THE STATE SECRETS PROBLEM: CAN CONGRESS FIX IT?

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I. THE STATE SECRETS PROBLEM

Imagine that a United States citizen, in a case of mistaken identity, is arrested while walking down the street and sent off to a black site run by the Central Intelligence Agency ("CIA") in Afghanistan. The citizen is interrogated, given mind-altering drugs, and subjected to beatings, waterboarding, and other forms of torture or cruel, inhuman, and degrading treatment. Finally, the CIA determines that it has the wrong person, so the person is sent back to the United States and left at the spot where he was first picked up. What legal recourse does such a person have? The person's legal rights—constitutional and statutory—have been egregiously violated. Nevertheless, because of the state secrets privilege, there is little chance of securing any redress through the courts.

The scenario set forth above is only barely hypothetical. Khaled El-Masri alleged essentially these facts in his lawsuit against the United States and various federal officials.[1] The district court dismissed El-Masri's lawsuit on state secrets grounds, and the Fourth Circuit affirmed.[2] The state secrets privilege is a common law evidentiary privilege that allows the government to withhold information, the disclosure of which would harm national security.[3] The modern articulation of the state secrets privilege is found in *United States v. Reynolds*.[4] *Reynolds* sets forth a three-part framework for assessing state secrets privilege claims. First, the claim must be made in a way that comports with procedural requirements;[5] second, the court must determine whether the information that

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1. El-Masri v. United States, 479 F.3d 296 (4th Cir. 2007), *cert. denied*, No. 06-1613, 2007 WL 1646914 (U.S. Oct. 9, 2007). Although El-Masri's scenario is quite similar to the hypothetical, subtle differences exist. Specifically, El-Masri is not a U.S. citizen, nor was he detained or released in a U.S. territory. Nevertheless, no court has held, and there is no reason to believe, that the plaintiff's citizenship is relevant for the purposes of the state secrets privilege.

2. El-Masri v. Tenet, 437 F. Supp. 2d 530, 541 (E.D. Va. 2006), *aff'd sub nom.* El-Masri v. United States, 479 F.3d at 300, *cert. denied*, No. 06-1613, 2007 WL 1646914 (U.S. Oct. 9, 2007).

3. *See* United States v. Reynolds, 345 U.S. 1, 6-7 & n.11 (1952) (stating privilege against revealing military secrets is "well established in the law of evidence").

4. 345 U.S. 1 (1953).

5. The privilege is the government's, and the government must formally assert the privilege. Thus, the assertion may neither be made nor waived by a private party. The assertion must be made "by the head of the department which has control over the matter, after actual personal consideration by that officer." *Reynolds*, 345 U.S. at 7-8; *see also El-Masri*, 479 F.3d at 304 (summarizing first part of framework for assessing state secret privilege claims).

the government seeks to protect is in fact privileged;[6] third, the court must determine how to proceed if the information is in fact privileged.[7]

Substantively, the privilege allows the executive branch to withhold information when there is a "reasonable danger" that disclosure would expose secrets that, "in the interest of national security, should not be divulged."[8] In determining whether the assertion of privilege is valid, the court may conduct an in camera examination of the information sought.[9] The court, however, does not necessarily examine the information. If, without examination, the court is satisfied that the information sought contains military or other covered secrets, it may simply accept the explanation of the executive branch.[10] Before accepting this explanation, however, the court must conclude that the question of privilege cannot be resolved without "creat[ing] an unacceptable danger of injurious disclosure."[11]

In determining whether disclosure risks exposing state secrets, the courts tend to be highly deferential to the determination of the executive branch, mainly out of respect for the greater institutional competence of the executive branch as compared to the courts in making such national security judgments.[12] Remedially, the courts have a fair degree of discretion as to what course to pursue if they determine that the executive branch has validly invoked the state secrets privilege. The increasingly common remedy chosen by courts, including the court in *El-Masri v. United States*,[13] is dismissal.[14] A court will dismiss a case

6. *Reynolds*, 345 U.S. at 8; *see also El-Masri*, 479 F.3d at 304-05 (summarizing second part of framework for assessing state secret privilege claims).

7. *Reynolds*, 345 U.S. at 8-10; *see also El-Masri*, 479 F.3d at 304, 306 (summarizing third part of framework for assessing state secret privilege claims).

8. *El-Masri*, 479 F.3d at 305 (quoting *Reynolds*, 345 U.S. at 10).

9. *Id.*

10. *Id.*

11. *Id.* (citing *Reynolds*, 345 U.S. at 9).

12. *See, e.g.*, Jama v. Immigration & Customs Enforcement, 543 U.S. 335, 348 (2005) (acknowledging Court's policy of deferring to President on questions of foreign affairs); Dep't of Navy v. Egan, 484 U.S. 518, 527 (1988) (declaring that President, as head of executive branch and commander in chief, has authority to protect national security information); Chi. & S. Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103, 111 (1948) (advocating limited judicial role in foreign policy matters).

13. 479 F.3d 296 (4th Cir. 2007).

14. *See El-Masri*, 479 F.3d at 306-07 (noting numerous Supreme Court and circuit court decisions dismissing cases involving invocation of state secrets privilege); *see also, e.g.*, Sterling v. Tenet, 416 F.3d 338, 341 (4th Cir. 2005) (affirming dismissal of Title VII racial discrimination case because privileged state secrets were central to case); Tenenbaum v. Simonini, 372 F.3d 776, 777 (6th Cir. 2004) (affirming summary judgment motion in defendants' favor because defendants could not defend themselves against criminal espionage claims without disclosing privileged state secrets); Kasza v. Browner, 133 F.3d 1159, 1170 (9th Cir. 1998) (affirming dismissal of case against Air Force on state secrets grounds); Black v. United States, 62 F.3d 1115, 1119 (8th Cir. 1995) (affirming dismissal of case alleging that government subjected plaintiff to harassment and psychological attacks on state secrets ground); Bareford v. Gen. Dynamics Corp., 973 F.2d 1138, 1140 (5th Cir. 1992) (finding it appropriate to affirm dismissal based on state secrets grounds because plaintiffs would be unable to prove their claim that military weapons were defective without revealing state secrets about manufacturing of military weapons); Halkin v. Helms, 690 F.2d 977, 981, 1009 (D.C. Cir. 1982) (affirming dismissal of

involving state secrets if "the circumstances make clear that privileged information will be so central to the litigation that any attempt to proceed will threaten that information's disclosure."[15]

Our hypothetical lawsuit would be subject to a number of state secrets privilege objections. First, the government could claim, as it did in *El-Masri*, that litigating the case would reveal how the government "organizes, staffs, and supervises its most sensitive intelligence operations."[16] Second, the claim inevitably involves the question of what interrogation techniques were actually used and what techniques were authorized. These techniques are considered state secrets because their disclosure would allow enemies to prepare for them should they be captured.[17] Third, the location of the facility where the plaintiff was held is also a state secret. When the executive branch plausibly raises such claims, it is not uncommon for the court to dismiss the entire lawsuit.[18]

The reason the courts employ the remedy of dismissal is fairly straightforward. The state secrets privilege is meant to protect the fundamentally important interest in national security from impairment by disclosure of sensitive information.[19] The problem with the state secrets privilege, as it has been developed by judges, is that it frequently fails to consider or pay more than lip service to two competing interests. First, the way the courts have applied the state secrets privilege overlooks fundamental individual rights[20]—in the hypothetical case, the liberty interest to be free from unlawful detention and from abusive treatment. The famous formulation from *Marbury v. Madison*[21] states:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.
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> . . . .
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> The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.[22]

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case against CIA based on state secret grounds as well as justiciability and remedial concerns).

15. *El-Masri*, 479 F.3d at 308.

16. *Id.* at 309.

17. *Id.* (reinforcing notion that government cannot be required to divulge means and methods by which it gathers intelligence).

18. *See Kasza*, 133 F.3d at 1166 (quoting United States v. Reynolds, 345 U.S. 1, 11 n.26 (1952)) (recognizing when subject matter of action is state secret, court should dismiss plaintiff's claim solely on invocation of privilege); Weston v. Lockheed Missiles & Space Co., 881 F.2d 814, 816 (9th Cir. 1989) (observing that state secrets privilege alone can be basis for dismissal of claim).

19. *El-Masri*, 479 F.3d at 302.

20. *See, e.g., id.* at 300, 313 (upholding dismissal of claim for illegal detention on state secrets grounds).

21. 5 U.S. (1 Cranch) 137 (1803).

22. *Marbury*, 5 U.S. (1 Cranch) at 163.

As this language suggests, the denial of a remedy also strongly implicates rule of law values. If an individual such as I have hypothesized cannot maintain a lawsuit against the government or its officials, how can the executive branch be held accountable to the rule of law?[23]

This problem of governmental accountability leads us to the basic defect of the state secrets privilege as it has been judicially developed. The privilege does not balance the competing interests. In fact, this feature of the state secrets privilege is express. If the information that the executive branch wishes to withhold is covered, the privilege is considered to be absolute.[24] Unlike other governmental privileges, such as the presidential communications privilege, it is not qualified and subject to balancing against competing interests.[25]

Several factors exacerbate the absolute standard's potential for harmful consequences. First, the scope of information covered by the privilege has been given an extremely broad reading.[26] Overclassification of government information is a well-known problem.[27] Furthermore, the so-called mosaic theory extends coverage to a vast array of innocuous information. Mosaic theory holds that "hostile intelligence agencies can piece together puzzles from smaller bits of information."[28] While this theory is sound in some instances, it is easily abused and overapplied. The second problem of the absolute approach to the state secrets privilege is that it fails to appreciate the real potential for abuse. The *Reynolds* case itself is an example.[29] We now know that the information the

23. I do not mean to dismiss the possibility that the executive branch could adopt systems that would tend to promote adherence to law. *See, e.g.*, *Guidelines for the President's Legal Advisors*, 81 IND. L.J. 1345, 1349-54 (2006) (suggesting framework for preserving Office of Legal Counsel's ("OLC") traditional role of ensuring presidential accountability under rule of law); Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559, 1595-601 (2007) (analyzing principles to guide OLC in safeguarding against unlawful exercise of presidential power); Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 683 (2005) (positing that reforms should focus on supplying executive's constitutional approach with "firmer empirical footing, greater institutional and popular insight, and more vigilant scrutiny of constitutional risk areas").

24. *See, e.g.*, *El-Masri*, 479 F.3d at 306 (noting dismissal of cases in which state secrets are involved).

25. *Compare In re* Sealed Case, 121 F.3d 729, 744-45 (D.C. Cir. 1997) (stating presidential communications privilege is qualified and "can be overcome by an adequate showing of need"), *with* United States v. Reynolds, 345 U.S. 1, 11 (1952) (stating that even most compelling showing of necessity will not trump claim of privilege when military secrets are at stake).

26. *See, e.g.*, *Reynolds*, 345 U.S. at 10-12 (applying privilege in action involving fatal military plane crash); Sterling v. Tenet, 416 F.3d 338, 346-48 (4th Cir. 2005) (applying privilege to Title VII claim brought against director of CIA); Kasza v. Browner, 133 F.3d 1159, 1170 (9th Cir. 1998) (applying privilege in action alleging that Air Force unlawfully handled hazardous waste).

27. *See* Christopher M. Ford, *Intelligence Demands in a Democratic State: Congressional Intelligence Oversight*, 81 TUL. L. REV. 721, 769-71 (2007) (analyzing negative effects of overclassification, specifically lack of transparency, increase in expense, and difficulty identifying genuine secrets).

28. Christina E. Wells, CIA v. Sims*: Mosaic Theory and Government Attitude*, 58 ADMIN. L. REV. 845, 847 (2006).

29. *See Reynolds*, 345 U.S. at 10-12 (holding government entitled to withhold information in accident reports of fatal military plane crash under state secrets privilege).

government sought to withhold (accident reports of a fatal military plane crash) contained evidence of negligence but no state secrets at all.[30] More recently, we have been reminded of the potential for rampant, inadvertent abuse that secrecy creates by the report of the Inspector General on the Federal Bureau of Investigation's ("FBI") abuse of the national security letter authority.[31]

Finally, the absolute approach is in some tension with the most recent cases dealing with the scope of executive power in the context of the war on terror. For example, in *Hamdi v. Rumsfeld*,[32] the President asserted his role in safeguarding national security to support the program of designating enemy combatants and holding anyone so designated—including U.S. citizens—incommunicado and indefinitely, with no process or review beyond the initial designation.[33] The Supreme Court rejected the President's assertions of unreviewable authority[34] and instead subjected his claims to a balancing test.[35] Most remarkably, the balancing test that Justice O'Connor employed in her plurality opinion was the garden variety due process balancing test exemplified by *Mathews v. Eldridge*,[36] a case dealing with the denial of social security disability benefits.[37] Indeed, she explicitly balanced liberty concerns with her assessment of the weightiness of the national security concerns raised by the President.[38] In doing so, Justice O'Connor emphasized: "Nor is the weight on [the liberty] side of the *Mathews* scale offset by the circumstances of war or the accusation of treasonous behavior . . . ."[39] It is hard to square *Hamdi* with an approach to state secrets that absolutely privileges any information that has only a remote potential impact on national security.

That said, there is a common trait between the state secrets cases and *Hamdi*. In each of these instances, the courts are reticent to get deeply involved.[40] All of these cases express an appropriate preference for the issues to

30. *See* LOUIS FISHER, IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE *REYNOLDS* CASE 166-82 (2006) (discussing lack of state secrets in *Reynolds* case).

31. OFFICE OF THE INSPECTOR GEN., A REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION'S USE OF NATIONAL SECRET LETTERS 66-106 (1997).

32. 542 U.S. 507 (2004).

33. *Hamdi*, 542 U.S. at 510-11.

34. *Id.* at 516-17.

35. *Id.* at 532-35.

36. 424 U.S. 319 (1976). The *Mathews* test requires balancing the private interest of an individual affected by official government action against the asserted government interest. *Hamdi*, 542 U.S. at 528-29. The Court in *Hamdi* then appended a string of citations, listing an array of ordinary due process cases following the *Mathews* test, including: Heller v. Doe, 509 U.S. 312 (1993); Zinermon v. Burch, 494 U.S. 113 (1990); Schall v. Martin, 467 U.S. 253 (1984); Addington v. Texas, 441 U.S. 418 (1979).

37. *Hamdi*, 542 U.S. at 528-29; *see also Mathews*, 424 U.S. at 323 (describing issue as whether due process requires hearing prior to termination of disability benefit payments).

38. *Hamdi*, 542 U.S. at 532-35.

39. *Id.* at 530.

40. *See, e.g., id.* at 533-35 (holding that detained citizen may challenge his classification as enemy combatant, but proceeding may be tailored to eliminate potential to burden executive during time of war); United States v. Reynolds, 345 U.S. 1, 9-10 (1952) (recognizing that executive's ability to

be dealt with by politically accountable and institutionally more competent branches. In other words, the courts do not want to impose themselves where Congress has not provided guidelines. I regard this reticence as appropriate because, under our constitutional system, questions involving tradeoffs between security on the one hand and liberty and the rule of law on the other are fundamentally policy decisions to be made by accountable representatives through the deliberative process of bicameralism and presentment set forth in the Constitution. Beneath this process, of course, is a bedrock of constitutional law, and it is the Court's role to enforce constitutional protections, particularly where the political branches have failed to enact statutory protections.

II. CONGRESSIONAL POWER OVER STATE SECRETS

There is a prior question to deciding what a statutory reform of the state secrets privilege should look like, and it is the prior question that I wish to address: does Congress have the power to regulate the definition or treatment of state secrets? The Bush administration has taken a strong position against congressional authority.[41] The Justice Department briefs in the state secrets cases include a section on the nature of the state secrets privilege.[42] These briefs claim that the privilege derives from the President's constitutional authority as commander in chief and as "the sole organ" in foreign affairs.[43] This view could mean merely that the President has inherent authority to protect state secrets in the absence of legislation to the contrary. Understood this way, the claim strikes me as unobjectionable, especially given the statutory context of approval of the state secrets privilege. But the Justice Department cannot be plausibly understood as having such a modest meaning. Instead, it has told us in many memos—the torture memo and the memo on the National Security Agency's surveillance program, for example[44]—what it thinks inherent power means. It

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preserve state secrets cannot be placed entirely within discretion of courts); El-Masri v. United States, 479 F.3d 296, 312-13 (4th Cir. 2007), *cert. denied*, No. 06-1613, 2007 WL 1646914 (U.S. Oct. 9, 2007) (observing that court is barred from disregarding procedural restriction in order to act as check on executive).

41. Charlie Savage, *Bush Challenges Hundreds of Laws: President Cites Powers of His Office*, BOSTON GLOBE, Apr. 30, 2006, at A1, *available at* http://www.boston.com/news/nation/articles/2006/04/30/bush_challenges_hundreds_of_laws?mode=PF (describing President Bush's decisions to disregard laws he deems unconstitutional).

42. *See, e.g.*, Brief of Appellee at 8-14, El-Masri v. United States, 479 F.3d 296 (4th Cir. 2007) (No. 06-1667), 2006 WL 2726281 (describing nature of state secrets privilege favorable to executive branch).

43. *Id.* at 8 (quoting United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936)).

44. *See* Memorandum from Jay S. Bybee, Assistant Attorney Gen., to Alberto R. Gonzales, Counsel to the President, Office of Legal Counsel 36-39 (Aug. 1, 2002), http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf (discussing protection of interrogation tactics used on enemy combatants from attack under 18 U.S.C. §§ 2340-2340A in context of President's commander in chief powers); Dep't of Justice, Legal Authorities Supporting the Activities of the National Security Agency Described by the President 1 (Jan. 19, 2006), http://www.fas.org/irp/nsa/doj011906.pdf (suggesting President's inherent powers include ability to initiate "warrantless surveillance of enemy forces for intelligence purposes").

means what Justice Jackson called preclusive power, power that cannot be limited by Congress.[45] This approach is applied specifically to the matter of secrets in President Bush's signing statements. He has issued 170 objections to statutory provisions that would violate his constitutional power to withhold information the disclosure of which could harm national security.[46]

The Bush administration's view derives from its own version of the unitary executive theory. Traditionally, the unitary executive theory held that whatever authority was vested in the executive branch was subject to the supervision of the President.[47] This view followed from the nature of the executive power vested in the President by the first clause of Article II and from the Take Care Clause.[48] In order for the President to take care that the laws are being faithfully executed, the President must have the authority to supervise subordinate executive officials for the purpose of ensuring that they carry out their duties in compliance with the law. A classic example of the theory's application came during the Reagan administration. Congress had enacted a law requiring the Department of Health and Human Services ("HHS") to mail a pamphlet on HIV/AIDS to every household in the nation.[49] The White House repeatedly refused to clear the pamphlet that HHS drafted.[50] Eventually, Congress enacted a law setting forth the precise contents of the pamphlet and requiring HHS to send it without seeking the preclearance of the President.[51] The Office of Legal Counsel ("OLC") issued an opinion declaring that this law violated the President's role as head of the unitary executive branch by vesting executive power in an official who is not subject to the supervision of the President.[52] The President, according to the theory, must have the authority to review and determine whether the pamphlet that HHS produces actually fulfills the legal requirements set forth in the statute. The traditional unitary executive theory spoke to the President's position in the chain of command of the executive branch and not to the substance of the President's power in any area or to the division of power between Congress and the President, except as it relates to the President's

45. Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 637-38 (1952) (Jackson, J., concurring).

46. *See* NEIL KINKOPF & PETER SHANE, AM. CONSTITUTION SOC'Y, INDEX OF PRESIDENTIAL SIGNING STATEMENTS: 2001-2007 (2007), *available at* http://www.acslaw.org/node/5309 (cataloguing issuance of presidential signing statements).

47. *See* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 568-69 (1994) (noting unitary executive theory is strongly supported by Article II of Constitution).

48. U.S. CONST. art. II, § 1, cl. 1; *id.* art. II, § 3.

49. *See* Statute Limiting the President's Authority to Supervise the Director of the Centers for Disease Control in the Distribution of an AIDS Pamphlet, 12 Op. Off. Legal Counsel 47, 47 n.2 (1988) [hereinafter AIDS Pamphlet Advisory Opinion] (discussing legislative history concerning congressional act).

50. *See, e.g.*, *Study for Congress Criticizes Slow AIDS Education Effort*, N.Y. TIMES, Dec. 20, 1988, at A18 (reporting on Congress's frustration with executive branch inaction).

51. AIDS Pamphlet Advisory Opinion, *supra* note 49, at 47 n.2 (quoting 133 CONG. REC. S.14,112 (daily ed. Oct. 13, 1987)).

52. *Id.* at 47.

supervisory role.[53] The Supreme Court rejected the unitary executive view in *Morrison v. Olson*,[54] when it upheld the insulation of the independent counsel—whom all parties conceded was a purely executive officer—from the supervision and control of the President.[55]

The Bush administration's version of the unitary executive theory is distinct from the traditional version.[56] The new version of the unitary executive theory involves not simply the chain of command within the executive branch but also severely limits the power of Congress to make laws that govern the way in which the executive branch carries out its duties and authorities.[57] A recent OLC opinion illustrates the difference. Congress frequently imposes "reporting requirements" on executive branch officials.[58] These requirements obligate the executive branch to report to Congress on a wide variety of issues. Congress has also enacted legislation to provide whistleblower protection to federal employees who provide information to Congress.[59] On the traditional view of the unitary executive, this statutory scheme would be unconstitutional if it were to preclude the President from supervising the information provided by the executive branch, because the President's Take Care Clause duty requires that he ensure the information being provided is accurate and in conformity with statutory requirements. That, however, is not the rationale of the recent OLC opinion. The OLC was asked whether the President could prohibit an executive branch official from providing accurate cost information to Congress.[60] (The specific context was the cost estimate of the prescription drug benefit that the President had proposed. We now know that the estimates the President provided to Congress were extremely understated and that the accurate estimates were deliberately withheld from Congress in order to secure the legislation's

53. *See, e.g.*, Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1167-68 (1992) (noting unitary executive theory's acceptance of congressional power to structure executive department and President's exclusive power to control executive department).

54. 487 U.S. 654 (1988).

55. *Morrison*, 487 U.S. at 659-60; *see also* Neil Kinkopf, *Furious George*, LEGAL AFF., Sept.–Oct. 2005, at 28, 28-31 (criticizing Barr and torture memos and discussing history and policy behind Bush-endorsed exclusivity view on separation of powers issues).

56. *See* Neal Kumar Katyal, Hamdan v. Rumsfeld*: The Legal Academy Goes to Practice*, 120 HARV. L. REV. 65, 70 (2006) (describing Bush administration's version of unitary executive theory as "revolutionary").

57. *See generally* Common Legislative Encroachments on Executive Branch Authority, 13 Op. Off. Legal Counsel 248, 248 (1989) (providing overview of congressional "attempts to intrude into the functions and responsibilities assigned by the Constitution to the executive branch").

58. Past administrations have issued policy-based objections to some particularly intrusive reporting requirements. *See id.* at 254-55 (opposing Congress's concurrent reporting requirements related specifically to budget recommendations and legislative proposals because they prevent President from exercising his constitutional right of supervision and control over executive branch).

59. *See, e.g.*, 5 U.S.C. § 7211 (2000) (protecting federal employee whistleblowers).

60. Authority of Agency Officials to Prohibit Employees from Providing Information to Congress, Op. Off. Legal Counsel (May 21, 2004), http://www.usdoj.gov/olc/crsmemoresponsese.htm [hereinafter Agency Official Opinion].

passage.[61]) The OLC responded that the statutes could not constitutionally prevent the President from forbidding an executive branch employee from providing information to Congress.[62] Whereas the traditional unitary executive theory was based on the President's duty to see that the laws enacted by Congress are complied with, advocates of the new version of that theory hold that "we do not believe that the statutes . . . could constitutionally be applied . . . to the circumstance where a government official instructs a subordinate government employee not to provide an Administration's cost estimates to Congress, whether or not the estimates are viewed as privileged."[63] This new version of the unitary executive theory applies beyond ensuring that subordinate employees follow the law to cover situations where the President may actually instruct federal employees to ignore statutory law. Given the Supreme Court's ruling in *Morrison*, even the more modest traditional version of the unitary executive theory is dubious.[64] There is quite simply no support whatsoever for the new version of the unitary executive theory.

If the unitary executive model is not the correct way of looking at separation of powers issues, what is? The best model, especially for situations involving the state secrets privilege's protection of information about military and foreign affairs, is the approach set forth in Justice Jackson's concurring opinion in *Youngstown Sheet & Tube v. Sawyer (Steel Seizure)*.[65] Justice Jackson's classic exposition of the structure of government power emphasizes that the Constitution does not neatly divide power among the branches, but rather the powers of the President and Congress are largely overlapping.[66] Thus, it may be that the President has some sort of inherent power to act in a particular way. This inherent power, however, does not mean that Congress has no power to legislate in the same area, and if Congress has the power to legislate in the area, then the President is duty bound to follow the law that Congress has validly enacted. Indeed, the case that the Bush administration quotes as the canonical statement of the President's authority to withhold information regarding national security without limit even by Congress—*Department of Navy v. Egan*[67]—actually conforms perfectly to the Jackson approach and recognizes congressional power to act in this area.

> The President, after all, is the "Commander in Chief of the Army and Navy of the United States." His authority to classify and control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position in the Executive Branch that will give that person access to such

61. *See, e.g.*, Robert Pear, *Drug Cost Estimate Is Raised*, N.Y. TIMES, Mar. 5, 2005, at A14 (discussing increases to estimates of Medicare spending by White House and budget office).

62. Agency Official Opinion, *supra* note 60.

63. *Id.* § I. OLC made this claim even though each precedent it cited dealt specifically with either classified or privileged information.

64. See *supra* text accompanying notes 54-55 for a discussion of *Morrison*.

65. 343 U.S. 579, 634-55 (1952) (Jackson, J., concurring).

66. *Id.*

67. 484 U.S. 518 (1988).

> information flows primarily from this constitutional investment of power in the President and exists quite apart from any explicit congressional grant.[68]

This frequently quoted passage asserts nothing more than that the President has inherent constitutional authority to classify national security information. Because the authority "exists quite apart from any explicit congressional grant,"[69] the President may act if Congress has been silent. The President's authority to act does not, as an initial matter, depend on Congress. Nevertheless, this says nothing about presidential power to act contrary to statute. Nor does it mean that Congress has no overlapping authority in the area. Just three pages later, the Court recognizes Congress's power: "Thus, *unless Congress specifically has provided otherwise*, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs."[70]

In fact, Congress has ample authority to regulate the classification of national security information. It is vested with vast authority relating to war and to foreign relations.[71] Moreover, Congress creates the agencies of the executive branch, creates the offices within those agencies, and defines and limits the authorities and duties of those agencies and officers.[72] Finally, Congress has the power to enact legislation that is necessary and proper to effectuating all federal power, including the President's powers.[73] These powers provide a strong basis for Congress to respond to the growing problems raised by the state secrets privilege. While Congress may not intrude into areas of exclusive presidential power, such areas are—as Justice Jackson emphasized—rare and narrow. Thus, Congress is sufficiently empowered to enact reasonable limitations on the state secrets privilege.

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68. *Egan*, 484 U.S. at 527 (citation omitted).

69. *Id.*

70. *Id.* at 530 (emphasis added).

71. The list includes the power to declare war, to make rules for government of the military, to define and punish offenses against the law of nations, to provide and support the military, to regulate international commerce, etc. *See, e.g.*, U.S. CONST. art. I, § 8, cl. 3 (according Congress power to regulate international commerce); *id.* art. I, § 8, cl. 10 (according Congress power to define and punish offenses against law of nations); *id.* art. I, § 8, cl. 11 (according Congress power to declare war); *id.* art. I, § 8, cl. 12 (according Congress power to raise and support military); *id.* art. I, § 8, cls. 11-14 (according Congress power to make rules for government of military).

72. *See, e.g.*, HAROLD C. RELYEA, CONG. RESEARCH SERV., CRS REPORT FOR CONGRESS, EXECUTIVE BRANCH REORGANIZATION AND MANAGEMENT INITIATIVES: A BRIEF OVERVIEW 3 (2007), *available at* http://www.fas.org/sgp/crs/misc/RL33441.pdf (providing background of executive branch organization procedure).

73. U.S. CONST. art. I, § 8, cl. 18.