the administration had lied about the contents of the report. That would have been not only in the interests of the three widows but in the interest of the judiciary. The Supreme Court chose to avoid the issue, but its record merely underscored that the executive branch is at full liberty to deceive the judiciary at no cost to itself.

With respect to state secrets, such deception is no longer necessary. In a culminating act of judicial surrender, in *Zubaydah* the Court capitulated to executive power in finding publicly available information excludable under claim of privilege. At last, the Court embraced the full spirit of *Duncan v. Cammel, Laird*, and recognized a class privilege.

