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State Secrets Privilege: Origins, Parameters, and Application

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On January 25, 2007, for the first time in Taiwan's history, President Chen Shui-bian filed a request for a constitutional interpretation and invoked the state secrets privilege in an attempt to shield the first lady from a corruption trial. The interpretation sparked a national uproar and many in the media voiced criticism of the president. The controversy centered on the assertion by the grand justices that the president enjoys "special privilege over state secrets," and that he alone can decide what is a state secret. Some argued that this is a "super umbrella" of protection tailored for the president, which may lead to the creation of a dictatorship and allow a ruler to cheat the people in the name of "protecting national secrets."

The state secrets privilege has been described as the "nuclear bomb of legal tactics," which is most often used by the executive branch in civil court cases to protect against subpoenas, discovery motions, or other judicial requests for information. Based the application of this privilege in the United States, we find that state secrets privilege is increasingly subject to abuse and is wrongly used to protect the executive branch from embarrassment, to hide criminal activity, and to thwart legal requests for information and close off investigations.

We argue that the state secrets privilege should be treated as qualified, not absolute. Otherwise there is no adversary process in court and no exercise of judicial independence over available evidence. The judiciary should take steps to prevent the state secrets privilege from remaining a

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license for executive overreaching, and to prevent injustice from being committed in the name of secrecy.

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"When the president does it that means that it is not illegal."[1]
—**Richard Nixon**

"There is a name for a system of government that deceives its citizens, abuses power and breaks the law, rejects judicial and legislative checks on itself, claims power without limit, and acts in secret. It is dictatorship."[2]
—**Jonathan Schell**

President Chen Shui-bian (陳水扁) is responsible for many "firsts" during his presidency: the first president to be accused of corruption, graft, and forgery; the first one to invoke the state secrets privilege (國家機密特權); and the first Taiwan president to be threatened with impeachment proceedings.

In November 2006, Taipei district prosecutors indicted President Chen's wife, Wu Shu-chen (吳淑珍), on corruption and forgery charges in connection with the embezzlement of the State Affairs Fund (國務機要費). President Chen was also suspected of involvement and named as a co-defendant in the case, but escaped immediate prosecution because of presidential immunity.[3] Along with Wu, three top aides were also indicted on various charges.

The prosecution concluded that the first couple had used 712 receipts provided by members of the first family and other individuals to illegally claim reimbursements totaling NT$14.8 million (US$450,000) from the

[1]"The Third Nixon-Frost Interview," *New York Times*, May 20, 1977, A16.

[2]Jonathan Schell, "The Hidden State Steps Forward," *The Nation*, January 9, 2006, http://www.thenation.com/doc/.

[3]Article 52 of the Constitution of the Republic of China stipulates, "The President shall not, without having been recalled, or having been relieved of his functions, be liable to criminal prosecution unless he is charged with having committed an act of rebellion or treason."

president's discretionary State Affairs Fund between 2002 and 2006. President Chen has admitted using false receipts to claim money from the fund, but has insisted that it was used for "secret diplomatic missions" he could not disclose. Prosecutors, however, found that the money had been spent on diamond rings, watches, and other luxury items for his wife and family.

The Taipei District Court asked the president to provide information supporting his claims that the documents concerning six "secret" diplomatic missions were protected by the *Classified National Security Information Protection Act* (CNSIP) (國家機密保護法). The Office of the President rejected the demand to turn over documents on the grounds that President Chen had a constitutional "executive privilege" to decide the confidentiality of presidential documents.[4]

However, the court still ruled that prosecutors and lawyers be allowed to look at the documents. This ruling was based on the judgment that the president had not provided evidence to prove his claim that the papers were "absolute national secrets" (絕對機密) pertaining to national security issues and secret diplomatic missions that fall under his jurisdiction.

Wang Ping-yun (汪平雲), a member of the president's legal advisory group, stated that the court's order showed that the Taipei District Court had decided not to recognize the president's claim to state secrets privilege or executive privilege or the president's claimed right to withhold material that he had decided was "absolutely secret" due to its nature as "diplomatic, military, or sensitive national security secrets."[5]

The convener of the Democratic Progressive Party's (DPP, 民進黨) legislative caucus, Ker Chien-ming (柯建銘), accused the judges and prosecutors of trying to engineer a "soft coup" against the president. Ker said that the decision by trial judges to open to examination by prosecutors and defense lawyers previously sealed testimony and documents from the interrogation of President Chen by prosecutor Eric Chen (陳瑞仁) "has already harmed national security."

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[4]Dennis Engbarth, "President Claims Right to Keep Secret Files from Court," *Taiwan News*, January 23, 2007, 2.

[5]Ibid.

Chet Yang (楊文嘉), the secretary-general of the pro-independence group, the Taiwan Society (台灣社), said the case was not a matter of corruption, but "an extraordinary case resulting from the need for secret diplomatic missions, unhealthy budget and auditing systems, and executive practices established during the authoritarian era."[6] He added that as any judicial inquiry concerning the president is unconstitutional, the court hearing was bound to be biased and any result would be a miscarriage of justice and lead to the collapse of the judicial system. Yang criticized the court and prosecutors for their "near sickly and stubborn" rejection of executive privilege and the state secrets privilege enjoyed by the president, and for adopting repressive methods to keep the defense lawyers in line.

To resolve the dispute on the issue, President Chen filed a request for a constitutional interpretation on January 25, 2007, and asked the Council of Grand Justices to stop the corruption trial against his wife on the grounds that it violated the head of state's constitutional right to protect classified information.

The Constitutional Ruling and Controversies Surrounding It

Responding to President Chen's petition for an interpretation, the grand justices ruled on June 15 that although not explicitly stipulated in the Constitution, based on the principle of checks and balances, the president—as the chief executive—has "special privilege over national secrets" and the right to refuse to testify in court. However, the grand justices also emphasized that the state secrets privilege derives from the principle of checks and balances; it is not an absolute power granted by the Constitution.[7]

This constitutional interpretation immediately sparked a national uproar. While the Office of the President issued a statement expressing

[6]Flora Wang and Ko Shu-ling, "DPP Committee Pledges to Push for Interpretation," *Taipei Times*, January 25, 2007, 3.

[7]"The Council of Grand Justices Interpretation No. 627," http://www.lawtw.com.

respect for and appreciation of the ruling—which, it stressed, should serve as the basis for the handling of all relevant cases in the future—many local media organizations voiced criticism. The controversy centered on the assertion by the grand justices that the president enjoys "special privilege over state secrets," and that the president alone can decide what is and is not a state secret.

Those who are against the idea of granting the president "special privilege over state secrets" argue that this could lead to the creation of a dictatorship and enable an audacious ruler to cheat the people in the name of "protecting national secrets." In fact, as world history indicates, state secrets in any country can involve shady dealings that are nevertheless vital to the survival of a nation.[8]

The ruling was also heavily criticized among the public in Taiwan as a "super umbrella" of protection tailored for the president—representing an actual expansion of the president's executive power. Lin Ming-hsin (林明昕), a law professor at National Taiwan University, said the ruling was "abstract" and there was no solid reasoning behind it. While the public had expected the justices to rule on a particular problem, Lin said, it seemed they were afraid of using their power for fear of being criticized for meddling in court proceedings. Lin said the justices' vague position illustrated a longstanding problem in the country's constitutional system. Their unwillingness to take a stand on controversial issues had resulted in more constitutional disputes.[9]

Her Lai-jie (何賴傑), a law professor at National Chengchi University, said he did not think the justices had the power to tell the district court how to pursue the case. He also said they had avoided being specific in their ruling because the more precise the ruling, the more their credibility would be questioned.[10]

President Chen's lawyers said they would request the district court to close the case. However, public prosecutors claimed that their investi-

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[8]William Fang, "Choosing Democracy or Security," *China Post* (Taipei), June 17, 2007.
[9]Ko Shu-ling, "Experts Divided on State Secrets Ruling," *Taipei Times*, June 18, 2007, 3.
[10]Ibid.

gation had not run counter to the justices' interpretation and did not interfere with the president's exercise of his powers. Prosecutor Eric Chen, who was responsible for the State Affairs Fund case, said the justices' interpretation would not affect the trial, as the president was not a defendant.

In order to examine the unprecedented invocation of the state secrets privilege by President Chen, the outcome of the constitutional interpretation, and the accompanying controversies, this paper will first trace the origins and evolution of the privilege. I will then discuss the cases of Reynolds and Nixon and the application of the privilege under the current Bush administration in the United States, and explore the doctrines that insulate the executive from judicial scrutiny. Several questions at the core of the privilege issue will then be raised: What secrets does President Chen seek to protect under this claim? Who decides what is a privilege? Is the state secrets privilege absolute? How can the judiciary best play its role in the system of checks and balances? What is the legal position of President Chen under Taiwan's Constitution versus the state secrets privilege? Are there alternative means for holding presidents accountable? This will be followed by some concluding remarks.

Origins and Evolution of the Privilege

The state secrets privilege has been described as the "nuclear bomb of legal tactics."[11] The privilege cannot be found in the U.S. code, the code of federal regulations, or the U.S. Constitution. It is debatable whether the privilege is based upon the president's powers as commander-in-chief and leader of foreign affairs (as suggested in *United States v. Nixon*) or derived from the idea of separation of powers (as suggested in *United States v. Reynolds*).[12] Instead, it is a part of common law, the body of laws and

[11]"State Secrets Privilege Gets a Workout," *Secrecy News*, April 23, 2002, http://www.fas.org/sgp/news/secrecy/2002/04/23.html.

[12]Carrie Newton Lyons, "The State Secrets Privilege: Expanding Its Scope Through Government Misuse," *Lewis & Clark Law Review* 11, no. 1 (Spring 2007): 99-132. http://law.lclark.edu/org/lclr/.

precedents created over centuries of legal decisions. In the Cold War-era case that established the state secrets privilege in the United States—*United States v. Reynolds*, the Supreme Court observed that American courts had not had much experience of an evidence privilege protecting military secrets, but noted that such a privilege was well-established in English common law.[13] The majority cited the British case of *Duncan v. Cammell, Laird and Co., Ltd.*[14] to demonstrate the existence of the privilege in England and relied upon it in formulating its holding on the American state secrets privilege.

The state secrets privilege is most often used by executive branch officials in civil court cases to protect against subpoenas, discovery motions, or other judicial requests for information. Used in civil litigation, it allows the government to ask a court to keep certain information secret on grounds of national security, even if that means dismissing the case.

Now, the privilege is being used in Taiwan as a tool to prevent cases that could otherwise be brought in court from receiving review in that forum. It is effectively denying litigants their day in court and interfering with public and private rights. Specifically, the current use and expansion of the privilege has four negative consequences: (1) inconsistency with *Reynolds* by over-broadening its scope and timing, and invocation such that it prevents review of the case on its merits; (2) expansion of the privilege into the realm of *Totten v. United States*, despite the distinct nature of the *Totten* privilege; (3) interference with private civil liberties and rights that the government should be protecting; and (4) interference with public rights and the public's role of providing a check on the power of the government.[15]

Others have suggested that the state secrets privilege might be more about preventing disclosure of accountability, embarrassing facts, and litigation.[16] Or, in the words of Weaver and Pallitto: "The incentive on

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[13]*United States v. Reynolds*, 345 U.S.1 (1953): 7.

[14]*Duncan v. Cammell, Laird*, & Co., [1942] A.C. 624, 636 — 37 (H.L.).

[15]See note 12 above.

[16]Nat Hentoff, "Closing Our Courts Crying 'State Secrets,' the Administration Seals the

the part of administrators is to use the privilege to avoid embarrassment, handicap political enemies, and to prevent criminal investigation of administrative action."[17]

United States v. Reynolds

The state secrets privilege was first recognized by the U.S. Supreme Court in its 1953 ruling in *United States v. Reynolds*. Following the deaths in the crash of a B-29 aircraft of three civilian engineers working for the military, their widows sought the accident reports and damages for their wrongful deaths. However, the government refused to turn over the reports, claiming the mission was national-security-related, and to do so would reveal secrets that could harm the nation. The court in this case took the government at its word and dismissed the claim. The justices explained the impossible position in which the reviewing court had been put: "The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect."[18]

As a footnote to the case that established the privilege, the accident reports were declassified and released in 2000, and it was found that the argument was fraudulent and there was no secret information. The reports did, however, contain information about the poor state of the aircraft itself, which would have been very compromising to the U.S. Air Force's case. Many commentators have alleged government misuse of secrecy in this landmark case.[19]

Courts to Avoid Scrutiny," *Village Voice*, June 9, 2006. www.villagevoice.com/news/0624, hentoff,73492,6.html.

[17]William G. Weaver and Robert M. Pallitto, "State Secrets and Executive Power," *Political Science Quarterly* 120, no. 1 (Spring 2005): 85-112.

[18]See note 13 above.

[19]Henry Lanman, "Secret Guarding: The New Secrecy Doctrine so Secret You Don't Even Know about It," *Slate*, May 22, 2006, http://www.slate.com/id/2142155; and Hampton Stephens, "Supreme Court Filing Claims Air Force, Government Fraud in 1953 Case: Case Could Affect 'State Secrets' Privilege inside the Air Force" (March 14, 2003), http://www.fas.org/sgp/news/2003/03/iaf031403.

The *Reynolds* decision set a precedent establishing the executive branch's ability to restrict, in the name of national security, what evidence can be considered at trial. For some, the dispute over the case raises very current questions about the extent of judicial deference to the executive branch in matters of national security. According to Churchill and Goldenberg, the disclosure of the documents originally denied in 1953 affords a rare opportunity to compare a government privilege claim with the underlying allegedly "secret" information. "This comparison highlights the risk of permitting the executive branch to determine, without close judicial scrutiny, whether relevant government information may be withheld from discovery."[20]

What happened in *Reynolds* raises grave questions about the capacity and willingness of the U.S. judiciary to function as a separate, trusted branch in the field of national security. Without the judiciary independently looking at the documents, there was no way to determine if there was reasonable danger to national security and if the assertion of the privilege was appropriate. To preserve its independent status, the judiciary must have the capacity to critically examine executive claims. Otherwise there is no system of checks and balances, private litigants will have no opportunity to successfully contest government actions, and it will appear that the executive and judicial branches are forming a common front on national security cases.

This case has been cited over five hundred times in court—and nineteen times in the U.S. Supreme Court. The actual case behind the case law, though, is a lie.[21]

United States v. Nixon

In *United States v. Nixon*, the president's lawyers claimed that he had an absolute right of executive privilege. Since the power of executive

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[20]"Who Will Guard the Guardians? Revisiting the State Secrets Privilege of United States v. Reynolds," *Federal Contracts Report* 80, no. 11 (September 30, 2003).

[21]Hal C., "Supreme Court Won't Re-open Case That Set Precedent for 'State Secrets'," *Unknown News*, June 22, 2003, http://www.unknownnews.net/0624-2.html.

privilege is not expressly stated in the U.S. Constitution, there was some controversy over this matter,[22] partly because some presidents have overreached themselves in exercising this authority. Presidential attempts to conceal evidence of wrongdoing during the Watergate scandal that led to President Richard Nixon's resignation, and during the scandal that led to President Bill Clinton's impeachment, gave executive privilege a bad name.[23]

For years, presidents had claimed executive privilege on the grounds that there was a need to protect military, diplomatic, or national security secrets. The prevailing idea was that a president cannot be forced to share with other branches of government certain conversations, actions, or information if sharing that information could place U.S. foreign relations at risk. This "executive privilege" was generally accepted.[24]

In the Supreme Court case of *United States v. Nixon*, Nixon's lawyers argued that executive privilege should extend to certain conversations between the president and his aides, even when national security is not at stake. They argued that in order for aides to give good advice and to truly explore various alternatives, they had to be able to be candid. If they were going to issue frank opinions, they had to know that what they said was going to be kept confidential.

In the opinion, the Supreme Court conceded that there is indeed a privilege for "confidential executive deliberations" about matters of policy having nothing to do with national security. This privilege is constitutionally based, deriving from the separation of powers. However, the Supreme Court held that this privilege is not absolute but can be overcome if a judge concludes that there is a compelling governmental interest in getting

[22]This has led a few scholars to conclude that executive privilege is a "constitutional myth." See Mark Rozell, "Executive Privilege and the Modern Presidents: In Nixon's Shadow," *Minnesota Law Review* 83, no. 5 (May 1999): 1069-1126.

[23]Mark J. Rozell, "Executive Privilege Revived? Secrecy in the Bush Presidency," *Duke Law Journal* 52, no. 2 (November 2002): 403-21.

[24]For a thorough analysis of executive privilege, see Mark J. Rozell, "Executive Privilege: Definition and Standards of Application," *Presidential Studies Quarterly* 29, no. 4 (December 1999): 568-80.

access to the otherwise privileged conversations, as in the case of the Nixon tapes.

White House counsels desperately tried to stretch the state secrets privilege to encompass all claims of executive privilege. In their brief to Judge John J. Sirica, White House counsel unsuccessfully claimed that "the principles announced in *Reynolds* have been applied by the lower courts to all claims of executive privilege, whether dealing with military secrets or with other kinds of information."[25] In front of the U.S. Supreme Court, Nixon's lawyers cited *Reynolds*, arguing that "there are some kinds of documents on which the decision of the Executive must be final, and not subject to review by the courts."[26] However, the *Nixon* court held that "neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified presidential privilege of immunity."[27] The court granted that there was a limited executive privilege in areas of military or diplomatic affairs, but gave preference to "the fundamental demands of due process of law in the fair administration of justice." Therefore, the president had to obey the subpoena and produce the tapes and documents. Nixon resigned shortly after the release of the tapes.

The Application of the Privilege under the Bush Administration

Facing a wave of litigation challenging its eavesdropping at home and its handling of terror suspects abroad, the Bush administration is increasingly turning to the state secrets privilege.[28] According to a recent study, the United States has successfully asserted the secrets privilege at least sixty times since the early 1950s, and has been stymied only five

[25]"Separation of Powers and Executive Privilege: The Watergate Briefs," *Political Science Quarterly* 88, no. 4 (December 1973): 582-654.

[26]*Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law*, vol. 79 (Washington, D.C.: University Publications of America, 1975), 718.

[27]*United States v. Nixon*, 418 U.S. 683 (1974), 706.

[28]Scott Shane, "Invoking Secrets Privilege Becomes a More Popular Legal Tactic by U.S.," *New York Times*, June 4, 2006.

times.[29] Lawyers in the Bush administration have invoked the state secrets privilege in at least twenty-three cases since 2000, more than any previous administration since the privilege was crafted in 1953. In each case where there has been a final decision, the government has won.

The use of the state secrets privilege, critics say, is part of President George W. Bush's forceful expansion of presidential secrecy.[30] The secrets privilege is an especially powerful weapon because federal judges, reluctant to challenge the executive branch on national security, almost never refuse the government's claim to confidentiality. As experience confirms, the state secrets privilege is always a winning strategy for those attorneys who handle national security cases.[31] Judges almost invariably agree to requests, according to Weaver, "It's like one of the magic rings from *The Lord of the Rings*. You slip it on and you are invisible—you are now secret."[32]

According to Thomas Blanton, director of the National Security Archive at the George Washington University, that is true even though a growing body of declassified documents suggests that in the past at least, the privilege has been used to protect presidential power, not national secrets.[33] In claiming the state secrets privilege, "the government always overreaches," Blanton says, "it always misleads and in some cases it lies, because it believes its authority is at stake."

The Bush administration has used this strategy successfully on two occasions with FBI translator Sibel Edmonds, to prevent her from testifying about misconduct in the FBI. They used it again with Maher Arar,

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[29]William Fisher, "'State Secrets Privilege' Not So Rare," August 16, 2005. http://www.antiwar.com/ips/fisher.php.

[30]Andrew Zajac, "White House Use of Privilege Draws Criticism: Administration Invokes State-Secrets Precedents in Terrorism Cases; 'Little Accountability Imposed'," *Chicago Tribune*, March 6, 2005.

[31]David Hencke, "War on Terror Means More State Secrets; Guidelines Put Security Ahead of Open Government," *Guardian*, March 30, 2004.

[32]Ryan Singel, "Feds All Go Out to Kill Spy Suit," May 2, 2006. http://www.wired.com/politics/security/news/2006/05/70785.

[33]Andrew Zajac, "Bush Wielding Secrecy Privilege to End Suits," *Chicago Tribune*, March 3, 2005.

an innocent Canadian citizen who was arrested when passing through JFK airport on his way home from his vacation, only to find himself "renditioned" to Syria, where he was tortured. And they used it once again with Khalid El-Masri, the German citizen mistakenly arrested and flown to Afghanistan, where he was detained, beaten, and tortured by the CIA.

More recently the privilege has been employed against lawsuits challenging broader policies, including the three lawsuits attacking the National Security Agency's eavesdropping program—one against AT&T by the Electronic Frontier Foundation in San Francisco and two against the federal government by the American Civil Liberties Union in Michigan and the Center for Constitutional Rights in New York. Experience of the privilege in practice has shown that it is frequently invoked to cover up executive mistakes.[34]

Some have argued that the Bush administration's seizure of power has gone too far, including as it does an assault on judicial review. "It has been a central theme from the start of the administration, and they're pushing it like crazy."[35] By invoking the state secrets privilege in cases involving actions taken in the war on terror (i.e., extraordinary rendition, allegations of torture, alleged violations of the Foreign Intelligence Surveillance Act),[36] Greenwald opines, the administration attempts to evade judicial review of these claims of exceptional war powers. In effect, this is preventing a judicial ruling determining whether there is a legal basis for such an expansion of executive power.[37]

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[34]"Government is Abusing 'States Secrets Privilege' to Cover Up National Security Blunders, ACLU Says," January 12, 2005, www.aclu.org/safefree/general/18815prs20050112.html.

[35]Mark Follman, "The Bush Code of Secrecy: How the White House is Covering up CIA Abductions, Brutal Interrogations, and Spying on Americans," http://www.salon.com/news/feature/2006/06/23/.

[36]Glenn Greenwald, "Rechecking the Balance of Powers: The Bush Administration Has Finally Been Rebuked for Its Repeated Efforts to Evade Judicial Review," *In These Times*, July 21, 2006, http://www.inthesetimes.com/article/2730/.

[37]Robert Pallitto, "Secrecy and Foreign Policy," *Foreign Policy in Focus*, December 8, 2006, http://www.fpif.org/fpiftxt/3774.

The Bush administration has routinely asserted the privilege to dismiss suits in their entirety by claiming that for it to participate in the trials at all would mean revealing state secrets. In other words, in addition to relying on the state secrets doctrine to an unprecedented degree, the administration is now well on its way to transforming it from a narrow evidentiary privilege into something that looks like a doctrine of broad government immunity.[38]

The latest case is the White House's invocation of executive privilege when it instructed President Bush's top adviser Karl Rove not to cooperate with a Senate investigation into the firing of nine U.S. attorneys. White House counsel Fred Fielding has consistently said that top presidential aides, past and present, are immune from subpoenas, and has declared the documents sought to be off-limits under executive privilege.[39]

The increase in reported cases is indicative of a greater willingness to assert the privilege than in the past. With few exceptions, the privilege is invariably fatal to efforts to gain access to covered documents. It is hardly surprising that such an effective tool tempts presidents to use it with increasing frequency and in a variety of circumstances.[40]

In recent years, as the Bush administration has relied more heavily on the state secrets privilege to have cases thrown out of court, judges have generally been willing to concede meekly to the government's argument. However, the Bush administration escalated the use of the state secrets privilege to a point where the judiciary had to resist.

In the case of the Guantanamo Bay tribunals, the Supreme Court ruled that the Bush administration cannot use ad hoc military commissions to try suspected terrorists. The ruling rebuffed Bush's contention that the president has special powers during wartime to disregard acts of Congress and international treaties. The court emphatically ruled that Congress and

[38]See note 17 above.

[39]"Bush Bars Rove from Testifying in Senate Probe: White House Invokes Executive Privilege to Prevent Testimony over the Firing of Federal Prosecutors," CBS News, August 2, 2007, http://cbs11tv.com/topstories/214100824.html.

[40]See note 17 above.

the judiciary share authority with the executive, even in time of war.[41]

In the summer of 2006, U.S. District Judge Vaughn R. Walker in San Francisco and District Judge Anna Diggs Taylor in Detroit ventured to deny government state secrets claims in domestic surveillance and eavesdropping cases. "It is important to note that even the state secrets privilege has its limits," Walker wrote. "While the court recognizes and respects the executive's constitutional duty to protect the nation from threats, the court also takes seriously its constitutional duty to adjudicate the disputes that come before it. . . . To defer to a blanket assertion of secrecy here would be to abdicate that duty."[42]

However, in July 2007, the appeal court in Cincinnati reversed the district court ruling that President Bush's warrantless surveillance program was illegal. By a two-to-one vote, the court ruled that the plaintiffs had no legal standing to challenge the National Security Agency's surveillance program. Because the decision to dismiss the case was based on that legal technicality, the court did not take a position on the legality of the program. Moreover, the decision bolstered the administration's position in this and similar cases that any courtroom discussion of the program would jeopardize "state secrets," and so lawsuits challenging the program must be dismissed.[43]

Although the Bush administration's assertion of the state secrets privilege has sparked fierce debate and drawn criticism from scholars, one at least has pointed out, "If not for 9/11, the U.S. law in this area likely would not have gone where it appears to be going under Bush."[44] President Chen Shui-bian's invocation of the privilege in the name of national security has been proved to be a big lie in the end.

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[41]Carol D. Leonnig, "Judge Rules Detainee Tribunals Illegal," *Washington Post*, February 1, 2005; A01.

[42]Glenn Greenwald, "Huge News: Judge Refuses to Dismiss NSA Lawsuit," July 20, 2006. http://glenngreenwald.blogspot.com/2006/07/huge-news-judge-refuses-to-dismiss-nsa.html.

[43]Charlie Savage, "Court Gives Bush Win on Surveillance Reverses Ruling that Found Program Illegal," July 7, 2007. http://www.boston.com/news/nation/washington/articles/2007/07/07/.

[44]This point was made by the anonymous reviewer.

What Secrets Does President Chen Seek to Protect under the Claim of State Secrets Privilege?

President Chen and his team appear to have realized how powerful a tool the state secrets privilege can be. As Follman has pointed out, "to prevent a case from going forward at all by claiming that the entire case itself would jeopardize national security is a really drastic remedy."[45] The assertion of the privilege here seems to be calculated to undermine the integrity of an investigation.

Is President Chen trying to use executive privilege in an attempt to shield the first lady from trial? Does he really seek protection for national security or immunity for himself and his family? Are there secrets behind secrets?

As Lyons put it, the state secrets privilege was "born with a lie on its lips."[46] When the government says "national security," the courts seem to cower. Yet anyone who has worked in this area knows that national security is seldom truly at stake when the government claims it to be. The late Supreme Court justice Byron White once observed that "the label of 'national security' may cover a multitude of sins."[47] Typically, the invocation of national security borders on being a hoax. Erwin Griswold once explained the real motivation behind government secrecy: "It quickly becomes apparent to any person who has considerable experience with classified material that there is massive over-classification[48] and that the principal concern of the classifiers is not with national security, but with

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[45]See note 35 above.

[46]Kenneth Graham, "Government Privilege: A Cautionary Tale for Codifiers," May 11, 2005, http://repositories.cdlib.org/uclalaw/plltwps/.

[47]Cited in "National Security," http://www.bushsecrecy.org/PageIndex.cfm? ParentID.

[48]Carol A. Haave, deputy secretary of defense for counterintelligence and security, conceded that approximately 50 percent of classification decisions are over-classifications. See *Subcommittee on National Security, Emerging Threats and International Relations of the House Committee on Government Reform Hearing*, 108th Cong. (2004) (Testimony of Carol A. Haave), http://www.fas.org/sgp/congress/2004/082404transcript.pdf. See also testimony of J. William Leonard, director of ISOO: "It is my view that the government classifies too much information." Ibid.

governmental embarrassment of one sort or another."[49]

In the State Affairs Fund case, after drawing on public funds with so many fake invoices, President Chen strenuously defended himself by saying the money was spent on secret diplomacy; however, after a detailed investigation prosecutors proved he was lying. Using a presidential privilege to cover up wrongdoing is hardly in accord with justice and fairness.

President Chen insisted that he had to collect invoices from other people to claim reimbursement from the State Affairs Fund in order to cover expenses for six diplomatic projects. He stressed that he had not pocketed a single cent of the fund.[50] He also complained that the legislature had cut the fund to NT$35 million, far too little to cover the cost of "secret diplomacy." It is hard to believe that, while Taiwan is in the midst of an economic miracle, holds the world's fourth-largest foreign exchange reserves,[51] and while the president has billions of NT dollars at his disposal annually in legal secret budgets, it is necessary for him to seek funding for secret diplomacy through individual means. Is that not worse than in some developing countries?

Can we trust the government when it tells us that national security is at stake? Should the government's claim of secrecy result in an immediate, no-questions-asked dismissal of a case? Does the government have legitimate reasons for making such a claim? Probably not, given President Chen's track record.

What many people simply do not realize is that the current administration may be abusing the state secrets privilege in an unprecedented way in order to hide corruption and criminal activity. If President Chen gets his way and the defense stands, it appears that there is nothing the courts can do to stop a plainly illegal program.

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[49]Erwin Griswold, "Secrets Not Worth Keeping: The Courts and Classified Information," *Washington Post*, February 15, 1989.

[50]S. C. Chang, "President Has Not Pocketed a Cent of State Affairs Fund," Central News Agency (CNA), August 1, 2006.

[51]Han Nai-kuo, "Taiwan World's Fourth-Largest Holder of Foreign Exchange Reserves," CNA, August 3, 2007.

The executive branch should not be allowed to extend the shield to hide evidence that is "sensitive" simply because it is embarrassing or, worse, demonstrates wrongdoing. Weaver and Pallitto conclude that the state secrets privilege is increasingly subject to abuse and is wrongly used to protect the executive branch from embarrassment, to hide criminal activity, and to thwart legal requests for information and close off investigations.[52]

Who Decides a Privilege?

The Taipei District Court has argued that the Office of the President should provide enough information to determine whether the six files in question are truly state secrets as the law defines them—that is, whether all the procedures involved conformed to the CNSIP. Furthermore, the court stated that it would open to the public documents related to the six diplomatic missions if the president failed to produce evidence to demonstrate his position that they actually merited confidential status.

The deputy secretary-general of the Office of the President, Cho Jung-tai (卓榮泰), said the president's state secret privilege is at constitutional level, and thus cannot be defined by the CNSIP. Cho stated that all of the items requested by the court "were top national secrets whose content could not be released publicly in order to avoid harm to the image, security, and interests of the nation."[53] In addition, Cho stated that the president's possession of the state secrets privilege is based on the necessity for him to carry out his constitutional duties. According to Cho, as the head of state, the president is obligated to defend national security and interests, and therefore only the president himself can determine whether any information related to his state secrets privilege can be provided to the courts. Cho

[52]See note 17 above.

[53]"President Claims Right to Keep Secret Files from Court," January 23, 2007. http://www.taiwanheadlines.gov.tw/fp.asp.

insisted that the Constitution vests the president with the power to act as "sole organ"[54] with regard to all national security matters. As a result, neither the courts nor anything else can "interfere" with the president's decisions. These decisions are for the president alone to make.

The president's legal adviser Wang Ping-yun said the court's order showed that the Taipei District Court had decided not to recognize the president's claim to state secrets privilege or executive privilege, or the president's claimed right to withhold material that he had decided was "absolutely secret" due to its nature as "diplomatic, military, or sensitive national security secrets."[55] Wang said that under the CNSIP only the president has the right to determine what an "absolute secret" is. In the opinion of Ker Chien-ming, convener of the DPP's caucus in the legislature, "Whether something is secret or not is not something which can be determined by a district court judge." Ker said that the president's state secrets privilege was a power guaranteed by the Constitution. On the other side, Kuomintang (KMT, 國民黨) lawmaker Joanna Lei (雷倩) accused President Chen of seeing himself "almost as an emperor." She said it was ridiculous that he should think he has the power to decide on the degree of confidentiality applicable to diplomatic documents and that he was contemptuous of the judicial system.[56]

In his authoritative 1940 treatise on evidence, John Wigmore concluded that the executive branch is entitled to protect state secrets but that in cases in which classified information is at issue, it is up to the judge to decide whether such evidence qualifies as legitimately secret, and thus legally privileged. Wigmore warned that a court that "abdicates its in-

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[54]According to Louis Fisher, the executive branch relies heavily in part on the "sole organ" doctrine to define presidential power broadly in foreign relations and national security, including assertions of an inherent executive power that is not subject to legislative or judicial constraints. For more detailed analysis, see Louis Fisher, "Presidential Power in Foreign Relations: The 'Sole Organ' Doctrine," The Law Library of Congress, August 2006, http://www.fas.org/sgp/eprint/fisher.pdf; and Louis Fisher, "History Refutes the President's Claims to Unlimited Power over Foreign Affairs," *Legal Times*, December 4, 2006, http://hnn.us/roundup/entries/32753.html.

[55]See note 4 above.

[56]"Su Asks MOJ to Petition for Ruling on 'Immunity'," *Taiwan News*, January 25, 2007.

herent function of determining the facts upon which the admissibility of evidence depends will furnish to bureaucratic officials too ample opportunities for abusing the privilege."[57]

Responsibility for deciding questions of privilege rests with an impartial independent judiciary, not the party claiming the privilege, and certainly not when the party in question is the executive branch. In *Reynolds*, the Supreme Court emphasized that the decision to rule out the documents is the decision of the judge, and it is the judge who controls the trial—not the executive.[58] The court concluded that neither Congress nor the president may encroach on the judiciary by "transferring to itself the power to decide justiciable questions."

Indeed, secrecy and the expansion of executive power have gone hand-in-hand. Secrecy enables power, and this is particularly true of the activities of the executive branch. The executive is far freer to act if its actions never come to light. Formal and informal constraints by the coordinate branches and the public cannot be exercised against actions taken in secret.[59]

Is the State Secrets Privilege Absolute?

Does the president have the power of absolute privilege? Cho Jung-tai claimed that under the principle of separation of powers, the president's special power to refuse to disclose in legal proceedings "military, diplomatic, and national security secrets," or "state secrets privilege," "should be absolutely protected." He argued that the listing of President Chen as an "unindicted accomplice" in the indictment and the continued trial of the case were all "obviously unconstitutional." Moreover, Cho stated that given the higher constitutional level of presidential duties, the scope of

[57]Archibald Cox, "Executive Privilege," *University of Pennsylvania Law Review* 122, no. 6 (June 1974): 1383-1438.

[58]See note 13 above.

[59]See note 17 above.

the application of this state secrets privilege was "not limited to the secrets defined by the National Secrets Protection Act."[60]

Is the state secrets privilege absolute? According to Louis Fisher, the state secrets privilege should be treated as qualified, not absolute. Otherwise, there is no adversary process in court, no exercise of judicial independence over available evidence, and no fairness accorded to private litigants who challenge the government.[61] The U.S. Court of Appeals for the D.C. Circuit warned in a 1971 case that "no executive official or agency can be given absolute authority to determine what documents in his possession may be considered by the court in its task. Otherwise the head of an executive department would have the power on his own say-so to cover up all evidence of fraud and corruption when a federal court or grand jury was investigating malfeasance in office, and this is not the law."[62]

In the 1974 Supreme Court case of *United States v. Nixon*, the court acknowledged "the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties." While the court thus conceded the need for confidentiality in discussions between presidents and their advisers, it ruled that the right of presidents to keep those discussions secret under a claim of executive privilege was not absolute, and could be overturned by a judge. In the court's majority opinion, Chief Justice Warren Burger wrote "neither the doctrine of separation of powers, nor the need for confidentiality of high level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances."[63]

The ruling reaffirmed decisions from earlier Supreme Court cases, establishing that the U.S. court system is the final arbiter of constitutional questions, and that no person, not even the president of the United

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[60]See note 4 above.

[61]Louis Fisher, "The State Secrets Privilege is Too Easy to Abuse: Commentary," November 17, 2006, http://www.niemanwatchdog.org/index.cfm.

[62]*Committee for Nuclear Responsibility, Inc. v. Seaborg*, 463 F.2d 783, 794 (D.C. Cir. 1971).

[63]See note 27 above.

States, is above the law. The Supreme Court unanimously rejected Richard Nixon's bid to block the special prosecutor's subpoena for the tapes, ruling that "the search for the truth" in a criminal case outweighs the "president's privilege of confidentiality." Nixon had claimed he had an "absolute privilege" of keeping secret his White House conversations. Disagreeing, the court said that executive privilege is what lawyers call a "qualified privilege." Sometimes it is honored, and sometimes not, depending on the circumstances.[64]

If the president and his aides were discussing matters of national security, military operations, or diplomatic secrets, those conversations would almost always be shielded from disclosure, the court said. However, if the president tried to shield all conversations with his aides simply because they are "presidential deliberations," that claim would not necessarily carry much weight. Although the president's privilege to have confidential conversations in the White House "is entitled to great respect" most of the time, the chief justice said, "it is essential that all relevant and admissible evidence be produced" in a criminal case.[65]

According to the president's statement, after information has been determined to be privileged under the state secrets doctrine, it is absolutely protected from disclosure—even for the purpose of in camera examination by the court. The executive branch may assert a right to keep its secrets, but this must not be viewed as an absolute right, only a privilege granted by the court when appropriate. Otherwise, there can be no judicial independence and no fair trial for people who would challenge their government.

A system in which the president can engage in illegal behavior but then block the courts from ruling on the legality of his actions is, by definition, a system of lawlessness.[66] Does the state secrets doctrine guarantee that such government criminals are above—and beyond—the law? If the president is permitted to break one law on his own say-so, then a president

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[64]David G. Savage, "Clinton May Employ Executive Privilege to Shield Close Aides," *Los Angeles Times*, http://www-tech.mit.edu/V118/N2/bclinton.2w.html.

[65]*United States v. Nixon*, 418 U.S. 683 (1974).

[66]See note 37 above.

can break any other law on his own say-so—a formula for dictatorship.[67]

Judicial Review: Checks and Balances

Presidential secretary-general Chen Tang-shan (陳唐山) stated that the judges and prosecutors in President Chen's case "do not understand the concept of state secret privilege," adding that their demands "to know everything" had already "impinged on presidential powers."[68] His deputy, Cho Jung-tai, said, "the president should have executive privilege to refuse to offer the court information on defense, foreign affairs, and state secrets." He urged the Council of Grand Justices to order the Taipei District Court to stop the trial and revoke the court's ruling to review documents which they believed would jeopardize state secrets. There is a role for secrecy in foreign affairs, but President Chen's actions in this case dangerously expanded executive power to shield himself from oversight.

There are arguments in the United States for judicial oversight of executive branch action even if national security is involved. First, when agencies violate the constitutional rights of citizens and commit crimes, it is perverse and antithetical to the rule of law to allow them to avoid judgment in court and the exposure of these activities to the public by refusing to disclose inculpatory information. Second, if the privilege protects the executive from investigation and judicial power, this provides administrators with an incentive to use the privilege to avoid embarrassment, to handicap political enemies, and to prevent criminal investigation of administrative action. In these circumstances, the privilege may have the effect of encouraging or tempting agencies to engage in illegal activity. Third, the privilege obstructs the constitutional duties of courts to oversee executive action.[69] Oversight of executive branch activity is notoriously

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[67]Elizabeth Holtzman, "The Impeachment of George W. Bush," *The Nation*, January 30, 2006. http://www.thenation.com/doc/.

[68]Dennis Engbarth and Chang Ling-yin, "Dispute Surrounds Scope of Presidential Powers and Protection," *Taiwan News*, January 25, 2007, 1.

[69]See note 17 above.

difficult, and even more so in areas where state secrets exist.

There is no denying that the state secrets privilege can play a role in protecting national security. Like other evidentiary privileges, however, it can only function properly when limited in its application and balanced against the interests of justice.[70] In the case of Mr. El-Masri mentioned above, and in other cases both before and after September 11 that involve military and intelligence programs, the U.S. executive has instead used the privilege as a shield against embarrassment and scandal. In several cases, the executive has completely evaded judicial oversight. Broad application of the state secrets privilege reflects a failure to understand—or an unwillingness to accept—the capacity of the courts to review classified evidence. "In the absence of stronger judicial willingness to scrutinize secrecy claims, secrecy can be expected to continue to expand and undermine the public's ability to influence governmental policies."[71]

Steven Aftergood has argued that, "if the administration prevails, then we will be well on our way to a different form of government in which executive authority is effectively unchecked."[72] Yet many judges follow a line in state secrets cases that obsequiously accepts the executive branch's claims when they relate to national security. By doing so, they are not truly fulfilling their role as constitutional co-equals of the executive branch. They are not checking, nor are they balancing; they are merely abdicating. Many judges seem to believe that they must abdicate, because they are not competent to make determinations regarding national security matters.[73]

If the president knows that assertion of the privilege will almost always be accepted by the judiciary, and that judges rarely order documents

[70]Virginia Sloan, "It's Time to Reform the State Secrets Privilege," http://communities.justicetalking.org/blogs/day10/archive/2007/06/06.

[71]Meredith Fuchs, "Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy," *Administrative Law Review* 58, no. 1 (Winter 2006): 131-76.

[72]Cited in note 35 above.

[73]John W. Dean, "ACLU v. National Security Agency: Why the 'State Secrets Privilege' Shouldn't Stop the Lawsuit Challenging Warrantless Telephone Surveillance of Americans," http://writ.news.findlaw.com/dean/20060616.html.

to be produced for inspection, then there is great incentive on the part of the executive branch to misuse the privilege. If the president is abusing his rights, the courts are precluded from enforcing theirs, and the president ignores the laws as well as the constitution itself, what becomes of democracy—let alone the three branches of government?

A court's unquestioning acceptance of an executive branch claim of privilege undermines the established practices and role of an independent judiciary. Although there is a role for the state secrets privilege to prevent disclosure of genuine state secrets to private parties, it is critical that an independent judiciary reviews such claims and determines when the privilege properly applies.[74] In particular, courts must determine whether the material at issue is actually secret, whether it is necessary to the case, and whether the potential harm from disclosure justifies dismissing the case.[75] The general counsel of the National Security Archive, Meredith Fuchs, has commented thus: "We want judges to remember that they have an independent role in assessing state secrets privilege claims. Important cases shouldn't be dismissed lightly."[76]

Secrecy may tempt administrators to carry out activities contrary to law and the constitution, but when those activities are suspected, the courts double the damage by refusing to impose costs on the executive branch for its breaches. The U.S. federal courts, including the Supreme Court, have often refused to scrutinize executive actions that involve foreign policy or national security. However, what theory of presidential power would justify such deference by the other branches?[77] "Allowing the executive to violate the law and then avoid judicial scrutiny altogether by invoking the state secrets privilege as a bar to litigation would dangerously concentrate all executive, legislative, and judicial power in one

[74]Sharon B. Franklin, "Remember Checks and Balances?" http://www.tompaine.com/articles/2007/06/25/.

[75]David Kay and Michael German, "Abusing the Secrets Shield," *Washington Post*, June 18, 2007, 17.

[76]See note 67 above.

[77]See note 17 above.

branch of government."[78]

For the first time in Taiwan's history, President Chen has relied upon the state secrets privilege to claim that the disclosure of the six secret documents in court would jeopardize national security, and therefore that they cannot be reviewed by private parties, the attorneys involved in the case, or even the judge.[79] In these circumstances, how can the judges in the Taipei District Court know whether President Chen is making a legitimate claim? When the state secrets privilege is initially invoked, no judge can know whether it is being asserted for legitimate reasons or to conceal embarrassment, illegality, or constitutional violations. What, then, are the options available to judges? Is there some way to protect secrets while giving more space to due process?

Typically, when faced with sensitive evidence, a court might close the courtroom, place briefs under seal, and make the other side's attorneys promise not to divulge the information, or even, in rare cases, make them seek security clearance. In the government's view, that is not secure enough for some secrets. Even a judge cannot be trusted to hear the most sensitive secrets. Whether there is a real risk of disclosure if litigation is allowed to continue, and whether grave damage to national security will result in the event of disclosure, are purely executive decisions which the court is compelled to accept uncritically. The judge may not call into court the executive official who executes the affidavit setting forth these decisions for further scrutiny of his claims, even if this takes place in camera. And all of this is the case "even where allegations of unlawful or unconstitutional actions are at issue."[80]

One alternative offered by Robert Chesney calls for the creation of a secret court, akin to the Foreign Intelligence Surveillance Court, to review

[78]"ACLU Urges Court to Reject State Secrets Claim in NSA Case," http://www.aclu.org/safefree/nsaspying/25955prs20060621.html.

[79]President Chen has actually shown the documents on the "secret diplomacy" to DPP legislators.

[80]Shayana Kadidal, "The State Secrets Privilege and Executive Misconduct," http://jurist.law.pitt.edu/forumy/2006/05/30.

complaints with national security ramifications.[81] Plaintiffs would be barred from attending the proceedings, but their cases would be advanced by lawyers with security clearances who would be obliged to keep the information confidential—even from their clients.

The judiciary in Taiwan should take steps to prevent the state secrets privilege from remaining a license for the executive to overreach its powers, and to prevent injustice from being committed in the name of secrecy. The judiciary must clarify that it is judges, not the executive branch, that have the final say about whether disputed evidence is subject to the state secrets privilege and whether the state secrets privilege is being used to excuse a vast array of unlawful behavior orchestrated by the president. This will enable public scrutiny of governmental conduct and thus preserve accountability for executive actions.[82]

A president's prerogative to protect national security secrets needs to be respected, but it should not unconditionally trump the rights of those harmed by the very programs the president means to shield from public view.[83] A proper balance needs to be struck between a nation's need for secrecy, i.e., national security, and the public's right to know.[84] If the courts continue to blindly accept the administration's unprecedented expansion of state secrets claims, the executive branch will operate above the law and can continue to act with impunity—a dangerous precedent for any country calling itself a democracy.[85]

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[81]Robert M. Chesney, "State Secrets and the Limits of National Security Litigation," *George Washington Law Review* (2007), http://papers.ssrn.com/sol3/papers.cfm; and "Keeping Secrets: How to Balance National Security with People's Rights to Have Their Day in Court," *Washington Post*, July 15, 2007, B06.

[82]See note 37 above.

[83]Editorial, "State Secrets or Dirty Laundry?" *Washington Post*, July 16, 2007.

[84]"State Secrets Privilege," http://www.sourcewatch.org/index.php.

[85]Michael Ratner, "For His Eyes Only: Bush's Secret Crimes," *The Nation*, July 2, 2006. http://www.thenation.com/doc/20060717/ratner.

The Legal Position of the President under Taiwan's Constitution vs. the State Secrets Privilege

President Chen filed a request for constitutional interpretation on January 25, 2007, asking if an investigation and indictment concerning the alleged misuse of the State Affairs Fund—a fund to be used at the discretion of the president—contravened the ROC Constitution. Article 52 of the Constitution stipulates that the president shall not, without having been recalled, or having been relieved of his functions, be liable to criminal prosecution unless he is charged with having committed an act of rebellion or treason. Nevertheless, it does not state that the president may not be investigated during his term, or may not be indicted after the end of his term of office.

In the petition, President Chen claimed that the investigation of the State Affairs Fund case by the Taiwan High Court Anti-Corruption Center, and the indictment and trial of the first lady, were both unconstitutional, since the president may not relinquish his criminal immunity under the Constitution. Therefore, he asked that the Taipei District Court be ordered to halt proceedings in the State Affairs Fund case.

During his visit to Palau in September 2006, however, President Chen had said that he and the Office of the President would cooperate with the investigation. Indeed, he twice welcomed Prosecutor Eric Chen into the Office of the President for the purpose of carrying out the investigation.

President Chen's claims in his petition for a constitutional ruling are listed as follows: (1) Article 52 of the Constitution should be interpreted in a broad sense; (2) the president is not liable for investigation, indictment, or trial; (3) the president has state secrets privilege, and so he is not obliged to offer evidence or relevant papers for investigation; (4) the president cannot be subpoenaed to give testimony during either the investigation or the trial; (5) in any criminal case apart from one of sedition or treason, the president and any co-defendant(s) shall be granted temporary immunity from prosecution (meaning, in this case, that the first lady Wu Shu-chen is not liable for investigation, indictment, or trial either); and (6) it is unconstitutional for the Office of the Prosecutor General to set up a special

investigation unit to investigate the president.

Responding to President Chen's petition for interpretation, the grand justices ruled on June 15 that although not stipulated in the Constitution, based on the principle of checks and balances, the president—as the chief executive—enjoys the privilege not to make public secrets regarding national security, national defense, and foreign affairs. However, the grand justices also emphasized that the state secrets privilege derives from the principle of checks and balances of power, and is not an absolute power granted by the Constitution.

According to the justices, presidential immunity from criminal prosecution shields the president from being investigated, prosecuted, or tried on criminal charges as a suspect or defendant other than for offenses against the state's internal and external security while he is in office.[86] This privilege would not exempt the president from the obligation to testify as a witness in the criminal trials of others, although he can be questioned only in places of his choosing in accordance with the Code of Civil Procedure.

Public prosecutors claimed that their investigation had not run counter to the justices' interpretation and that it did not interfere with the president's running of his office. Prosecutor Eric Chen, who was responsible for the State Affairs Fund case, said the justices' interpretation would not affect the trial, as the president was not a defendant, adding that President Chen had given his first testimony only after he was aware of his right to keep silent and other rights protected in the Code of Criminal Procedure and after he had agreed to be questioned.

Most noteworthy is that the interpretation establishes that, if subpoenaed, the president has a duty to testify in criminal prosecutions against

[86]It is quite the opposite in the United States. Although a sitting president has immunity from litigation arising from actions performed in his official capacity, that immunity does not extend to actions arising from his private conduct nor does it allow him to postpone litigation while he is in office. The issue of executive privilege came to the fore when President Bill Clinton was sued for actions alleged to have occurred before he was president. In a unanimous decision, the court ruled that nothing in the U.S. Constitution allows a sitting president to postpone a private civil damages lawsuit while he is in office. The principle of equal justice under law requires that every person, no matter what his position or office, answer to the criminal justice system for his offenses.

other parties if both the prosecution and the defense deem it necessary. Furthermore, although the president cannot be investigated and questioned as a defendant, the interpretation indicates that as long as the president's prerogatives are not impinged upon, prosecutors are free to exercise their authority when investigating the scene of a crime and safeguarding evidence on suspicion of presidential wrongdoing. In addition, the above-mentioned presidential immunity does not extend to evidence relating to the president that is gathered and safeguarded for the criminal prosecution of other parties. Thus, the massive investigation carried out by Prosecutor Chen for the State Affairs Fund case against Wu Shu-chen and others is neither unconstitutional nor illegal. The material the prosecutor has gathered has the weight of evidence and is therefore admissible in this trial. If this evidence convinces the court of the guilt of the accused, then the pressure will be on the defense to subpoena the president in the hope of changing the court's mind.

In its deliberations, the district court continuously issued written requests to the president for classified document verification codes, but all requests were refused. Judicial Yuan (司法院) Interpretation No. 627 gives the following clarification on this matter: if the court is dealing with information the president has already provided, the provisions of the CNSIP may apply. Whether they actually apply shall depend on whether the president has followed CNSIP stipulations and verified the security classifications and terms of protection of the information in question. In other words, if a piece of information has not been classified, then judicial procedure is not governed by CNSIP stipulations. The grand justices also indicated that information already under consideration may be classified retroactively, but that does not make any prior juridical procedure illegal. Thus, where the president refused to provide security codes, the court was acting legally by following regular procedure, and it is too late now for the Office of the President to provide the withheld codes. Such is the consequence of President Chen's defiance of the requests of the court.

Also noteworthy in Interpretation No. 627 is how the grand justices have taken enormous lawmaking powers into their own hands. They have done so in two ways. First, they have determined that matters of defense,

diplomacy, and national security can be kept under wraps on the basis of the president's state secrets privilege, though they admit there is no explicit constitutional stipulation for such a privilege. We feel that this privilege, created by the grand justices through their own lawmaking, is vulnerable to abuse. In the State Affairs Fund case, when it was revealed that President Chen had drawn on public funds using fake invoices, the president strenuously defended himself by saying the money spent was for secret diplomacy; but after a detailed investigation prosecutors proved he was lying. Using presidential privilege to cover up wrongdoing is hardly in accord with justice and fairness and national legal sentiment. On the one hand, the grand justices hold that in deliberating on unclassified information the court need not take any special precautions, while on the other hand, they are of the opinion that the president can decide to withhold certain information on a whim without following established legal procedure. Are they not contradicting themselves?

Second, the grand justices have specified a method of resolving conflicts between the president and the court over classified information. The president may invoke his state secrets privilege and refuse to comply with a court request. However, in certain circumstances the court may refuse to accept the president's refusal. If the president is still unwilling to comply, he should appeal to the Taiwan High Court, which will assign a special panel of five judges to decide on the matter. The grand justices also indicated that this should be the approach before the relevant legislation emerged. In doing this, the grand justices are not only laying down the law but also telling the Legislative Yuan (立法院) how to do its job. The lawmaking of this Council of Grand Justices has gotten out of hand: the "grand justices temporary dispensing action"—also without explicit legal basis—is another case in point. The Council is a part of the judiciary. That the judiciary can assume legislative power is, to put it mildly, something that can be debated.

It is also highly controversial for the grand justices to treat the president as the head of the executive, when according to Article 53 of the Constitution, the Executive Yuan (行政院) is the highest executive organ in Taiwan and therefore it is the premier who is the head of the executive.

Alternative Means for Holding Presidents Accountable

President Chen rode to victory in the presidential election of 2000 on what appeared to be the wave of the future. People applauded his pledge to end the corruption that had become entrenched under the long years of KMT rule. Millions of Taiwanese voted for Chen in the hope that he would change a political culture that many saw as corrupt and favoring vested interests. The suspicion now is that Chen has delivered more of the same. The DPP came to power with an image of integrity; but now the party is perceived as having perpetuated a corrupt system rather than having corrected it.

The current crisis that Chen is undergoing, the worst of his seven-year administration, is the result of public anger at numerous alleged scandals, some of which are now in the process of investigation by prosecutors, and growing calls from various sectors of society for him to step down and take responsibility. The problem plaguing President Chen is not just a scandal-triggered political crisis; it is also a crisis of confidence. It is hardly surprising that more than 70 percent of the people no longer have confidence in him, as revealed in opinion polls conducted by major newspapers and TV networks.

The allegations of corruption have generated three recall attempts in the opposition-dominated legislature, unprecedented in Taiwan's young democracy. The allegations were also behind the almost daily street protests in September and October 2006, the largest one taking place in the capital, Taipei, where more than 300,000 demonstrators gathered to demand Chen's resignation.

It is common practice in Western democracies for any president with a sense of honor and integrity to resign if he or any family member is involved in a corruption-related scandal.[87] Will President Chen follow in

[87]In the advanced democracies, corruption scandals have brought down several prominent political figures, for example, in Italy (the "clean hands" investigation), Germany (Helmut Kohl), the United States (Rep. James Traficant, D-Ohio), and Great Britain (Peter Mandelson).

President Richard Nixon's footsteps and resign? This is unlikely. For one thing, Taiwan has no prosecutors like the Watergate special prosecutors, Archibald Cox, Jr.,[88] and Leon Jaworski.[89] For another, the Council of Grand Justices, the members of which were all appointed by President Chen, is unlikely to rule that the documents, which Chen has said are classified top secret, have to be submitted. And even if the documents were subpoenaed, Chen were to be proved a liar, and the first lady were to be convicted, it is highly unlikely that the president would step down as he promised. Although Chen has vowed that he will resign if his wife is convicted, he has a poor record of keeping his promises if the consequences might hurt him.[90] In these circumstances, what alternative means are available for holding presidents to account, other than suits or prosecutions that could be stymied by assertions of state secrets privilege?

Impeachment Attempts against President Chen

Under the Constitution of the Republic of China, the president can be impeached by a two-thirds vote in the parliament, the Legislative Yuan. Passage of an impeachment motion then requires approval from the Council of Grand Justices, while passage of a recall motion would initiate a public referendum on whether Chen should step down. The public referendum requires a simple majority of all voters who cast ballots to approve the dismissal of the president. If more than 50 percent of the vote is against the president, new elections are held in which the impeached president is barred from contesting. So far, President Chen has already survived three attempts to oust him when the opposition failed to garner enough

[88]When he was fired, Archibald Cox stated, "whether ours shall be a government of laws and not of men is now for Congress and ultimately the American people."

[89]During his tenure as special prosecutor, Leon Jaworski was perhaps most famous for his protracted constitutional battle with the White House concerning his attempts to secure evidence for the trial of former senior administration officials on charges relating to the Watergate cover-up.

[90]President Chen stated clearly in a recent TV interview that he will not resign even if the first lady is found guilty, because the majority of judges are KMT members.

support to pass the motion, and legislators from the ruling DPP have boycotted the vote on these occasions.

In June 2006, the opposition People First Party (PFP, 親民黨) and its ally, the KMT, initiated for the first time a motion to recall Chen on grounds that he should take responsibility for alleged irregularities by members of his administration and his family. However, the motion failed to win a two-thirds majority in the legislature. In October, the PFP initiated a campaign to impeach Chen in the wake of revelations that the president had failed to disclose his assets truthfully and allegedly used other people's receipts to claim expenses from the State Affairs Fund.

As a recall or impeachment motion requires the backing of two-thirds of all sitting legislators to pass, and currently only 220 seats in the 225-seat Legislative Yuan are filled, that means that 147 legislators would have to back a recall or impeachment for it to pass. If all 90 KMT lawmakers, 22 PFP lawmakers, and 12 Taiwan Solidarity Union (TSU, 台灣團結聯盟) lawmakers voted in favor of a recall or impeachment, the motion would still fail by 23 votes. The motion may also be able to garner the support of the Non-Partisan Solidarity Union (無黨聯盟, 8 lawmakers) and at least one independent (Li Ao [李敖]), so by this reckoning, at least 12 of the 85 DPP legislators would also have to back a recall or impeachment motion in order for it to pass. As it happened, 116 legislators voted in favor of the motion, well short of the required two-thirds. Without the support of some DPP legislators, any such motion is bound to fail.

The third impeachment motion, brought by the KMT, garnered 118 votes, 28 short of the 146 needed for a two-thirds majority. This was the third time since June 2006 that Chen's forces had defeated a recall motion, which if successful would have precipitated a national referendum on whether the president should be ousted.[91]

The Constitution provides the people of Taiwan with the means to get rid of a president who has committed rebellion or treason, but it does

[91] Shih Hsiu-chuan, Mo Yan-chih, and Jimmy Chuang, "Pan-Blue Camp Vows to Oust the President, Legally," *Taipei Times*, November 4, 2006, 1.

not provide a process for terminating the tenure of a corrupt one. Apparently, it is fruitless to try to impeach a president for being a criminal. There are two quite different reasons for this. The first, and more practical one, is that there is simply no possibility that President Chen will actually be removed from office. The KMT leadership has rejected the idea, not least because there is no possibility that the constitutionally required two-thirds of a nearly evenly divided Legislative Yuan would vote to convict an impeached President Chen. Ma Ying-jeou (馬英九), then chairman of the KMT and the party's prospective presidential candidate, has expressed strong disapproval of an impeachment attempt, citing two major reasons. One is that there is no indication thus far that Chen is directly implicated in any of the various scandals. The other is that, in Ma's opinion, public outrage against Chen has not yet reached the point at which there is likely to be a referendum result in favor of a recall bill. Thus, advocates of impeachment are in effect supporting a strategy that is doomed to fail.

Chen has been able to remain defiant mainly because the KMT and the PFP are divided on the issue of launching a recall campaign against him, and they have thus been unable to create sufficient political pressure on the president. However, calls for Chen to step down have been widespread within the two parties and among their supporters at the grass-roots level.

The second reason why the campaign is pointless is that, as the outcome of the previous votes indicated, most lawmakers from Chen's DPP and its allies the TSU have remained loyal to the president, despite widespread discontent over the alleged embezzlement scandal, including among his most loyal followers.[92] In a response to the attempted presidential recall, the embattled Chen claimed in an e-mail that the recall was an "oppression of justice." Chen has accused the KMT of "naked political interference in the judicial process," "oppression of the justice system," and conducting a "Chinese cultural revolution."

[92]Jane Richards, "Taiwan Leader Survives in Vote: Though Averting Impeachment, Chen is Weakened by Scandal," *Washington Post*, November 25, 2006, A17.

Despite the failure of the impeachment attempts, they do at least serve to remind those in power that their election does not grant them carte blanche to do whatever they wish and flout the will of the people. This can actually help democracy.

Conclusions

In an attempt to shield the first lady from trial for corruption, President Chen Shui-bian invoked the state secrets privilege and filed a request for constitutional interpretation. Although the privilege has been successfully used in the United States on more than sixty occasions since the early 1950s, this is the first time it has been invoked in Taiwan. For this reason, it is essential that the people of Taiwan are provided with a general picture of the origins, parameters, and application of the state secrets privilege.

This paper has traced the background to President Chen's petition for constitutional interpretation on the state secrets privilege and the controversies that emerged as a result. It has then gone on to provide an overview of the doctrines that insulate the executive from judicial scrutiny and to briefly describe the categories of cases in the United States that the executive has claimed must be dismissed by the courts on the basis of that privilege. Several questions surrounding the privilege invoked by President Chen have then been explored. Finally, the paper has examined the legal position of the president under Taiwan's Constitution regarding the state secrets privilege and discussed alternative means for holding presidents to account.

On the basis of the cases cited above, we conclude that an administration can use the argument of state secrets to avoid challenges to its conduct, undermine judicial oversight, and ultimately threaten democracy. By using the state secrets privilege to shut down whole lawsuits that would examine government actions before the cases even get underway, an administration avoids having to give a legal account of its behavior. And if this tactic persists, the administration will have succeeded in creating an insurmountable immunity that can be invoked against any legal claim.

In Taiwan, the administration is using the state secrets privilege to dismiss cases that could challenge government misconduct. When the administration invokes this privilege, even judges are barred from assessing the information and deciding if the claim is valid. Thus, instead of the court checking the executive and keeping it within its constitutional boundaries, the president becomes the only informed judge of his own conduct.

When a president is suspected of violating the Constitution or engaging in criminal activities, there are strong reasons for judicial, political, and public access to this information. Even grave threats to national security do not permit the president unbridled discretion to act outside the parameters of the law. We cannot allow the executive branch to evade all accountability for embarrassing, illegal, or unconstitutional acts by crying "state secrets." Nor can we allow courts to abdicate their constitutional responsibility to evaluate such claims of privilege. Courts have the duty to oversee the use of the privilege and to take measures to prevent its misuse. By allowing the president to evade judicial review, the ultimate power of the Constitution is lost.

The Chen administration is trying to evade judicial review. In effect, this is preventing a judicial ruling that would determine whether there is a legal basis for such an expansion of executive power. In these circumstances, impeachment is the only possible means for the Legislative Yuan to exercise its duty to uphold the checks and balances in the Constitution that are intended to prevent abuse of power.

In the United States, the lesson learned from Watergate and the forced resignation of Richard Nixon was that the imperial presidency had grown too strong.[93] Nixon paid for his deceptions with his presidency, his reputation, and a degrading defeat for his party in the following presidential election. However, there is one important point that we should remember: "U.S. law used to be perhaps not a bad model for Taiwan to follow, but that

[93]Jonathan Schell, "Too Late for Empire," *The Nation*, August 14, 2006, http://www.thenation.com/doc/.

is becoming much less true under an administration that many Americans regard as every bit as corrosive to American democracy and rule of law as Chen's sharpest critics in Taiwan view Chen's administration, so that Taiwan would be ill-advised to set off down the course the United States now appears to be following."[94]

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