

Welcome to Civil Discourse. This podcast will use government documents to illuminate the workings of the American Government and offer contexts around the effects of government agencies in your everyday life. Now your hosts, Nia Rodgers, Public Affairs Librarian and Dr. John Aughenbaugh, Political Science Professor.

**N. Rodgers:** Hi Aughe.

**J. Aughenbaugh:** Good morning, Neha. How are you?

**N. Rodgers:** I'm good. How are you?

**J. Aughenbaugh:** I'm doing fine. Thank you. In particular, because today, our listeners, we get to talk about something that if I had to venture a guess, most Americans don't know it exists.

**N. Rodgers:** I'm excited about this because I have lots of questions because that's how I roll.

**J. Aughenbaugh:** That's how you roll.

**N. Rodgers:** That's how I roll, as the young people say, except I bet the young people don't say that anymore. It's now probably the old people who say that. There's this thing that presidents say when they don't want to answer a question. They say, "I am invoking privilege." Is that what we are talking about when we talk about the State secrets privilege, or are we talking about something else?

**J. Aughenbaugh:** We're talking about something else. It flows from roughly the same idea. For listeners in law, there's this idea of, something, something privilege.

**N. Rodgers:** Like a lawyer-client privilege, where if you tell your lawyer that you ex murdered your ex-wife, the lawyer does not have to disclose that because there's-

**J. Aughenbaugh:** There's privilege.

**N. Rodgers:** There's privilege. Although the lawyer then can't put you on the stand and let you knowingly lie.

**J. Aughenbaugh:** Yeah. Because most governments say that lawyers cannot suborn or encourage perjury.

**N. Rodgers:** They never can ask you, did you ex murder your wife, because then you'd have to, if you said no, then they would know you're lying.

**J. Aughenbaugh:** Yes .

**N. Rodgers:** They wouldn't ask you that. They would ask you other things.

**J. Aughenbaugh:** They would ask you other things.

**N. Rodgers:** Did you love your wife? Did you-all get along? Did you have a fabulous relationship?

**J. Aughenbaugh:** Exactly right. But the basic idea of privilege in law, is this desire to encourage people to communicate. So if you think about spousal privilege, which is recognized by most governments in the United States, the idea is, government actually want spouses to communicate, and the thinking is, if there is a privilege that allows you to not disclose what is being discussed, you're more likely then to have those conversations.

**N. Rodgers:** Right.

**J. Aughenbaugh:** How can lawyers give you effective legal counsel or representation if you don't feel confident or comfortable enough to share everything that you may have done related to the charges that were brought against you. Because as a lawyer I can't represent you if I don't know everything.

**N. Rodgers:** I see what you're saying. Is it right to tell that person everything so that they can look across your defense and make the best possible defense even what they know?

**J. Aughenbaugh:** You asked about executive privilege?

**N. Rodgers:** Right.

**J. Aughenbaugh:** The idea of executive privilege is, we want those in leadership positions in government to get the best, most complete advice and counsel from their subordinates. We want presidents to consult with a large number of experts before making a decision that could affect millions of people, both within the country and around the world, and the thinking is, people would be less likely to give complete unvarnished advice counsel, if they know that what they said could be reported.

**N. Rodgers:** Because it might make them look bad or it might make the situation worse.

**J. Aughenbaugh:** Sure. Good.

**N. Rodgers:** Or if they were in a diplomatic situation, it might ruin the relationship with the other country if that came out.

**J. Aughenbaugh:** Yes. Now, what we're talking about is a related privilege to executive privilege in government, and that is the state secrets privilege. A common definition here, of the State secrets privilege is, that the privileged permits the government to block the release of any information in a lawsuit that if the information was disclosed, would cause harm to national security.

**N. Rodgers:** How did you find out that X country had done a cyber warfare thing? We're not going to tell you our methods because then we can never use those methods again in order to do that research?

**J. Aughenbaugh:** Yes. Or we don't want our enemies to know how we do X or how we came to that information.

**N. Rodgers:** We don't want them to know the person that told us that there was a problem, to start with, because that person is a mole and we don't want them to know that.

**J. Aughenbaugh:** We can't disclose that, Your Honor, in a court case. We can't disclose that, Your Honor, because if we did, then we would let terrorists know that we know how they do X, and if they found that out, then they would figure out who within their organizations are working with us, and that might put those lives in jeopardy, or may put our agents' lives in jeopardy. Or it may put our allies in a very difficult political diplomatic situation if that becomes public.

**N. Rodgers:** Similar to the way journalists don't reveal their sources. Because if they reveal their source, then their source usually dries up, because they either get fired or they no longer have access to the information and therefore, the new source no longer has access to that. Like the reporter doesn't. So reporters will go to jail before they will tell you who their sources are.

**J. Aughenbaugh:** That's a very good comparison. Journalistic privilege operates under the same logic, which is, sources would be less likely to disclose information to the press if it becomes standard practice that sources will be made public.

**N. Rodgers:** If you thought you could be fired or killed for telling something, you wouldn't tell it because.

**J. Aughenbaugh:** That's a very good comparison.

**N. Rodgers:** But in this case, the compelling point is not the transparency of journalism; it is the national security issue. We are protecting the national security. That seems like it could get dangerously broad.

**J. Aughenbaugh:** Yes. As we will discuss in just a few minutes, Neha, that is one of the more significant criticisms of the State secrets privilege, is that there is some evidence that increasingly presidential administrations are overusing the privilege to avoid embarrassing information being disclosed in a public trial.

**N. Rodgers:** But we're going to get to that in a minute.

**J. Aughenbaugh:** A little bit yes.

**N. Rodgers:** Where did this start? Did this start recently or does this go on for seven, the State secret privilege, as long as there's been a state, like as long as we've had the United States.

**J. Aughenbaugh:** That's a very good question.

**J. Aughenbaugh:** The origin of the State secret privilege, like the origin of many concepts in American law, actually resides with British common law. The Brits have had a version of the State secret privilege for centuries.

**N. Rodgers:** That's the king, instead of the government. The king saying, "I don't have to testify about that in court because it will undermine the safety and security of the United Kingdom."

**J. Aughenbaugh:** Yeah, it will undermine my reign-

**N. Rodgers:** My authority.

**J. Aughenbaugh:** -as the divine ruler of this great land.

**N. Rodgers:** This tiny, I didn't see, anyway.

**J. Aughenbaugh:** In the United States, its development is traced specifically to a court case, US Supreme Court case in 1953, where the Supremes finally recognized what the government had long been asserting in other contexts, and the case is United States versus Reynolds. Basically, what happened in the Reynold's case is that there was a military plane that crashed in Georgia and the family members of three civilians who died filed a wrongful death suit against the federal government.

**N. Rodgers:** Wait, wait. I'm sorry. People on the ground died from this plane crashing into them?

**J. Aughenbaugh:** Yes.

**N. Rodgers:** That's when they said.

**J. Aughenbaugh:** Yeah.

**N. Rodgers:** They weren't in the plane, they were crashed upon?

**J. Aughenbaugh:** Yeah, these are the widows of three civilians who filed a wrongful death suit against the federal government. During the trial, they asked the federal government to submit the accident report and the government refused, telling the federal district court judge, if we submit the accident report and it becomes public, it would disclose information about secret military equipment that was in use on the plane that went down.

**N. Rodgers:** You're flying along in a stealth bomber and I'm working in my field and you crash your stealth bomber into my field and you kill me. My significant other decides to sue the federal government and say, I want the accident report, but the accident report is titled, What the Heck Went Wrong with our Stealth Bomber? First of all, we have a very new stealth bomber that nobody knows about. Then it starts talking about that.

**J. Aughenbaugh:** All the features of the plane.

**N. Rodgers:** Then the Russians are nifty. We want one of these. Let's build our own stealth bomber. Now that you've given us a report about what's made. Okay, I see.

**J. Aughenbaugh:** Yeah. It's a public document at that point, right?

**N. Rodgers:** Right. Because reports submitted in a court of law they become public.

**J. Aughenbaugh:** Yeah. The United States loses in the lower court, and the US government appeals to the US Supreme Court, and the court actually sided with the government.

**N. Rodgers:** I'm not surprised by that. 1953 would have been the Korean War and Cold War. You're talking there with secrets and some secrets and aside of secrets, please.

**J. Aughenbaugh:** Yeah.

**N. Rodgers:** With chocolate sprinkles of secrets on top.

**J. Aughenbaugh:** Yeah. Again, podcast listeners, Nia and I have discussed when we're looking at commissions, in particular, the Moynihan Commission which looked at government secrets. Once the Cold War arose in the United States, a lot of behavior of the federal government changed because we didn't want our sworn enemy, the Soviet Union, to figure out how we were monitoring them and what technology we were using. Again, this was a few years before the Space Race, Nia. This was the nuclear weapons race, the conspiracy mentality.

**N. Rodgers:** Was rife.

**J. Aughenbaugh:** Yeah. Initially, the state secrets privilege was used so that certain information would not be disclosed. The trial would continue, it's just that certain evidence was subject to the privilege.

**N. Rodgers:** But if you don't have certain kinds of evidence, you can't go forward, right?

**J. Aughenbaugh:** Yes.

**N. Rodgers:** Wait, let me back up and say, one of the privileges, if you will, of being an American, is the right to sue over anything, anywhere, anytime for any reason.

**J. Aughenbaugh:** Yes.

**N. Rodgers:** You can file a lawsuit against anything, anyone. You can file a lawsuit against rain in the United States. A judge will quickly throw that out and say, rain is an act of God and cannot be sued. But you can file that. If you have the time, you can go on and do the work and file it at the courthouse.

**J. Aughenbaugh:** Nia, to your point, one of the dominant features of American political culture since the country's founding is the American willingness propensity to litigate any and all disputes.

**N. Rodgers:** Yes. We are the most litigious of all the countries.

**J. Aughenbaugh:** Well, actually scholars say we're just in the top five now. There are some scholars that suggest that interestingly in North Japan per capita files more lawsuits than any other nation. But of all the things that we've exported, I'm not entirely sure.

**N. Rodgers:** I was going to say, you're welcome.

**J. Aughenbaugh:** Our litigious nature, I'm not entirely sure is the best one that we've exported. But Alexis de Tocqueville, writing in the 1830s when he was reviewing the American form of democracy, one of his clearest conclusions about the American form of democracy was our secular belief in courts to settle disputes.

**N. Rodgers:** Which is funny because you and I have discussed on multiple occasions how Article 3 was an afterthought and yet Americans have made it the central, whatever else they may or may not know about the Constitution they know they can sue.

**J. Aughenbaugh:** It is the secular religion in the United States.

**N. Rodgers:** It really is. Let me backup.

**J. Aughenbaugh:** But, Nia, as a practical matter, you're spot on. Because in many trials without certain key evidence, the case ends up being dismissed because, for instance, in the Reynold's case, the widows could not determine if it was mechanical failure, if it was pilot failure. Was the government aware of either or both before they did the training flight because it was a training flight? They couldn't determine that. What you oftentimes see is, when the government makes a state secrets privilege and the judge agrees with the government, then the case falls apart. It ends up being dismissed because of lack of evidence to support the claim against the government.

**N. Rodgers:** Can we dig in a little bit on something you just said there? Here's what I assume happens. You have the widows and you have the government as represented by Bob. The widows and Bob. The widows have a lawyer. His name is Joe, Joe and Bob. They go to the judge in chambers and Joe says we need this report because it's going to tell us whether there was a mechanical problem. It's going to tell us whose fault it was. If it is the fault of the government, then they need to pony up. Bob is going to say, Your Honor, we can't give you that report because it gives too much information that our enemies could then use to either thought the use of this vehicle, or make their own, or whatever, whatever, whatever. That's not done in front of anybody else. That's just done in chambers, in front of the judge. Then the judge makes that decision. Is that how that works?

**J. Aughenbaugh:** Yeah. What you're talking about is in-camera inspection. A judge has the authority to go ahead then and say to Bob, who was representing the federal government, well, let me see the report.

**N. Rodgers:** The judge actually sees the report?

**J. Aughenbaugh:** Well, the judge can.

**N. Rodgers:** Or the information or whatever.

**J. Aughenbaugh:** One of the criticisms is that over time, many of the judges would just defer to the assertion of the state secrets privilege.

**N. Rodgers:** I trust you, I think you're telling the truth.

**J. Aughenbaugh:** One of the purposes of having an independent judiciary is to provide a check and a balance on the political branches. The critique or criticism was a lot of federal judges were basically just saying, okay, well, if that's what you assert and you are the federal government, who am I to go ahead and question you about national security?

**N. Rodgers:** Which is a similar argument that people have about the FISA courts. Is that it's all too easy to get a warrant at a FISA court because the judge is like, you wouldn't ask if you didn't have a reason.

**J. Aughenbaugh:** That's right.

**N. Rodgers:** You wouldn't assert secret privilege if you didn't have a state secret to protect.

**J. Aughenbaugh:** Listeners, Nia just made reference to FISA courts, the Foreign Intelligence Surveillance Act courts. Interestingly enough, recently, a number of interest groups, including the ACLU, asked the US Supreme Court to direct the Foreign Intelligence Surveillance Court to release more information about FISA awards, and what warrants are being granted, what warrants are being denied. The US Supreme Court, by a vote of 72, denied the request. Interestingly enough, I believe Justices Sotomayor and Gorsuch, they issued a dissent of the [inaudible 00:22:04] being denied, saying this is an important constitutional issue that the Supreme Court should take up.

**N. Rodgers:** That's unique bedfellows there.

**J. Aughenbaugh:** You don't see that very often. I think the most recent Supreme Court term, Sotomayor and Gorsuch, voted together about 55 or 60 percent of the time.

**N. Rodgers:** Proof that when people think that a justice on the Supreme Court is put in by a president of a certain political party that they are going to fall in line with that party, and that party's consistent ideology, they need to get over that. That is not what happens. It happens sometimes, but sometimes.

**J. Aughenbaugh:** I mean, Gorsuch and Sotomayor compared to the rest of the justices, I think either they the voted least together or close to the least together. But even still, the figure was 55-60 percent of the time. I have close friends.

**N. Rodgers:** That you don't get along with that well.

**J. Aughenbaugh:** Well, we don't agree.

**N. Rodgers:** Fifty five percent of the time.

**J. Aughenbaugh:** Percent of the time. They're close friends, I would give my life for them.

**N. Rodgers:** They're people you would let pick up your kid from school, and you agree with them less than these two people.

**J. Aughenbaugh:** There's the common narrative that these justices just like, hate one another. Because, a president of one political party appointed judge A, and the president of another political party appointed justice B, of course they don't get along. No, they actually get along more than most of us.

**N. Rodgers:** When we think about it, they are nine. That's a very small club.

**J. Aughenbaugh:** It's small group interaction. Me and you have talked about this.

**N. Rodgers:** You have to get along.

**J. Aughenbaugh:** We have to get along or just don't register every single objection that you think or feel. But back to the State secret privilege.

**N. Rodgers:** When a judge decides that and theoretically, the judge in the best way, they would read the document, they would decide, that really does endanger national security. Does that judge have to have security clearances?

**J. Aughenbaugh:** Well, according to federal law, no. Because the assumption is what judges do in chambers is private. I mean let's face it, if judges started reporting discussions with lawyers in chambers, you want to talk about lawyers losing confidence in judges?

**N. Rodgers:** We need to have lot less litigious society because people would not work the same way this works in that you wouldn't trust that you are going to get any sort of privacy or any kind of anything. That gets decided and the judge says no, this is legitimate, you can't have this report, and it ends the case for those people because they can't prove who's at fault, because they don't have the report to prove that.

**J. Aughenbaugh:** Then they would go back into the courtroom and the judge would say, in your hypothetical, to Joe representing the widows, "Joe, do you have any other evidence?"

**N. Rodgers:** No sir, we need that report.

**J. Aughenbaugh:** We need that report. The judge says, "Sorry, that report is governed by state secrets privilege. Absent any other any other evidence, there's no case here. Case dismissed."

**N. Rodgers:** But if they have other material, then they can bring it up.

**J. Aughenbaugh:** They can they can bring it up.

**N. Rodgers:** You can still go ahead with the case if you have sufficient material.

**J. Aughenbaugh:** It just becomes extremely difficult.

**N. Rodgers:** It's intended to do that. It's intended to put a stop to.

**J. Aughenbaugh:** Yes. Because, again, the government is making the claim that the disclosure of certain information would harm national security. Do the political branches of the federal government have the authority to provide national security for the entire country? Yes.

**N. Rodgers:** I have mixed feelings about this.

**J. Aughenbaugh:** I'm there right there with you.

**N. Rodgers:** Because there's part of me that's like what we have to protect national security, we do. That's part of being a country is that we protect our way of finding information, our way of doing certain things. Because we can't function as a nation and protect our citizens if we don't. But then there's another part of me that's, yes, but if there's no sunlight, that's where mold grows, that's where you have this problem of if there's no transparency. Going back briefly to the FISA courts, they grant the warrants in something like 90 plus percent of the times that they're asked for. Unlike regular judges who regularly say no, you can't have a warrant for that. That's not sufficient grounds for you to just bust in Aughie's door and start going through their cabinets.

**J. Aughenbaugh:** Or at least didn't they have the process forces government officials to dot the i's and cross right teams.

**N. Rodgers:** Right. Because other people can watch.

**J. Aughenbaugh:** Okay. Yeah. Because those warrants in criminal court cases, non-FISA warrants. The warrant has to be given to you.

**N. Rodgers:** When they kick in your front door. That's on TV most of the time they knock politely. They knock politely, you open the door, they hand it to you and say, hey, we have a warrant to look through.

**J. Aughenbaugh:** Yeah. Okay. For evidence of x. In many law enforcement, try not to go ahead and wreck your house.

**N. Rodgers:** They often will say to you, if your kids are here, would you like to take them out on the front lawn. Because they're not trying to traumatize your children.

**J. Aughenbaugh:** Yes. Many cops will go ahead and say, okay, we have a warrant to basically search your entire house or you can just go ahead and tell us where the evidence is. I mean, they give you a choice. But it's all public. Unlike a FISA warrant and unlike for instance, the state secrets privilege, where the government basically is saying trust us.

**N. Rodgers:** Yes. We have evidence that you're not always trustworthy, therefore.

**J. Aughenbaugh:** Well, it is a really good segue to the next thing I want to mention about the state secrets privilege. Which is how often it gets used. The court gives official, if you will, acceptance to the privilege in 1953. Between 1953 and 1976, the federal government only asserted the privilege four times.

**N. Rodgers:** Not 40, not 14, 4. F-O-U-R.

**J. Aughenbaugh:** That's right.

**N. Rodgers:** The number after three and the number before five.

**J. Aughenbaugh:** Before five. Four times.

**N. Rodgers:** That's in 23 years, '53-'76, right. 23 years. That's not very many.

**J. Aughenbaugh:** No.

**N. Rodgers:** Which I would assume that means that when it happened the third time they were like, we don't do this very often, so we're going to just trust that it's not unreasonable.

**J. Aughenbaugh:** That's why many federal judges were prone to accept the privilege assertion.

**N. Rodgers:** Because they are so aware.

**J. Aughenbaugh:** I mean, this has to be serious because the federal government hardly ever invokes it.

**N. Rodgers:** Okay.

**J. Aughenbaugh:** Nia, do you want to guess with after what events did we see an explosion of the federal government asserting the state secrets privilege?

**N. Rodgers:** For Homeland Security, it's got to be 911.

**J. Aughenbaugh:** 911. Yes.

**N. Rodgers:** Every time anybody in Homeland Security says, I'm doing this and you say why, they say 911. Or some derivative thereof.

**J. Aughenbaugh:** It is the catalytic events for some rather significant changes in our federal government and in our court system.

**N. Rodgers:** It created the Department of Homeland Security. If you're going to talk about Homeland Security, that's when you get the creation of that department.

**J. Aughenbaugh:** Yeah.

**N. Rodgers:** How many times?

**J. Aughenbaugh:** The Bush 43 administration invoke the privilege 23 times post 911.

**N. Rodgers:** Five times as many, almost six times as many.

**J. Aughenbaugh:** Many in roughly six-and-half years.

**N. Rodgers:** We never do this. We always do this.

**J. Aughenbaugh:** We're doing this. By the way, if you think that Nia and I are beating up on the Bush 43 administration, no. Because subsequent presidential administrations have also used the privilege with some regularity. The Obama administration relied upon it in a variety of cases, including cases concerning the federal government being involved with torture. The Obama administration used it in challenges to the drone targeted killings program. They also used it in regards to continuing the Bush 43's warrantless surveillance program. The Trump administration, again, listeners, you've heard me say this. But we're going to be learning and we're going to be creating so many exceptions to what we know about the presidency, about the rule of law with the Trump administration. Trump expanded its usage to include immigration and various elements of foreign policy, including diplomatic exchanges that the President had with leaders of other nations.

**N. Rodgers:** The infamous phone calls from the White House. Can I just say though, that in defensive of President Trump, President Trump, I think had a layman's understanding of the law as it applies to the president, as opposed to a constitutional understanding of the law as it applies to the president. He has been involved in lawsuits his entire life.

**J. Aughenbaugh:** Yes.

**N. Rodgers:** He is a litigious individual and people are litigious with him for a variety of reasons. Almost all having to do with his businesses. In his world, there are privileges that you don't have to disclose certain things when people try to force him to disclose his tax. Unless the case is specifically about that. You can't do that. You can't force somebody to tell you what their taxes are, what their income is. I get where he might perceive that privileges being different maybe than presidents before him. However now that he has opened that door. I feel certain that all presidents after him, we'll walk through it because when have they ever given back a power that they have taken. "The president is too powerful here take this back." That never happens. When that does happen, it will be one of the signs of the apocalypse. You can look around for horseman at that point because it's getting ready to go down.

**J. Aughenbaugh:** Nia and I discussed this, that the rise of the modern presidents, starting with Teddy Roosevelt, because that's the most presidential scholars date the start of the modern president. Teddy Roosevelt expanded the powers of the office of president. Presidents who had been labeled the best, the greatest by historians and political scientists, weren't shrinking violets who did nothing. They were typically presidents who push the envelope. Right?

**N. Rodgers:** Right.

**J. Aughenbaugh:** George Washington was basically creating brand new norms because he was the first president. What I mean if you think about Thomas Jefferson, Andrew Jackson, Abraham Lincoln, Teddy Roosevelt, Woodrow Wilson, FDR, LBJ.

**N. Rodgers:** You have an enormous expansion of presidential powers under eating those individuals.

**J. Aughenbaugh:** They push the envelope. Worry it's not stopped. The Biden administration near this fall. In two different Supreme Court cases that will be heard in I think by the end of this calendar year have a sorted state secrets.

**N. Rodgers:** Yeah. Because why stop. Once that flood gate gets opened then it's really hard to close it.

**J. Aughenbaugh:** Yes. Because so many presidents are now using it. You have scholars who are like, hey, wait a minute here.

**N. Rodgers:** It feels like abuse at this time. It feels like instead of use, we've moved over the line into abuse. It's a national security thing. But I'm going to need you to prove that that's a national security thing. Because at this point, the other problem with that, is it Homeland Security or national security are so nebulous in their definition that you hear talk of overfishing in American waters as a national security problem.

**N. Rodgers:** I'm like, is that really a national security problem? That seems like a reach to me. I'm just saying it seems like a reach.

**J. Aughenbaugh:** It might be bad policy, it might be bad food policy, it might be bad sustainability policy, but is it truly a national security problem?

**N. Rodgers:** Exactly. I would think that that would be one of the main criticisms is that because the definition of national security is so nebulous, then when you put anything under it, you have to start questioning where is it being used too much? Is the privilege being abused?

**J. Aughenbaugh:** Part of the criticism of the privilege is that, not only is national security as a concept or as a justification nebulous, but is it being used to cover up embarrassing facts or circumstances that the presidential administration don't want the public to become aware? There isn't an exception in the United States Constitution for the government to avoid being embarrassed.

**N. Rodgers:** I wish there was an embarrassment clause. That would be hilarious.

**J. Aughenbaugh:** But there are broader theoretical concerns here. If we know that judges don't even review the government claim, then it calls into question checks and balances.

**N. Rodgers:** Yeah, it calls into question the judiciary and the seriousness of its work.

**J. Aughenbaugh:** Its work, because on one hand, the state secrets privilege flows from separation of powers. I mean, the logic is the executive branch is tasked by the US Constitution to execute the law, so it should be able to determine the best way to, for instance, provide national security. On the other hand, we have a related concept in the US Constitution, which is checks and balances. If James Madison was correct in Federalist 51, the reason why we have these shared powers is that we are concerned that people in each branch of the federal government might try to go too far. Might try to go ahead and cover up their wrong doings, even if they were not done for evil. People make mistakes. But in a democracy, how do we hold the government accountable if the government can just go ahead and say, "Oops, sorry, you guys aren't going to find out about this because it is a 'state secret.'"

**N. Rodgers:** Well, and how can we learn from that mistake and not make it again? I mean, all you're doing is asking the next administration to make the same mistake because they would not have access to the knowledge that would help you prevent from making that mistake. Are there any good things?

**J. Aughenbaugh:** Well, many national security scholars, many Homeland Security scholars have said it's a necessary tool to have if the United States is going to be an active player in international affairs because as we pointed out earlier in this episode, many nation-states would not want to work with us if they knew that.

**N. Rodgers:** We just go around spilling their secrets. You know who told us that? Scotland. Scotland told us that. Scotland be like, "I'm never talking to you again. Get out of my face." I know Scotland's not a nation by the way. I know they want to be, but they're not one yet.

**J. Aughenbaugh:** Well, at least some people do. Some people in Scotland would like it. Others don't.

**N. Rodgers:** 50-50 last time they voted?

**J. Aughenbaugh:** I mean, you think about how Trump a couple of times got into problems because he went ahead and spilled the beans on what other world leaders thought we're privileged diplomatic communications.

**N. Rodgers:** Yeah, something happened in Iran and he was like, "Yeah, Israel did that," and Israel was like, "Don't tell people." I don't think he was intentionally trying to destroy their state secrets as it were. I think he thought it was obvious so he was like, "Well, yeah." You're right, it could chill those relationships. It certainly could chill individuals. If an individual knew something, if I was an insider in Al-Qaeda and I gave information, if I thought there was any way my name would come out and I would be shot, summarily shot and more importantly, my family would be shot, I wouldn't do it because I would be worried.

**J. Aughenbaugh:** Or think about this, and this is a more recent event. Think about the disagreement that has occurred between Australia, United States, Britain, and France about the selling of nuclear submarine technology to the Aussies.

**N. Rodgers:** France is pretty mad at us right now.

**J. Aughenbaugh:** Yeah.

**N. Rodgers:** They're pretty grumpy. They're like, "Wait, we had a \$60 billion contract," and we're like "Psych." Actually, Australia said psych to France. For listeners who may not know, Australia had a deal with France. They were going to buy some nuclear submarine technology and a couple of actual nuclear subs and they had set up this deal and it was like several billion dollars over x number of years because that's how you do these deals. Then about, I don't know, three or four months ago, they said to France, "Never mind, we're buying it from the United States." France was like, "Excuse me?" Because one, it's a huge deal financially that they're not going to be making the money. But also, what the heck is the United States doing in all this?

**J. Aughenbaugh:** Since when does the US go poach?

**N. Rodgers:** From their allies.

**J. Aughenbaugh:** Then it became public that Great Britain brokered the deal.

**N. Rodgers:** The United States has said, and Australia has said that the reason that they are doing that is because of moves made by China involved in all of this China Sea and Taiwan and there's all these issues there and so what it is is the United States is projecting power into Asia.

**J. Aughenbaugh:** France has been more willing to work with and negotiate with the Chinese and the Aussies wanted to go ahead and send a very clear message to the Chinese.

**N. Rodgers:** That they're not. It caused France for the first time in 250 years to pull their ambassador out of the United States. That's a big deal. They're our oldest world ally. They were with us against England when we left.

**J. Aughenbaugh:** All this becomes public, and quite a few people that I've read, scholars who are like, if there was ever a time that the state secrets privilege should have been invoked in the United States, Great Britain, at all, it should have been this, because the Chinese are just sitting back saying, "Do we really have anything to fear from the west when they can't even do a nuclear technology deal? Really, seriously?"

**N. Rodgers:** The other thing too, about that, the problem I would think with privilege, another one of these things that would happen with state secret privileges, the more people who know a thing, the more people will tell a thing.

**J. Aughenbaugh:** Yes.

**N. Rodgers:** Part of that was that Australia told it. Australia sent a cable to France basically saying never mind and France was like, "First of all, you break up with us by cable and second of all, you couldn't even call and second of all, what are you talking about?"

**J. Aughenbaugh:** It's funny you mentioned the "we're no longer doing a deal with you" cable between the Aussies and the French. As one scholar went ahead and describe it online, it's like breaking up with your significant other via text.

**N. Rodgers:** It may be a generational thing, but world politics runs on old school generation, not young school generation.

**J. Aughenbaugh:** You should do this face to face. You don't send the cable and say, "Thanks, but no." That's not the way it's done. That's why Trump got in trouble when he went ahead and said that, "Of course, you know, the Israelis went ahead and did that." That's not what you do. By the way, this isn't a positive of the state secrets privilege, but I do want to go ahead and remind listeners. Nia and I have been beating up about how the courts don't seem to be engaged in their accountability role, when they just accept the state secret privilege. But there is another institutional actor who could rein in the use of state secrets. It's Congress.

**N. Rodgers:** Yeah.

**J. Aughenbaugh:** Congress could go ahead, and change the practice by putting explicit language in authorizing legislation, forbidding the Executive Branch from using state secrets privilege. Now, you want to talk about why Congress doesn't? Because right now, let's say you are the Republicans in the United States Congress, you are thinking that at some point in the future, who might be President of the United States?

**N. Rodgers:** Right. Another Republican

**J. Aughenbaugh:** Republican. Do we want to tie the hands of the leader of our political party?

**N. Rodgers:** That's why a lot of stuff doesn't get done. Also, two words, it's hard. That's the other reason things don't get done. It's because sometimes it's hard. People who are involved, they're like, "I don't want to do that, it's hard."

**J. Aughenbaugh:** Think about the trade-offs, listeners. Nia, you and I talked about this. You and I are of mixed mind about this. On one hand, we see the obvious problems in a democracy of a branch of the Federal Government. Basically, saying to the courts of law, "Sorry, you guys can't use that because it would harm national security." On the other hand, as you and I have discussed, the Constitution's not a suicide pact. We want the political branches, but particularly the Executive Branch of the Federal Government, to provide national security. If it thinks the privilege is an effective tool to make sure that we sleep safe and sound every single night, should we be second guessing their use of this tool? It's complicated, it's different.

**N. Rodgers:** It's complicated.

**J. Aughenbaugh:** If you're a member of Congress, and you're representing some small rural community in Nebraska, what do you know about the provision of national security? Your constituents sent you there to make sure that a farm bill that protects farmers in your district gets passed, that vaccines get put into people's arms, that inflation doesn't get too high, etc. That's what they're saying you need to. [inaudible 00:51:36] the Congress do. What do I know about state secrets? What is state secret?

**N. Rodgers:** Exactly. Where does that apply and not apply? It's complicated. If it were simple, we just solved it. Because that's how that usually works. That's usually my answer for all of these things when they're complicated. But I agree with you that the global war on terror has made this significantly harder to deal with. That's why you see that huge leap after 9/11. It wasn't that there wasn't terrorism before 9/11. There was plenty of terrorism before 9/11. There was even airline terrorism before 9/11 quite a few times. You get all kinds of things where there are clear terrorist events. It's not that there's not terrorism, it's that when the United States government decides to declare war on terrorism, we're going after this as a concept. We're going after this to try to destroy it or stamp it out. It grows leaps and bounds. It just explodes with growth.

**J. Aughenbaugh:** Of all the criticisms you can make about the United States government historically, there's plenty. We've chronicled many of them.

**N. Rodgers:** We'll do more.

**J. Aughenbaugh:** We'll do more in the future. But when this country goes to war, it goes to war.

**N. Rodgers:** All in.

**J. Aughenbaugh:** It's all in, and it uses every tool at its disposal. There's the famous quote from John Marshall before he became Chief Justice, when he was a member of the House of Representatives. In a floor debate in the House, John Marshall said, "The power to wage war is the power to wage war successfully." If you give the political branches that authority to wage war, you don't hamstring or limit their power, it's a power to wage war. But it then begs the question, when does the war end? Is this war different? Because again, when you waged war against nation-states, seeing [inaudible 00:54:19] . There wasn't [inaudible 00:54:20] .

**N. Rodgers:** There was an ending. [inaudible 00:54:24] See Vietnam, but there was an ending.

**J. Aughenbaugh:** Then there were rules of engagement, then there were things that nation-states do that is or is not acceptable. If they do unacceptable things, they get punished in certain ways, etc. But with terrorism, it's different.

**N. Rodgers:** It's both a concept and a non-state actor driven activity.

**J. Aughenbaugh:** That's right. The desire is to cause fear. Democratic governments don't always respond to fear the way we would like them to, and that's part of why the increased use of the state secrets privilege is beginning to raise alarms. For scholars, when the Biden administration decided to go forward with these two cases in front of the Supreme Court, this term, and these are continuations of cases started with the Trump administration. The written briefs by the Biden administration's Justice Department were full in on supporting the state secrets doctrine. A whole bunch of scholars were like, "Wow, this isn't a political party thing. This isn't even an ideological thing. This is who's ever in power in the Executive Branch. Thus, see the checks and balances concerned. Because it doesn't matter who's President. They're all now going ahead, and saying, "Well, hey, that's a state secret, and we can't disclose that." Wow, that's a pretty stunning assertion, but anyways.

**N. Rodgers:** On that happy note, we'll be back next week with a different episode on something else. Hopefully, not nearly as sad and depressing.

**J. Aughenbaugh:** Yes. We will try to go ahead and have an episode. Well, I wouldn't necessarily say it will be happy-happy, joy-joy.

**N. Rodgers:** Actually I think it might be because I think that next week might be our week that we're meeting with Hillary.

**J. Aughenbaugh:** Oh, yes.

**N. Rodgers:** Fun with patents.

**J. Aughenbaugh:** Yes, fun with patents, trademarks, and copyrights.

**N. Rodgers:** Hopefully, it will look up next week.

**J. Aughenbaugh:** Thanks, Nia.

**N. Rodgers:** Thank you, Aughie.

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