SOTOMAYOR REFUSES TO GIVE GOVERNMENT PRIVILEGE FOR ME BUT NOT FOR THEE

Justice Sonia Sotomayor's first opinion, released yesterday, is interesting for several reasons. Clarence Thomas was a predictable asshole to her about her opinion. (h/t fatster) It was the first time anyone has used the phrase "undocumented immigrant" in a SCOTUS opinion.

But I'm interested in the Obama Administration's unsuccessful attempt to get the Court to bail them out of troubles they're having on national security cases like *al-Haramain* and *Jeppesen*.

The case, *Mohawk v. Carpenter*, concerned whether a District Court's order allowing discovery that threatened the attorney-client privilege merited an immediate appeal. The Government submitted an amicus brief in the case, basically arguing that it did not. But at the same time, the Government tried to write an exception for itself, arguing that attorney-client privilege should not get to bypass the normal appeals process, but state secrets and presidential communications privileges should.

> As noted above (pp. 11-12, supra), the collateral order doctrine does not categorically exclude all discovery orders irrespective of their nature or the interests that are at stake. This Court has recognized that important governmental interests, principally of constitutional and statutory significance, justify immediate appealability under the collateral order doctrine. See, e.g., Osborn, supra (Westfall Act certification); P.R. Aqueduct, supra (Eleventh Amendment immunity); Helstoski, supra (Speech or Debate Clause immunity). Although the

> attorney-client privilege does not meet that high bar, privileges such as those protecting Presidential communications and state secrets qualify for such treatment in light of their structural constitutional grounding under the separation of powers, relatively rare invocation, and unique importance to governmental functions.
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> The Presidential communications privilege, which draws its authority from the constitutional role of the Executive and "can be viewed as a modern derivative of sovereign immunity," is well established. Northrop Corp. v. McDonnell Douglas Corp., 751 F.2d 395, 398 n.2 (D.C. Cir. 1984) (citing Raoul Berger & Abe Krash, Government Immunity from Discovery, 59 Yale L.J. 1451, 1459 n.46 (1950)). "The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution," and it derives largely from the "necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking." United States v. Nixon, 418 U.S. 683, 708 (1974). Unlike the attorney-client privilege (see pp. 15-17, supra), the Presidential communications privilege is invoked relatively rarely and only after authorization of senior Executive Branch officials.
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> [snip]
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> In addition to the Presidential communications privilege, this Court has long recognized a state-secrets privilege. That privilege may be invoked to avoid "a reasonable danger that compulsion of the evidence will expose military matters which, in the interest

> of national security, should not be divulged." United States v. Reynolds, 345 U.S. 1, 10 (1953). The state-secrets privilege, whose origins extend to early Anglo-American law, "performs a function of constitutional significance, because it allows the executive branch to protect information whose secrecy is necessary to its military and for eign-affairs responsibilities." El-Masri v. United States, 479 F.3d 296, 303 (4th Cir.), cert. denied, 128 S. Ct. 373 (2007) (emphasis added); cf. Totten v. United States, 92 U.S. 105, 107 (1876) (noting that in comparison to cases involving common-law privileges—including the attorney-client privilege—"[m]uch greater reason exists for the application of the principle [against maintenance of a suit resulting in disclosure of confidential matters] to cases of contract for secret services with the government"). As a matter of practice, the privilege is invoked by a formal request "lodged by the head of the department which has control over the matter, after actual personal consideration by that officer," underscoring its unique significance to the functions of the Executive Branch and the restraints on its invocation. Reynolds, 345 U.S. at 7-8 (footnote omitted). In addition to their paramount "public importance" and "the need for their prompt resolution," Nixon, 418 U.S. at 687, orders denying the applicability of the Presidential communications and state-secrets privileges also satisfy the other traditional elements of the Cohen inquiry. First, an order requiring the disclosure of information over the government's assertion of those privileges would conclusively resolve the issue. The Executive cannot be

> expected to persist in withholding information that a court has ordered to be disclosed; to suggest otherwise would be to invite the "unseemly" interbranch conflict that this Court declined to let unfold in Nixon. Id. at 692.
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> Second, neither the Presidential communications privilege nor state-secrets privilege turns on the merits of the action in which they arise, but rather on the nature of the constitutional prerogatives of the Executive Branch. Accordingly, when compared to the attorney client privilege (see pp. 17-21 supra), the governmental privileges are more readily severable from the merits of the underlying case. For example, the question whether disclosure of a state secret would endanger national security or diplomatic efforts is independent of the merits of the underlying action that seeks the disclosure. If information is properly deemed a state secret, then any assessment of the potential merits of the action or the disclosure's impact on the merits is beside the point—the state secret cannot be divulged regardless. See Reynolds, 345 U.S. at 11 (state-secrets privilege cannot be overcome by "even the most compelling necessity"). The Court in Nixon, a criminal case where the asserted Presidential communications privilege reflected a "generalized interest in confidentiality," engaged in a more case-specific inquiry, but only after finding appellate jurisdiction. 418 U.S. at 711.6 [my emphasis]

Now, it's crystal clear what the Government was trying to do with the state secrets stuff. They were trying to dig themselves out of several holes in the 9th Circuit, by pushing the Court to back their argument that they can appeal an

order to disclose evidence anytime a question of state secrets is involved. In particular, if I understand correctly (and please correct me if I'm wrong), this is what the Government tried to do in al-Haramain—appeal Judge Walker's ruling that al-Haramain's lawyers could have access to materials on their wiretapping so as to litigate the case.

Note, too, their claim that the Government would never refuse to turn over information after a Judge had ordered them to. Except that was precisely what they seemed to be preparing to do in al-Haramain, not just refusing to turn over information, but to take information already lodged with the Court Security Officer, along with filings that are the property of the Court, away from the Court.

Further, look at what they're suggesting: neither state secrets nor presidential privilege turns on the merits of the case. Meaning—if I understand it correctly—so long as they can invoke their privilege, then Courts will never get to the point of weighing the merits of the case. So long as they invoke the privilege, Courts will never get to rule that they broke the law. Yes, we know that's how and why they've been using the state secrets privilege—to avoid any responsibility over the torture and illegal surveillance done in our name. But it's interesting they would admit it, particularly in light of difficult questions such as whether FISA trumps state secrets.

So, as I said, it's not surprising they made this argument on state secrets.

But it's rather disconcerting that they did so on presidential communications, too. To do so—and then make the laughable claim that presidential communications privilege is invoked rarely at a time when their fucking social secretary is refusing to testify before Congress under what is a bastardized form of this privilege—is just pathetic.

I guess we can expect the Obama Administration

to try to protect far more than Desiree Rogers' involvement in a state dinner, given that they tried this ploy.

In other words, the Administration tried to use this case to say, "we don't think the privilege of schlub lawyers should change the normal process of appeals, but we'd really like for you to certify the claim that our privilege should change the normal process of appeals."

Thankfully, Justice Sotomayor (and presumably, the Court generally), was unwilling to do as the Administration wished.

> Participating as amicus curiae in support of respondent Carpenter,the United States contends that collateral order appeals should be available for rulings involving certain governmental privileges "in light of their structural constitutional grounding under the separation ofpowers, relatively rare invocation, and unique importance to governmental functions." Brief for United States as Amicus Curiae 28. We express no view on that issue.

A wise Latina indeed.

(Note: after I started writing this I saw that Daphne Eviatar hits this same issue in this post.)