U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

February 26, 2008

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

The Department of Justice (DOJ) has reviewed S. 2449, the "Sunshine in Litigation Act of 2007." As a threshold matter, the Department does not believe that legislation of this kind is necessary. District court judges and magistrate judges routinely handle requests for the entry of protective orders, and the Department is not aware of any serious or widespread problem in the exercise of the district courts' authority to apply Rule 26(c) or maintain oversight of protective orders. Confidentiality issues are necessarily case-specific, and the individual judge assigned to the case is best suited to determine the propriety of maintaining the confidentiality of information disclosed by or to the parties, the conditions of nondisclosure, and the duration of any such protections. Moreover, the bill is inconsistent with recent amendments to the Federal Rules of Civil Procedure for protecting privileged information during electronic discovery.

We have the following concerns with S. 2449, in its current form:

General Comments

1. S. 2449 does not recognize important traditional uses of protective orders and agreements such as for protecting settlement negotiation exchanges, trade secrets, sensitive and classified information concerning national security, and privileged material including material subject to the attorney-client, law enforcement and deliberative process privileges. See Rule 26(c) of Federal Rules of Civil Procedure ("good cause" provision for issuing protective orders); Pansy v. Borough of Stroudsburg, 23 F.3d 772 (3rd Cir. 1994) (adopting "good cause" requirement for issuing confidentiality orders); see also, testimony on Deputy Assistant Attorney General Carl J. Nichols, Senate Judiciary Committee, 13 February 2008 (concerning the use of protective orders in State Secrets cases). The bill would adversely affect DOJ's ability to resolve its cases as they commonly involve protection of public health or safety and some use protective or confidentiality orders for encouraging settlement negotiation exchanges and/or protecting trade secrets or national security. Rather than painting with a broad brush, Congress could amend its statutory language for existing federal causes of action to address any particular concerns in a more targeted fashion.

2. S. 2449 would displace the Federal Civil Rules of Procedure without amending them or undergoing the extensive legal review of the normal rules enabling process. By greatly limiting protective orders and agreements, the bill is out-of-sync with the 2006 electronic discovery amendments to the Federal Civil Rules of Procedure and proposed Rule 502 of Federal Rules of Evidence (see S. 2450). All these recent rule changes and proposals explicitly encourage confidentiality agreements and orders to guard against the real risks of inadvertent disclosure of privileged information during discovery in the computer age.

3. As currently drafted, section 2 of the bill would prohibit a court from entering a protective order for information obtained in civil discovery, unless the court found that the order would not restrict disclosure of "information relevant to the protection of public safety or health." Alternatively, the court could enter a protective order if it found that the public interest in disclosure of potential health and safety hazards is clearly outweighed by a specific and substantial interest in maintaining confidentiality and that the order is "no broader than necessary to protect the privacy interest asserted." In keeping with comments we raised when Congress debated similar legislation in the mid-1990s, we recommend amending this second "exception," so that it would explicitly recognize interests in protecting "privacy, *property, or other interests*."

Although we do not think the bill is unconstitutional, it could invite potential takings claims. The Supreme Court in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1002-04 (1984), recognized trade secrets as a species of property protected by the Fifth Amendment's Taking Clause. U.S. Const. amend. V. Because disclosure of vital business information or a trade secret may in some circumstances lead to a competitive disadvantage, litigants may claim that the disclosures contemplated by section 2 amount to court-approved takings of property for public use. *See* Note, *Trade Secrets in Discovery: From First Amendment Disclosure to Fifth Amendment Protection*, 104 Harv. L. Rev. 1330, 1336 (1991) (arguing that courts are widely considered state actors for purposes of constitutional analysis and that the Supreme Court has held that the taking clause prohibited the Illinois judiciary from awarding one dollar as compensation for a right that was clearly worth more, *Chicago, B. & Q.R.R. v. City of Chicago*, 166 U.S. 226, 233-35 (1897)), cited in Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 Harv. L. Rev. 427, 468 n.205 (1991); *Monsanto*, 467 at 1014-16 (conceivable public character constitutes public use; Congress determines mechanism). Accordingly, to guard against possible litigation risks, we suggest amending section 2 of the bill to make clear that courts may grant protective orders to protect proprietary interests.

4. A primary concern is that this bill calls for the district court to make specific factual findings both prior to entering a protective order and prior to continuing the protective order post-litigation. It thus infringes on judicial discretion and raises the likelihood of backlog and delay because of additional procedural requirements, without being based upon any finding that the courts are abusing their discretion to enter protective orders under the current system. Such

court management issues are preferably handled through the Federal Rules revisions process, rather than through legislation.

5. The bill provides that a confidentiality agreement cannot restrict disclosure of information to a Federal or state agency with law enforcement authority. There may be situations in which a Federal agency enters into such an agreement and legitimately may wish to preclude access to the information by a state agency. (However as a general rule, we typically include language in our confidentiality agreements that we have the right to share information with state or federal law enforcement authorities.)

6. The terms "public health or safety" and "potential health or safety hazards" used throughout the bill are not defined, which could lead to substantial uncertainty and litigation over the scope of the bill. Moreover, the two terms seem to be used interchangeably. If the same meaning is intended, then the same language should be used. If not, the difference in meanings should be explained in the bill.

7. Agencies of the Federal Government which are involved in civil litigation currently request "Privacy Act protective orders" on a regular basis to allow the agency to disclose in discovery information which is protected from disclosure under the Privacy Act.

In a 1992 views letter on an earlier version of S.2449, DOJ raised many of the above concerns and urged that the Government be excepted from the bill if it goes forward. This approach would be an improvement, particularly since the Government is already subject to the Freedom of Information Act and its settlements are generally public. However, there would still remain a risk of a compensable taking by the government such as for forced disclosure of a trade secret in private litigation (e.g., bill section 1660(a)(5)(A)). We note that a "Sunshine in Litigation" statute passed by the Florida legislature has a partial exemption for trade secrets. See section 69.081(5), F.S. (exemption for "trade secrets ... which are not pertinent to public hazards").

Technical Comments

1. Section 1660(a)(2) - These prohibitions would apply to all protective orders in all cases. As a result, courts in every case may be required to conduct a potentially time-consuming in camera review on all such requested orders, notwithstanding agreement by the parties. The requirement would add to the burden, length and time demands of litigation.

It is also unclear if this provision (and others in the bill) are intended to allow non-parties to argue that they have standing to intervene and challenge rulings. This could easily lead to increased litigation by potential intervenors over matters that are peripheral to the central dispute between the parties.

2. Section 1660(a)(2) - This provision on automatic termination of a protective order at the end of a case is confusing and would disrupt settled expectations of the conduct of cases including appeals. The finding to support continuation of the protective order would have to be included as a part of a final judgment or a post-judgment ruling. It would be unclear whether the protective order would remain in effect pending a request for a post-judgment ruling or appeal.

3. Section 1660(a)(5)(A) - see discussion above about takings risk of forced release of trade secret information.

4. Section 1660(a)(5)(B) - This provision barring a party from requesting a stipulated order would put a party in an impossible situation. A party would not know in advance whether its requested order would "violate this section," since the section allows the court to rule whether to issue the order. Would a ruling not to issue the order mean that the attorney is retroactively in violation of this bar? The attorney would have a Hobson's choice: request a stipulated order and risk someone arguing that the order is barred, or not request the order and risk violating ethical obligations to zealously represent the client.

5. Section 1660(c) -- The provision would seem to rewrite the law of contracts, which is a body of state law that usually allows parties to choose the terms of contract. Here, federal law would in effect require that at least certain forms of contracts - settlement agreements - be public. A party would not know whether a court would later find a confidentiality provision enforceable by a court after balancing under section 1660(c)(2). If the contract or settlement agreement did not allow for severability of the confidentiality provision, then the contract or agreement as a whole could be void or voidable. Moreover, for a party with trade secrets, presumably the party would later have to prove its basis for those trade secrets. It would be hard for such a party to plan whether the federal courts would be available to protect trade secrets. Finally, the definition of a "settlement agreement" is not clear, particularly as persons may settle potential claims as part of broader contract negotiations (not tied to any particular case). For all these reasons, federal courts might be seen as unavailable to resolve disputes.

6. Section 1660(c)(1)(A) - It is unclear whether the scope of this provision is limited to "matters related to public health or safety" (see 1660(c)(1)(B))?

7. Section 3 of S. 2449 states that the Act applies "only to orders entered in civil actions or agreements entered into on or after such date." Does this mean that the Act applies to all settlement agreements in all civil cases, even those not filed and entered in a court case? This seems somewhat inconsistent with section 1660(c)(1) which talks of cases between parties approved or enforced by a court.

Thank you for the consideration of our views. If we can be of further assistance on this legislation, please do not hesitate to contact this office. The Office of Management and Budget

has advised us that there is no objection to this letter from the perspective of the Administration's program.

Sincerely,

Brian A. Benczkowski
Principal Deputy Assistant Attorney General

Attachment

cc: The Honorable Arlen Specter
Ranking Member

The Honorable Jeff Sessions

Department of Justice

STATEMENT

OF

CARL J. NICHOLS
DEPUTY ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION
DEPARTMENT OF JUSTICE

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

"EXAMINING THE STATE SECRETS PRIVILEGE:
PROTECTING NATIONAL SECURITY WHILE PRESERVING ACCOUNTABILITY"

PRESENTED ON
FEBRUARY 13, 2008

Statement of
Carl J. Nichols
Deputy Assistant Attorney General
Civil Division
Department of Justice

Before the
Committee on the Judiciary
United States Senate

Concerning
"Examining the State Secrets Privilege:
Protecting National Security While Preserving Accountability "

February 13, 2008

Chairman Leahy, Ranking Member Specter, Members of the Committee, thank you for the opportunity to appear before you to address the important subject of today's hearing, the state secrets privilege. Since March 2005, I have served as a Deputy Assistant Attorney General in the Civil Division in the Department of Justice. In that capacity I both have been involved in the decisionmaking process regarding whether and when the Executive Branch will assert the state secrets privilege in civil litigation, and have gained an appreciation for the important role that the privilege plays in preventing the disclosure of national security information.

I would like to address two separate but related points in my testimony.

First, the state secrets privilege serves a vital function by ensuring that private litigants cannot use litigation to force the disclosure of information that, if made public, would directly harm the national security of the United States. The privilege has a longstanding history and has been invoked, during periods of both conflict and peace, to protect such information. But the role of the state secrets privilege is particularly important when, as now, our Nation is engaged in a conflict with a terrorist enemy in which intelligence is absolutely vital to protecting the

homeland. The privilege is thus firmly rooted in the constitutional authorities and obligations assigned to the President under Article II to protect the national security of the United States.

Second, accountability is preserved by a number of procedural and substantive requirements that must be satisfied before a court may accept an assertion of the state secrets privilege. These protections ensure that the privilege is asserted by the Executive Branch, and accepted by the courts, only in the most appropriate cases.

I. The State Secrets Privilege Plays a Critical Role in Preventing the Disclosure of National Security Information.

Any discussion of the state secrets privilege must begin with the vital role it plays in protecting the national security. The state secrets privilege permits the United States to ensure that civil litigation does not result in the disclosure of information related to the national security that, if made public, would cause serious harm to the United States. As the Supreme Court held in *United States v. Reynolds*, 345 U.S. 1, 10 (1953), such information should be protected from disclosure when there is a "danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged." The Supreme Court recognized the imperative of protecting such information when it further held that even where a litigant has a strong need for that information, the privilege is absolute: "Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but *even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake.*" *Id.* (emphasis added). As the Court of Appeals for the Fifth Circuit has noted, the "greater public good – ultimately the less harsh remedy – " is to protect the information from disclosure, even where the result might be dismissal of the lawsuit. *Bareford v. General Dynamics Corp.*, 973 F.2d 1138, 1144 (5th Cir. 1992).

The state secrets privilege thus plays a critical role, even in peacetime. But the privilege is particularly important during times, such as the present, when our Nation is engaged in a conflict with an enemy that seeks to attack the homeland. We remain locked in a struggle with al Qaeda, a terrorist enemy that does not acknowledge or comply with basic norms of warfare; that seeks to operate by stealth and secrecy, using the openness of our society against us; and that intends to inflict indiscriminate, mass casualties in the civilian population of the United States. In these circumstances, litigation may risk disclosing to al Qaeda or other adversaries details regarding our intelligence capabilities and operations, our sources and methods of foreign intelligence gathering, and other important and sensitive activities that we are presently undertaking in our conflict. The state secrets privilege ensures that critical national security efforts are not weakened or endangered through the forced disclosure of highly sensitive information.

The state secrets privilege is rooted in the constitutional authorities and obligations assigned to the President under Article II as Commander in Chief and representative of the Nation in the realm of foreign affairs. It is well established that the President is constitutionally charged with protecting information relating to the national security. As the Supreme Court has stated, "[t]he authority to protect such information falls on the President as head of the Executive Branch and as Commander in Chief." *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988).

The state secrets privilege is not, therefore, a mere "common law" privilege. Instead, as the courts have long recognized, the privilege has a firm foundation in the Constitution. Any doubt that the privilege is rooted in the Constitution was dispelled in *United States v. Nixon*, 418

U.S. 683 (1974), in which the Supreme Court explained that, to the extent a claim of privilege "relates to the effective discharge of the President's powers, it is constitutionally based." *Id.* at 711. The Court then went on to expressly recognize that a "claim of privilege on the ground that [information constitutes] military or diplomatic secrets" – that is, the state secrets privilege – necessarily involves "areas of Art. II duties" assigned to the President. *Id.* at 710. The lower courts have reaffirmed this conclusion. *See, e.g., El-Masri v. United States*, 479 F.3d 296, 303-04 (4th Cir.), *cert. denied*, 128 S.Ct. 373 (2007) (holding that the state secrets privilege "has a firm foundation in the Constitution"). As the D.C. Circuit has noted, the state secrets privilege "must head the list" of "the various privileges recognized in our courts." *Halkin v. Helms*, 598 F. 2d 1, 7 (D.C. Cir. 1978).

Before I turn to the second subject of my testimony, I would like to take an opportunity to discuss an issue arising out of *Reynolds* itself. Some have claimed that a review of declassified information in *Reynolds* demonstrates that the United States' assertion of the state secrets privilege in that case was somehow improper. Not only is that claim incorrect, but it has been rejected by two federal courts. In *Herring v. United States*, 2004 WL 2040272 (E.D. Pa. 2004), living heirs to those killed in the air crash at issue in *Reynolds* filed suit to set aside a settlement agreement, alleging that the United States' state secrets privilege assertion in *Reynolds* was fraudulent. After again reviewing the matter in 2004, Judge Davis held that the Air Force had not "misrepresent[ed] the truth or commit[ted] a fraud on the court" in *Reynolds*. *See Herring*, 2004 WL 2040272, at *5; *see also id.* at *6. Judge Davis reached this conclusion after analyzing precisely why disclosure of the information contained in an accident report of the crash would have caused harm to national security by revealing flaws in the B-29 aircraft. *See*

id. at 9. As Judge Davis found, "[d]etails of flight mechanics, B-29 glitches, and technical remedies in the hands of the wrong party could surely compromise national security," and thus "may have been of great moment to sophisticated intelligence analysts and Soviet engineers alike." *Id.* The Court of Appeals for the Third Circuit, reviewing the matter *de novo*, unanimously affirmed Judge Davis's decision. *See Herring v. United States,* 424 F.3d 384 (3rd Cir. 2005), *cert. denied,* 547 U.S. 1123 (2006).

II. Various Procedural and Substantive Requirements Ensure that the Privilege Is Invoked and Accepted Only in the Most Appropriate Cases.

Any discussion of the state secrets privilege should also recognize the significant procedural and substantive requirements for asserting the privilege. Several of these requirements are set forth in the Supreme Court's decision in *Reynolds*, and ensure that the privilege is invoked and accepted only in appropriate cases. This careful process ensures – and my experience confirms – that the privilege is not, in the words of the Supreme Court, "lightly invoked." 354 U.S. at 7.

Starting with the procedural protections, *Reynolds* enumerates three basic but important requirements. First, the privilege can be invoked only by the United States (that is, it cannot be invoked by a private litigant), and only through a "formal claim of privilege." *Reynolds*, 345 U.S. at 7-8. Second, the privilege cannot be invoked by a low-level government official, but instead must be "lodged by the head of the department which has control over the matter" – in other words, only an agency head may assert the privilege. *Id.* at 8. Third, that official must give "actual personal consideration" to the matter before asserting the privilege. *Id.* Separate from these important requirements, because the state secrets privilege is asserted in litigation, the Department of Justice, as the agency charged with conducting litigation involving the United

States, 28 U.S.C. §§ 516 & 519, must also agree that asserting the privilege in a particular situation is appropriate. Only if there is a "reasonable danger" that disclosure of the privilege will cause harm to the national security, *see Reynolds* at 10, will the privilege be asserted.

In practice, satisfying these requirements typically involves many layers of substantive review and protection. The agency with control over the information at issue reviews the information internally to determine if a privilege assertion is necessary and appropriate. That process typically involves considerable review by agency counsel and officials. Once that review is completed, the agency head – such as the Director of National Intelligence or the Attorney General – must personally satisfy himself or herself that the privilege should be asserted.

An important part of that process is the agency head's personal review of various materials, including the declaration (or declarations) that he or she must sign in order to assert the privilege. The point of such declarations is to formally invoke the privilege and to explain to the court the factual basis supporting the privilege. If the head of the department concludes that the privilege is warranted, the official formally invokes the privilege by signing the declarations, which are then made available to the court along with any supporting declarations. By signing the declarations, the department head and any supporting official attest, under penalty of perjury, to the truthfulness of their statements and to their personal attention to the matter.

Once the privilege is asserted, it is up to the court to decide whether, based on its review of the unclassified and classified materials that have been made available to it, the assertion should be upheld. It is well established that the court, in reviewing the privilege assertion, must accord the "utmost deference" to the privilege assertion and to the national security judgments of

the Executive Branch. *Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998); *see also Al-Haramain Islamic Foundation, Inc. v. Bush*, 507 F.3d 1190, 1203 (9th Cir. 2007) (reaffirming "the need to defer to the Executive on matters of foreign policy and national security" and concluding that the court "surely cannot legitimately find [itself] second guessing the Executive in this arena"). Still, notwithstanding this deferential standard of review, "[t]he court itself must determine whether the circumstances are appropriate for the claim of privilege." *Reynolds*, 345 U.S. at 8. In other words, it is for the court to determine, after applying the appropriate level of deference, whether the Executive Branch has adequately demonstrated that there is a reasonable danger that disclosure of the information would harm the national security. This review serves as an important check in the state secrets process.

In making its determination, moreover, a court often reviews not just the public declarations of the Executive officials explaining the basis for the privilege, but also classified declarations providing further detail for the court's *in camera, ex parte* review. One misperception about the state secrets privilege is that the underlying classified information at issue is not shared with the courts, and that the courts instead are simply asked to dismiss cases based on trust and non-specific claims of national security. Instead, in every case of which I am aware, out of respect for the Judiciary's role the Executive Branch has made available to the courts both unclassified and classified declarations that justify, often in considerable detail, the bases for the privilege assertions. By way of example, the Court of Appeals for the Ninth Circuit recently noted in upholding the government's assertion of the state secrets privilege that the panel had:

> spent considerable time examining the government's declarations (both those publicly filed and filed under seal). *We are satisfied that the basis for the*

> *privilege is exceptionally well documented. Detailed statements [in the government's classified filings] underscore that disclosure of information concerning the Sealed Document and the means, sources and methods of intelligence gathering in the context of this case would undermine the government's intelligence capabilities and compromise national security.*

Al-Haramain Islamic Foundation, Inc. v. Bush, 507 F.3d 1190, 1204 (9th Cir. 2007) (emphasis added); *see also id.* ("We take very seriously our obligation to review the documents with a very careful, indeed a skeptical eye, and not to accept at face value the government's claim or justification of privilege. Simply saying 'military secret,' 'national security,' or 'terrorist threat' or invoking an ethereal fear that disclosure will threaten our nation is insufficient to support the privilege. Sufficient detail must be – *and has been* – provided for us to make a meaningful examination.") (emphasis added).

Finally, I should also address the common misperception that the Executive Branch always seeks dismissal in each case in which it has asserted the state secrets privilege, and that the courts must dismiss each case in which the privilege has been asserted. That is incorrect. Instead, once a court has concluded that the privilege has been properly asserted, the privileged information is removed from the case, and the court must then decide whether, and how, the case can proceed without that information. To be sure, the result is that some cases must be dismissed because there is no way to proceed without the information. But in other cases, the privileged information is peripheral and the case can proceed without it. By way of example, in *BCG v. Guerrieri, et al.*, No. 2004CV395 (Weld Cty., Colo. 19th Dist. Ct.), a real estate and contract dispute between private parties, the United States asserted the state secrets privilege over certain information and moved for a protective order precluding disclosure of that information, but did *not* seek dismissal of the action.

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Thank you, Mr. Chairman, for the opportunity to address the Committee. I would be happy to address any questions that the Members may have.