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on

H.R. 5607, the "State Secrets Protection Act of 2008"

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Chairman Nadler, Representative Franks, and Members of the Subcommittee: Thank you for inviting me to testify today concerning the state secrets privilege and H.R. 5607, the "State Secrets Protection Act of 2008." My fellow panelists have testified with great knowledge and insight concerning the history of the state secrets privilege, recent applications of it, and the need for statutory reform. I will seek to avoid retreading the same ground as my colleagues and instead devote my remarks to the issues of government secrecy in general and how judicial oversight should be crafted to preserve the Executive Branch's discretion and authority in national security matters while advancing the significant interests in government openness and accountability.

I start from two bedrock principles, both of which may be considered truisms, but which also happen to lie in great tension with each other. First, secrecy in government can be absolutely necessary to the protection of our national security. This is especially so today, when secret intelligence sources and methods are vital to our ability to learn about, penetrate and disrupt terrorist groups and other non-state actors that, because of their access to advanced technology and weapons of mass destruction, pose grave threats to our security. Many sources and methods of gathering intelligence on such groups, as

well as on nations that would do us harm now or in the future, must remain secret if they are to remain effective. Similarly, the details of advanced weapons systems must be remain secret if we are to maintain our battlefield advantage over our present and potential adversaries. And our ability to work effectively with other nations, and to engage in sensitive negotiations with friendly or hostile governments, often requires that the details of diplomacy not be revealed publicly.

At the same time, the second principle is equally true, and no less important: secrecy in government is antithetical to democratic governance. Too much secrecy shields officials from oversight and inevitably breeds abuse and misconduct; it thus can fatally weaken the system of checks and balances that defines our system of government. At rock bottom, government "by the people" becomes impossible if the people do not know what their government is doing.

Add to these two principles a corollary derived less from theory than from observation: there are "secrets," and then there are *secrets*. What I mean by this is that just because a government official calls something "secret" does not mean that its disclosure would actually cause harm to our national security. Too often, information deemed classified by the Executive Branch merely echoes what was in last week's newspapers, or in yesterday's blogs. At other times, information the Executive Branch deems "Top Secret" one day—information that, if disclosed, "reasonably could be expected to cause exceptionally grave damage to the national security"[1]—is leaked by a senior government official the next day, or is declassified for a political purpose. These situations—which occur again and again, across Administrations—tend to undermine

[1] Executive Order 12958, § 1.2(a)(1) (April 17, 1995), as amended by Executive Order 13292 (March 25, 2003).

sweeping, absolutist claims for secrecy, and for unilateral Executive prerogatives to define and determine what remains "secret."

The fundamental question, then, is how to balance these competing principles. In considering this question, it is helpful to recall one of the central insights of the so-called Moynihan Commission (formally known as the Commission on Protecting and Reducing Government Secrecy) just over a decade ago. In his Chairman's Forward to the Commission's Report, Senator Patrick Moynihan, citing Max Weber, observed that

> secrecy is a mode of regulation. In truth, it is the ultimate mode, for the citizen does not even know that he or she is being regulated. Normal regulation concerns how citizens must behave, and so regulations are widely promulgated. Secrecy, by contrast, concerns what citizens may know; and the citizen is not told what may not be known.

Given the lack of transparency of this "regulatory" process of government secrecy, the modern administrative state tends to overregulate, rather than underregulate, information. This tendency is exacerbated by the fact that, in bureaucracies, information is power. Secrecy serves to tighten the bureaucrat's grip on power, and that grip is not easy to dislodge. As Weber, again quoted by the Moynihan Commission, wrote:

> The pure interest of the bureaucracy in power…is efficacious far beyond those areas where purely functional interests make for secrecy. The concept of the "official secret" is the specific invention of bureaucracy, and nothing is so fanatically defended by the bureaucracy as this attitude, which cannot be substantially justified beyond these specifically qualified areas.…Bureaucracy naturally welcomes a poorly informed and hence a powerless parliament—at least in so far as ignorance somehow agrees with the bureaucracy's interests.[2]

[2] Max Weber, *Essays in Sociology*, trans. and ed. H.H. Gerth and C. Wright Mills (New York: Oxford University Press, 1946), 233-34 (quoted in Report of the Commission on Protecting and Reducing Government Secrecy, Appendix A.3.).

Substitute "Congress" – as well as "courts" – for "parliament," and Weber's assessment is no less true in Washington, D.C., today than in Europe a century ago.

As with other forms of regulation, Executive Branch secrecy can and should be subject to legislative and judicial oversight. This is, of course, not an entirely new idea. Congress has seen fit—in legislation such as the Classified Information Procedures Act,[3] the Foreign Intelligence Surveillance Act,[4] and the Freedom of Information Act[5]—to make rules governing the protection and disclosure of national security-related information. What has been lacking is a legislative prescription as to how courts should assess Executive Branch assertions of the state secrets privilege in civil litigation, leading to confusion in the courts about the standards to apply, the procedures to use, and the deference to accord Executive Branch claims.

H.R. 5607 represents a much needed and commendable step toward the necessary legislative role in setting the ground rules for the state secrets privilege. In particular, it recognizes the need to balance and reconcile, where possible, the sometimes competing interests of justice and openness, on the one hand, and national security, on the other, through several procedural mechanisms.

Most notable is the bill's requirement that a court review all evidence that the government asserts is protected from disclosure by the privilege (or at least a sampling thereof if review of voluminous evidence is not feasible). This

[3] 18 U.S.C. App. 3.
[4] 50 U.S.C. § 1801 et seq.
[5] 5 U.S.C. § 552 et seq.

represents a departure from the approach established by the Supreme Court in *Reynolds v. United States*,[6] which specifically declined to require such review:

> [W]e 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. It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and 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.[7]

This requirement in the bill seems necessary to ensure that courts do not assess state secrets claims in a vacuum, without fully understanding the nature of the information at issue, the government's reason for wanting to keep it secret, or even whether the secret information is really at issue in the material to which a civil litigant might be seeking access. Requiring judicial consideration of the evidence will improve government accountability, promote justice for individuals who might be harmed by government misconduct or by private parties, and enhance our system of checks and balances. At the same time, the procedural mechanisms afforded by the bill—such as *in camera* hearings, attorneys and special masters with security clearances, the sealing of records, and expedited interlocutory appeals—help ensure that such judicial consideration itself will not pose a threat to security.

One provision in the bill, however, does raise a significant concern about potential infringement on Executive Branch prerogatives and judicial

[6] 345 U.S. 1 (1953).
[7] *Id.* at 10.

overreaching. The standard for judicial review set forth in subsection 6(c) of the bill states not only that "the court shall make an independent assessment of whether the harm identified by the Government…is reasonably likely to occur should the privilege not be upheld," but also that "[t]he court shall weigh testimony from Government experts in the same manner as it does, and along with, any other expert testimony." This subsection could be read as directing courts to give no deference whatsoever to a senior Executive official's judgment about how revelation of certain information would harm our national defense or diplomatic relations, but simply to weigh that judgment "in the same manner" as judgments offered by "any other expert." Given the President's constitutional responsibilities under Article II as Commander-in-Chief of the armed forces and the organ of the government in foreign affairs, and the Executive Branch's superior expertise in such matters, courts should be required to give some deference to the Executive Branch's determination that disclosure would be "reasonably likely to cause significant harm to the national defense or the diplomatic relations of the United States."

The mere fact of judicial review of the evidence in dispute should serve to check unreasonable, arbitrary or abusive assertions of the privilege. Courts can also insist that the government provide a *specific* explanation, in writing, of how disclosure would likely cause significant harm to the national defense or diplomatic relations. The government would thus be precluded from relying on its mere "say so" to exclude critical evidence from a case. Courts can also scrutinize carefully – and independently – whether the information that the

government claims is privileged is truly a necessary part of the case. They can also make independent judgments about what effect a valid assertion of the privilege should have on the conduct or outcome of the case. But if courts go further and accord no deference at all to Executive officials' judgments about national security, and regard them as no different from any other expert witness's judgments, it would pay short shrift to the President's constitutional responsibilities and Executive officials' greater expertise in defense and diplomatic relations.

It may be argued that courts will in fact show deference to government assertions of harm regardless of what the statute says about the standard of review. But if the statute does not clearly specify what level of deference should be accorded, then Congress will have simply replicated one of the problems we have today, with different judges applying different degrees of deference. It would be far better for Congress to state clearly what level of deference should be accorded to government claims of harm *and* what conditions the Executive Branch must meet in order to warrant such deference.

It bears emphasizing that deference does not mean that courts must simply accept the government's assertions about harm to national security at face value. Courts can and should evaluate such assertions in light of the evidence, other witnesses' testimony, and common sense. And, as stated earlier, they should insist on specific explanations about the harm. But if the government explains, for example, how revelation of the details of a sensitive negotiation with a foreign official would damage our diplomatic relations, or how revelation of a specific

signals intelligence method would harm our national defense, the court should be required at least to accord that judgment substantial weight if it is reasonable in light of the evidence presented.

In sum, H.R. 5607 is a commendable effort to provide needed guidance to courts on how to assess Executive Branch assertions of the state secrets privilege, and provides valuable mechanisms for balancing and reconciling the sometimes conflicting interests of justice and transparency in government, on the one hand, and protection of national security information, on the other.