

By David L. Applegate

State Secrets Privilege in the United States

The Price of

Security

The United States currently has no “State Secrets Act,” but rather only a “state secrets privilege,” a “common law evidentiary rule that allows the government to withhold information from discovery when disclosure would be inimical to national security.” *Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544, 546 (2d Cir. 1991). Under the state secrets privilege, the United States may prevent the disclosure of information in a judicial proceeding if “there is a reasonable danger” that such disclosure “will expose military matters which, in the interest of national security, should not be divulged.” *United States v. Reynolds*, 345 U.S. 1, 10 (1953). As a practical matter, that often ends the case.

THE STATE SECRETS PRIVILEGE DERIVES SUPPORT BOTH from the President’s powers as Commander-in-Chief, see *United States v. Nixon*, 418 U.S. 683 (1974), and from the idea of separation of powers, see *United States v. Reynolds*, 345 U.S. 1 (1953). It has its roots in Aaron Burr’s 1807 trial for treason, in which the government alleged that a letter from General Wilkinson to President Thomas Jefferson might contain state secrets and could therefore not be divulged without risk to national security. See I Simon Greenleaf & John Henry Wigmore, *A Treatise on the Law of Evidence* § 251 n.5 (16th ed. 1899); *United States v. Burr*, 25 F. Cas. 30, 37 (No. 14,692D) (Marshall, Circuit Justice, C.C.D. Va. 1807) (observing that, in appropriate circumstances, the government may refuse to disclose confidential state matters in judicial proceedings).

Despite such early origins, the seminal state secrets privilege case did not arise until after World War II. In *United States v. Reynolds*, 345 U.S. 1 (1953), the widows of three crew members of a B-29 Superfortress bomber that had crashed in 1948 sought accident reports on the crash but were told that the release of details would threaten national security by revealing the bomber’s top-secret mission. On separation of powers grounds, the U. S. Supreme Court ruled that the Executive Branch could bar evidence that it deemed a threat to national security, although later release of the evidence suggests that the government may simply have been trying to avoid embarrassment. (The accident reports in question were declassified and released in 1996; they appeared to contain no secret information but did disclose damaging information about the poor condition of the aircraft itself.)

The best exposition of the history and application of the privilege since that time is probably found in *El Masri v. United States*, 479 F.3d 296 (4th Cir. 2007). There, a German citizen of Lebanese descent had initially sued CIA Director George Tenet and others for allegedly detaining, interrogating, and mistreating him over the course of six months in Afghanistan after he had been originally arrested and detained in Macedonia. After citing the doctrine’s origins in the Aaron Burr trial, *El Masri* cited the *Reynolds* Court’s review of “a long line” of American and English decisions that had “recognized and refined a privilege for state secrets,” including *Totten v. United States*, 92 U.S. 105, 107 (1875). 479 F.3d at 303. In *Totten*, the Supreme Court had

affirmed dismissal of an action for breach of a secret espionage contract on the grounds 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.” *Totten* at 92 U.S. 105, 107, 23 L.Ed. 605 (1875).

Although the state secrets privilege developed at common law, *El Masri* noted, “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.” 479 F.3d at 303, citing *Reynolds*, 345 U.S. at 6. In *United States v. Nixon*, 418 U.S. 683, 710 (1974), *El Masri* continued, the Court had further articulated the doctrine’s constitutional dimension, “observing that the state secrets privilege provides exceptionally strong protection because it concerns ‘areas of Art. II duties [in which] the courts have traditionally shown the utmost deference to Presidential responsibilities.’” *Id.* As a result, *El Masri* found, the privilege, like the Executive’s constitutional authority, is broadest in the realm of military and foreign affairs. *Id.*

Application of the Privilege

With respect to an executive branch assertion of the state secrets privilege, *El Masri* enunciates two guiding principles: (1) military, diplomatic, or intelligence matters that in the interests of national security should not be divulged are privileged; (2) if a proceeding necessarily threatens disclosure of such information, the proceeding must be dismissed:

“First, evidence is privileged pursuant to the state secrets doctrine if, under all the circumstances of the case, there is a reasonable danger that its disclosure will expose military (or diplomatic or intelligence) matters which, in the interest of national security, should not be divulged. See *Reynolds*, 345 U.S. at 10, 73 S. Ct. 528. Second, a proceeding in which the state secrets privilege is successfully interposed must be dismissed 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. See *Sterling*, 416 F.3d at 348; see also *Reynolds*, 345 U.S. at 11 n.26, 73 S. Ct. 528; *Totten*, 92 U.S. at 107.

El Masri, 479 F.3d at 307-08.

