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The State Secrets Privilege: Relying on *Reynolds*

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In response to newspaper disclosures in December 2005 about secret eavesdropping by the National Security Agency (NSA),[1] a number of lawsuits challenged the constitutionality and legality of the program. The George W. Bush administration invoked the state secrets privilege as an absolute bar to litigation whenever the administration determines that the disclosure of agency documents would harm national security. In relying on the privilege in one NSA case, the Justice Department argued that its assertion "assuredly [is] not any indication that the allegations the plaintiffs are making are necessarily true. Nor is it an indication that the allegations are necessarily false. They're instead a function of the subject matter of those allegations. The reality is that given the nature of those allegations, it would expose state secrets for them to be either confirmed or denied."[2] Whether such phone companies as AT&T are cooperating with the government in intelligence gathering "is absolutely a secret; it's a secret of the highest order."[3]

On 12 May 2006, a federal district court ruled that Khaled El-Masri could not bring suit against the government on the grounds that he was illegally detained as part of the CIA's "extraordinary rendition" program, tortured, and subjected to other inhumane treatment. The court held that the state secrets privilege had been validly asserted.[4] In a similar case, Maher Arar sued the government for having him removed to Syria for the express purpose of deten-

[1] James Risen and Eric Lichblau, "Bush Lets U.S. Spy on Callers Without Courts," *The New York Times*, 16 December 2005.

[2] *Hepting v. AT&T Corp.*, U.S. District Court, Northern District of California, Transcript of Proceedings, 23 June 2006, 21.

[3] Ibid., 23.

[4] *El-Masri v. Tenet*, 437 F.Supp.2d 530 (E.D. Va. 2006).

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tion and interrogation under torture by Syrian officials. His case was dismissed in part on state secrets grounds.[5]

In these and other cases, the Justice Department relies primarily on *United States v. Reynolds* (1953), the first time that the Supreme Court recognized the state secrets privilege. For a federal court to automatically accept claims of state secrets by an interested party (the government)—and treat them as absolute—would do great damage to the reputation and integrity of the federal judiciary. It would repudiate any pretense of judicial independence, objectivity, the weighing of evidence, or fairness to a private litigant. This is especially true in the face of the repeated use of the privilege by the executive branch over the past several decades.[6]

In his authoritative treatise on evidence, John Henry Wigmore recognized that the state secrets privilege exists, but he concluded that the branch responsible for determining the necessity of the privilege is the judiciary, not the executive: "Shall every subordinate in the department have access to the secret, and not the presiding officer of justice?"[7] A court that "abdicates its inherent function of determining the facts upon which the admissibility of evidence depends will furnish to bureaucratic officials too ample opportunities for abusing the privilege."[8]

Reynolds in District Court

In *United States v. Reynolds* (1953), the Supreme Court for the first time recognized and upheld the state secrets privilege. Although the decision remains the principal citation for the privilege, the circumstances of the case provide powerful evidence that it was poorly and unwisely decided and should not be relied on to sustain independent and unchecked executive power. Many legal precedents exist, including *Dred Scott* and the Japanese-American cases of World War II. Not all provide sound and compelling guidance for contemporary times.[9]

In *Reynolds*, three widows brought an action under the Federal Tort Claims Act to sue the government for negligence in the midair explosion of a B-29 bomber on 6 October 1948, over Waycross, Georgia. Five of eight crew

[5] *Arar v. Ashcroft*, 414 F.Supp.2d 250 (E.D. N.Y. 2006).

[6] William G. Weaver and Robert M. Pallitto, "State Secrets and Executive Power," *Political Science Quarterly* 120 (Spring 2005): 85–112.

[7] John Henry Wigmore, *Evidence in Trials at Common Law*, vol. 8, 3rd ed. (Boston: Little, Brown, 1940), § 2379.

[8] Ibid.

[9] See Louis Fisher and David Gray Adler, *American Constitutional Law*, 7th ed. (Durham, NC: Carolina Academic Press, 2007), 263, 269–272, 761–766. In *Dred Scott v. Sandford* (1857), the Supreme Court held that Scott could not sue in federal court and that he (and all other black slaves and their descendants) was not a citizen of the United States or Missouri. In the two Japanese-American cases, *Hirabayashi v. United States* (1943), and *Korematsu v. United States* (1944), the Court upheld a curfew order and detention camps for Japanese-Americans, two-thirds of whom were U.S. citizens.

members perished, as did four of the five civilian engineers on board, who had served as technical advisers to an Air Force project. They provided assistance with the secret equipment tested on the flight, all of which was known to newspaper readers who learned of the crash the next day.[10] The widows requested several key documents, including the accident report and the depositions of three surviving crew survivors.

The Federal Tort Claims Act of 1946 authorizes federal agencies to settle any claim against the United States "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment."[11] Congress directed federal courts to treat the government in the same manner as a private individual, deciding the dispute on the basis of facts and with no partiality in favor of the government. The United States "shall be liable in respect of such claims…in the same manner, and to the same extent as a private individual under like circumstances, except that the United States shall not be liable for interest prior to judgment, or for punitive damages."[12]

Other than the exceptions listed in the statute, Congress authorized courts to adjudicate claims against the government and decide them fairly in light of available facts. Congress empowered the courts to exercise independent judgment. There was no reason for judges to accept at face value a government's claim that an agency document requested by plaintiffs was somehow privileged, without the court itself examining the document to verify the government's assertion. To uncritically accept the government's word would be to abdicate the court's duty to protect the ability of each party to present its case fairly in court. It would leave control entirely in the hands of self-interested executive claims.

The three widows filed their lawsuit on 21 June 1949. The case was assigned to Judge William H. Kirkpatrick, chief judge of the Eastern District in Pennsylvania. Representing the women were Charles J. Biddle and Francis Hopkinson of Drinker Biddle & Reath, a prominent law firm in Philadelphia. Biddle submitted 31 questions to the government, requesting that it provide answers and submit copies of identified records and documents. The government responded to the interrogatories on 5 January 1950.[13] The first question asked whether the government had directed an investigation into the crash. If so, the government was to attach to its answer a copy of the reports and findings of the investigation.[14] The government acknowledged that there had been an investigation

[10] Louis Fisher, *In the Name of National Security: Unchecked Presidential Power and the* Reynolds *Case* (Lawrence: University Press of Kansas (2006)), 1–2.

[11] 60 Stat. 843, § 403 (1) (1946).

[12] Ibid., 843–844, § 410(a).

[13] Fisher, *In the Name of National Security*, 31–35.

[14] Transcript of Record, Supreme Court of the United States, October Term, 1952, No. 21, *United States v. Reynolds* (hereafter "Transcript of Record"), 8.

but refused to produce the accident report.[15] No claim of state secrets was advanced at this stage.

Question 7 in the interrogatories: "Was any engine trouble experienced with the said B-29 type aircraft on October 6, 1947, prior to the crash?"[16] The government's unhelpful reply: "Yes, almost immediately before the crash." The last two questions sought information about possible mechanical or engineering defects on the B-29 for three months immediately preceding the crash. Was it necessary at any time to postpone a scheduled flight of the plane because of those defects? The government answered in the negative.[17] The last question asked whether the government had prescribed modifications to the B-29 engines to prevent overheating and to reduce fire hazards. If so, when were the modifications prescribed? If any modifications had been carried out, the interrogatory asked for details. The government's answer to this crucial question was a blunt and abrupt no.[18] When the declassified accident report was discovered on the Internet in 2000, the falsity of that answer became apparent.

In response to the widows' request for the accident report and the statements of the three surviving crew members, the government on 25 January offered five reasons for withholding the documents. The first: "Report and findings of official investigation of air crash near Waycross, Georgia, are privileged documents, part of the executive files and declared confidential, pursuant to regulation promulgated under authority of Revised Statute 161 (5 U.S. Code 22)."[19] The citation was to the Housekeeping Statute, which dates back to 1789 and merely directed agency heads to keep custody of official documents. It did not in any way authorize the withholding of documents from plaintiffs or the courts.[20] The other four reasons offered for withholding the documents relied on hearsay rules.[21]

Prior to the district court's decision, several district and appellate courts had issued important rulings on access to government documents considered too sensitive, privileged, or secret to be shared with a private plaintiff. Judges concluded that the documents should be given to the court to independently determine and verify whether the government had accurately characterized the contents.[22] A district court decision in 1944, *United States v. Haugen*, involved a national security dispute. The issue was whether a private company was a government contractor in the secret defense project at Hanford, Washington, a project designed to create fission of uranium derivatives and the construction of an atomic bomb. To show that the company was indeed a federal agency, the government needed to produce the contract, but the original was with the

[15] Ibid., 12.
[16] Ibid., 9.
[17] Ibid., 14.
[18] Ibid.
[19] Fisher, *In the Name of National Security*, 36.
[20] Ibid., 36, 44–48.
[21] Ibid., 36.
[22] Ibid., 37–42.

General Accounting Office in Washington DC. As a substitute, the government tried to rely on oral testimony from a major, and the district judge initially found that acceptable: "The right of the Army to refuse to disclose confidential information, the secrecy of which it deems necessary to national defense, is indisputable."[23]

Can the government prosecute someone on the basis of a document it refuses to release? The court proceeded to ask whether "secondary evidence" (not the contract but the oral testimony of the major) was admissible in a courtroom.[24] It found it unsatisfactory to rely on "a copy of the copy."[25] Because the government had "failed to present the best evidence available to it," the judge concluded that he should have sustained the initial objection to the major's testimony. Without such evidence, the government had failed to sustain its claim that the company was an agency of the United States.[26] The court therefore dismissed the government's prosecution. In short, the government could withhold a requested document, but exercising that privilege could come at a price: keep the document and lose the case.

In its appeal to the Ninth Circuit, the government decided to share the disputed document with the trial court. After the district judge dismissed the indictment, the government moved to reopen the case and submit the evidence to the court.[27] The trial then proceeded. The government handed the contract to the court "for its consideration."[28] Having examined the contract, and concluding that the company was an agency of the United States, the Ninth Circuit affirmed the conviction.[29]

Struggles over access to government documents appear in several cases decided in the years leading up to district court action in *Reynolds*. In *Bank Line Limited* (1946), the plaintiffs requested a copy of the record prepared by the U.S. Naval Board of Investigation regarding collisions between inbound and outbound vessels of a convoy. The government withheld the record by making a claim of privilege and arguing that disclosure would seriously hamper the administration of the Navy Department. A district court ruled that the plaintiff was entitled to the record. No reasons of national security had been presented to justify the claim of privilege.[30] In the government's appeal to the Second Circuit, letters were received from the Judge Advocate of the Navy and the Acting Secretary of the Navy, both urging the appellate court to refuse access to the Navy Board's record because it would interfere with the Navy's investigatory and fact-finding procedure and would be prejudicial to the de-

[23] *United States v. Haugen*, 58 F.Supp. 436, 438 (E.D. Wash. 1944).
[24] Ibid., 439.
[25] Ibid., 440.
[26] Ibid.
[27] *Haugen v. United States*, 153 F.2d 850, 851 (9th Cir. 1946).
[28] Ibid., 852.
[29] Ibid., 853.
[30] *Bank Line Limited v. United States*, 68 F.Supp. 587, 588 (D. N.Y. 1946).

partment's best interests.[31] After the Second Circuit rejected the government's petition to deny production of the record, the district court in 1948 allowed access to the documents by the plaintiffs.[32] In referring to the sovereign's command *Soit droit fait al partie* (Let right be done to the party), it added this observation: "But right cannot be done if the government is allowed to suppress the facts in its possession."[33]

Wunderly v. United States (1948) involved a collision between the plaintiff's automobile and an Army jeep. The government furnished the plaintiff with copies of statements made by the driver and his immediate superior but refused to furnish a copy of the statement of a major. A district court pointed out that the Federal Tort Claims Act places the United States, with respect to claims dealt with by the act, on a par with private litigants.[34] It overruled the government's position that the major's statement was privileged. No contention had been made "that any military secrets, possibly protected by the scope of common law privilege, are involved."[35] It relied in part on *O'Neill v. United States*, a district court decision that had been handed down a few months earlier, on 23 August 1948. The author of that decision was Judge Kirkpatrick. The case involved a tort action under the Admiralty Act brought by a seaman for personal injuries after damage to a tanker. Like the Federal Tort Claims Act, the Suits in Admiralty Act put the government in all respects on a par with private individuals in litigation. Judge Kirkpatrick held that the seaman was entitled to receive written statements, taken by the Federal Bureau of Investigation (FBI), made by witnesses who had personal knowledge of the damage done to the tanker.[36]

At the appellate level, with the case now called *Alltmont*, the Third Circuit vacated Kirkpatrick's order on 3 June 1949 because of confusion about which documents the government would be compelled to hand over.[37] Kirkpatrick issued a new decree on 28 June to clarify what he meant by witnesses to the accident.[38] The Third Circuit was now in a position, on 23 November, to rule on whether there had been a prior showing of good cause (required by Admiralty Rule 32) to obtain the FBI statements. The Third Circuit reversed Kirkpatrick, requiring him to determine whether the plaintiffs had shown good cause. Access to the statements might be unnecessary because the plaintiffs had the names and addresses of the persons who made statements to the FBI and could therefore interview them directly.[39]

[31] *Bank Line v. United States*, 163 F.2d 133, 135–136 (2d Cir. 1947).
[32] *Bank Line v. United States*, 76 F.Supp. 801 (D. N.Y. 1948).
[33] Ibid., 804.
[34] *Wunderly v. United States*, 8 F.R.D. 356, 357 (D. Pa. 1948).
[35] Ibid.
[36] *O'Neill v. United States*, 79 F.Supp. 827 (D. Pa. 1948).
[37] *Alltmont v. United States*, 174 F.2d 931 (3d Cir. 1949).
[38] *Alltmont v. United States*, 87 F.Supp. 214 (D. Pa. 1949).
[39] *Alltmont v. United States*, 177 F.2d 971, 978–979 (3d Cir. 1949).

In *Cresmer v. United States* (1949), the plaintiff directed the government to produce for inspection and copying the record or report of the investigation conducted by the Navy Board of Investigation of an air crash in Bayside, Long Island, resulting in the death of a private citizen.[40] The plaintiff claimed that government negligence contributed to the accident. The government argued that the person operating the plane, although an employee of the government, was acting unlawfully and not within the scope of his office and employment. The government also opposed the motion for production of documents on the grounds that the report was privileged.[41]

To make sure that the report did not contain military secrets that would be detrimental to the interest of U.S. armed forces or national security if disclosed, the district judge directed the government to produce the report for his examination. He received the report, read it, and saw "nothing in it which would in any way reveal a military secret or subject the United States and its armed forces to any peril by reason of complete revelation."[42] In the absence of a showing of a war secret or a threat to national security, the judge ruled that "it would appear to be unseemly for the Government to thwart the efforts of a plaintiff in a case such as this to learn as much as possible concerning the cause of the disaster."[43] The court granted the plaintiff's motion for production of the report.

Two other important decisions were handed down by federal courts before Judge Kirkpatrick issued his ruling in the B-29 case. In *Cotton Valley* (1949), a district court warned the United States of what would happen if it failed to comply with a court order to produce documents requested by a private party. The government could first submit the documents to the court for independent scrutiny to test the government's claim of privilege. Failure to follow that procedure would mean that the court would dismiss the government's effort to file an antitrust action against the company.[44] The Supreme Court affirmed that judgment on 24 April 1950.[45] Through this process, the government learned that its refusal to release requested documents could come at a cost: dismissal of a case.

The other lawsuit was *Evans v. United States*, decided by a district court on 12 May 1950. A private party brought a tort claims action against the government for an alleged negligent death caused by the crash of an Air Force plane. The government refused to permit the private parties to see public documents, including the official investigative report of the accident.[46] The government also withheld the names of any witnesses and their statements. The case was on

[40] *Cresmer v. United States*, 9 F.R.D. 203 (D. N.Y. 1949).
[41] Ibid., 204.
[42] Ibid.
[43] Ibid.
[44] *United States v. Cotton Valley Operators Committee*, 9 F.R.D. 719 (D. La. 1949).
[45] *United States v. Cotton Valley Operators Committee*, 339 U.S. 940 (1950).
[46] *Evans v. United States,* 10 F.R.D. 255, 257 (D. La. 1950).

all fours with the B-29 litigation. The court underscored its duty under the Federal Tort Claims Act to adjudicate disputes in an independent manner and to ensure that plaintiffs have adequate access to documents to prepare their case: "It is not the exclusive right of any such agency of the Government to decide for itself the privileged nature of any such documents, but the Court is the one to judge of this when contention is made. This can be done by presenting to the Judge, without disclosure in the first instance to the other side, whatever is claimed to have that status. The Court then decides whether it is privileged or not. This would seem to be the inevitable consequence of the Government submitting itself either as plaintiff or defendant to litigation with private persons."[47] In view of the allegations of the *Evans* complaint and the motion to produce information, documents, and witnesses with respect to what caused the accident, the court ruled that the plaintiffs had shown good cause to have the requested materials submitted to them by the government.[48]

Guided by these lower court precedents, Judge Kirkpatrick decided on 30 June 1950 that the report of the B-29 accident and the findings of the Air Force's investigation "are not privileged."[49] The interrogatories had flushed out some basic facts, but the government's answers "are far short of the full and complete disclosure of facts which the spirit of the rules requires."[50] He noted that in response to the question, "Describe in detail the trouble experienced," the government answered: "At between 18,500 or 19,000 feet manifold pressure dropped to 23 inches on No. one engine."[51] To Kirkpatrick, it was "obvious" that the government, in possession of the report and findings of its official investigation, "knows more about the accident than this."[52] The widows, he said, were entitled to have the documents produced.

On 20 July, Judge Kirkpatrick issued an order permitting the plaintiffs to inspect the requested documents and set a deadline of 7 August for the government to produce the documents.[53] On 24 July, the Justice Department presented to Judge Kirkpatrick a number of letters, affidavits, and statements explaining why the documents should not be released to the plaintiffs.[54] On 9 August, Kirkpatrick met in court to hear from Francis Hopkinson for the plaintiffs, two attorneys from the Justice Department, and two colonels from the Judge Advocate General's Office of the Air Force. Thomas J. Curtin, Assistant U.S. Attorney, brought with him an affidavit signed by Maj. Gen. Reginald C. Harmon, Judge Advocate General of the U.S. Air Force, who stated that information and findings of the accident report and survivor state-

[47] Ibid., 257–258.
[48] Ibid., 258.
[49] *Brauner v. United States*, 10 F.R.D. 468, 472 (D. Pa. 1950).
[50] Ibid., 471.
[51] Ibid.
[52] Ibid.
[53] Fisher, *In the Name of National Security*, 51.
[54] Ibid., 51–56.

ments "cannot be furnished without seriously hampering national security, flying safety and the development of highly technical and secret military equipment."[55]

At the 9 August hearing, Curtin also brought with him an undated claim of privilege by the Secretary of the Air Force, Thomas K. Finletter. This turned out to be the pivotal document, spawning great confusion in the case decided by the Supreme Court in 1953 and subsequent litigation in the 2003–06 period when the three families went back to court to charge that the government had deceived the judiciary. Finletter said that the B-29 carried "confidential equipment on board and any disclosure of its mission or information concerning its operation or performance would be prejudicial to this Department and would not be in the public interest."[56] Those basic facts were known to newspaper readers the day after the crash. Why did Finletter warn about disclosing the plane's mission or information concerning its operation or performance? Was that type of information in the accident report or the survivor statements sought by the widows? It would be discovered, a half century later, that those documents disclosed nothing about the plane's secret mission or the confidential equipment. Intentionally or not, the Finletter statement was a red herring.

Finletter regarded the compulsory production of the investigative report as "prejudicial to the efficient operation of the Department of the Air Force, … not in the public interest, and … inconsistent with national security." He asserted the privileged status of the requested reports "and … respectfully decline[d] to permit their production."[57] Finletter was not relying primarily on common law or the state secrets privilege. He relied on statutory authority given by Congress in the Housekeeping Statute. Nothing in that statute implied any authority on the part of federal agencies to withhold documents sought in litigation.[58] The last line of Finletter's statement might imply the state secrets privilege, in the sense of claiming that no matter what a federal judge ordered, the executive branch could refuse. As the government learned in district court and the Third Circuit, refusal could mean losing the case.

Judge Kirkpatrick announced at the 9 August hearing his impression that the government was not contending that the case involved "the well recognized common law privilege in regard to secrets or facts which might seriously harm

[55] Affidavit of the Judge Advocate General, United States Air Force, *Reynolds v. United States*, Civil Action No. 10142, U.S. District Court for the Eastern District of Pennsylvania, 7 August 1950, signed by Major General Reginald C. Harmon (hereafter "Harmon affidavit"). The affidavit was not filed with the court until 10 October 1950. However, Thomas J. Curtin of the Justice Department brought this affidavit with him to the August 9 hearing; Transcript of Proceedings, 9 August 1950, *Brauner and Palya v. United States*, Civil Action No. 9793, and *Reynolds v. United States*, Civil Action No. 10142 (E.D. Pa. 1950), 4 (hereafter "Proceedings for 9 August 1950").

[56] Claim of Privilege by the Secretary of the Air Force, *Reynolds v. United States*, Civil Action No. 10142 (E.D. Pa. 1950), 2, filed with the court on 10 October 1950 (hereafter "Finletter statement"). The five-page Finletter statement is not paginated. Although not filed until October 10, Curtin brought it with him to the August 9 hearing.

[57] Finletter statement, 5.

[58] Fisher, *In the Name of National Security*, 44–48.

the Government in its diplomatic relations, military operations or the national security." Curtin of the Justice Department requested that Kirkpatrick "pass that for a minute, because that does come into this case in the second document" (the Finletter statement).[59] Curtin insisted that "the findings of the head of the Department are binding, and the judiciary cannot waive it."[60] When it came to statutory interpretation of agency authority over access to documents, "we contend [the department's judgment] is final."[61]

Kirkpatrick pursued that point. Putting statutory questions aside, he wanted to know if the government claimed a common law privilege over military secrets, would the government's decision be final and unreviewable by a court? Curtin: "There is no other interpretation. In other words, I say that the Executive is the person who must make that determination, not the Judiciary."[62] The state secrets privilege had made its appearance, even if the Justice Department would never expressly claim that privilege in its briefs submitted to the district court.

On 21 September, Judge Kirkpatrick issued an amended order directing the government to produce for his examination several documents "so that this court may determine whether or not all or any parts of such documents contain matters of a confidential nature, discovery of which would violate the Government's privilege against disclosure of matters involving the national or public interest." The documents included the accident report and statements of the three surviving crew members.[63] When the government failed to produce the documents for his inspection, he ruled in favor of the three widows.[64] As earlier cases had signaled, the government's refusal to produce requested documents—either to plaintiffs or to a trial court—always ran a risk. The court could simply decide in favor of the plaintiff.

The Third Circuit Affirms

The government gave notice on 20 April 1951 that it would appeal Judge Kirkpatrick's decision.[65] To the government, the ultimate issue was whether the Housekeeping Statute "and the Constitutional doctrine of separation of powers creates in the head of an executive department a discretion, to be exercised by him, to determine whether the public interest permits disclosure of

[59] *Brauner v. United States*, Civil Action No. 9793 U.S. District Court for the Eastern District of Pennsylvania, Transcript of Proceedings, 9 August 1950, 6.

[60] Ibid., 9.

[61] Ibid., 10.

[62] Ibid.

[63] Amended Order, 21 September 1950, *Brauner and Payla v. United States*, Civil Action No. 9793, and *Reynolds v.United States*, Civil Action No. 10142 (E.D. Pa. 1950), 2.

[64] Fisher, *In the Name of National Security*, 56–57.

[65] Notice of Appeal to the United States Court of Appeals for the Third Circuit, *Brauner and Palya v. United States*, Civil Action No. 9793, and *Reynolds v. United States*, Civil Action No. 10142 (E.D. Pa. 1951).

official records."[66] No one argued that state secrets should be "disclosed" to the public. Delivering the documents to a district judge, to be read in chambers, could not be considered as disclosure. The government essentially argued that access to evidence in a trial would be decided not by the judiciary but by one of the parties to the case: the executive branch.

The government looked to British precedents for guidance: "We believe that all controlling governmental and judicial material, here and in England, clearly supports the view that, in this type of case at least, disclosure by the head of an executive department cannot be coerced."[67] Why this emphasis on "disclosure" when the procedure contemplated was always in camera inspection by a judge? Also, the analogy to Great Britain was misplaced because the U.S. Constitution recognizes values and principles that broke decisively with British history and practice, including an independent judiciary capable of deciding against the executive branch, even in cases of national security. The American Framers considered the British legal model, which placed all of external affairs, foreign policy, and the war power in the executive, and firmly rejected it.[68]

On 11 December 1951, the Third Circuit upheld the district court's decision: "Considerations of justice may well demand that the plaintiffs should have access to the facts, thus within the exclusive control of their opponent, upon which they were required to rely to establish their right of recovery."[69] In tort claims cases, where the government had consented to be sued as a private person, whatever claims of public interest might exist in withholding accident reports "must yield to what Congress evidently regarded as the greater public interest involved in seeing that justice is done to persons injured by governmental operations whom it has authorized to enforce their claims by suit against the United States."[70]

In addition to matters of public law, the Third Circuit viewed the case from the standpoint of policy. To grant the government the "sweeping privilege" it claimed would be "contrary to a sound public policy."[71] It would be a small step, the court said, toward "assert[ing] a privilege against any disclosure of records merely because they might prove embarrassing to government officers."[72] The court rejected the government's position that it was within "the sole province of the Secretary of the Air Force to determine whether any privileged material is contained in the documents and … his determination of this question must be accepted by the district court without any independent consideration

[66] Brief for the United States, *Reynolds v. United States*, No. 10483 (3d Cir. 1951), 1 (hereafter "Government's Brief"), 6.

[67] Ibid.

[68] Louis Fisher, *Presidential War Power*, 2nd ed. (Lawrence: University Press of Kansas, 2004), 1–16.

[69] *Reynolds v. United States*, 192 F.2d 987, 992 (3d Cir. 1951).

[70] Ibid., 994.

[71] Ibid., 995.

[72] Ibid.

of the matter by it. We cannot accede to this proposition."[73] To hold that an agency head in a suit to which the government is a party "may conclusively determine the Government's claim of privilege is to abdicate the judicial function and permit the executive branch of the Government to infringe the independent province of the judiciary as laid down by the Constitution."[74]

Final Step: The Supreme Court

Having lost in district court and the Third Circuit, the government petitioned the Supreme Court for a writ of certiorari. After looking to history, practices in the states, and British rulings, the government for the first time began to press the state secrets privilege: "There are well settled privileges for state secrets and for communications of informers, both of which are applicable here, the first because the airplane which crashed was alleged by the Secretary [of the Air Force] to be carrying secret equipment, and the second because the secrecy necessary to encourage full disclosure by informants is also necessary in order to encourage the freest possible discussion by survivors before Accident Investigation Boards."[75]

The fact that the plane was carrying secret equipment was known to newspaper readers the day after the crash.[76] The fundamental issue, which the government repeatedly muddled, was whether the accident report and the survivor statements contained secret information. As it turns out, they did not.[77] In its brief, the government invoked "the so-called 'state secrets' privilege," claiming that the claim of privilege by Secretary of the Air Force Finletter "falls squarely" under that privilege for various reasons. Nothing in the government's argument had anything to do with the *contents* of the accident report or the survivors' statements. Had those documents been made available to the district court, it would have seen nothing that related to military secrets or confidential equipment. At various places, the government's brief misled the Supreme Court on the contents of the accident report. It asserted: "To the extent that the report reveals military secrets concerning the structure or performance of the plane that crashed or deals with these factors in relation to projected or suggested secret improvements it falls within the judicially recognized 'state secrets' privilege."[78] "To the extent"? In the case of the accident report and the survivor statements, the extent was zero.[79]

[73] Ibid., 996–997.

[74] Ibid., 997.

[75] Brief for the United States, *United States v. Reynolds*, No. 21, U.S. Supreme Court, October Term, 1952, 11.

[76] Fisher, *In The Name of National Security*, 1–2.

[77] Ibid., 166–169.

[78] Brief for the United States, *United States v. Reynolds*, No. 21, U.S. Supreme Court, October Term, 1942, 45.

[79] For access to accident report, see pages 10a-68a of http://www.fas.org/sgp/othergov/reynoldspetapp.pdf, accessed 24 June 2007.

On 9 March 1953, the Supreme Court ruled that the government had presented a valid claim of privilege. It did so without looking at the documents. Divided 6 to 3, the Court described a confused level of judicial supervision: "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."[80] If the government can keep the actual documents from the judge, even for in camera inspection, there is no basis on which a judge can "determine whether the circumstances are appropriate for the claim of privilege." The court merely accepts at face value an assertion by the government, an assertion that, in this case, proved to be false. Nor is there any reason to regard in camera inspection as "disclosure." The Court reasoned that in the case of the privilege against disclosing documents, the court "must be satisfied from all the evidence and circumstances" before it decides to accept the claim of privilege.[81] Denied actual documents, the judge has no "evidence" other than claims and assertions by self-serving statements from executive officials.

Finally, the Court cautioned that judicial control "over the evidence of a case cannot be abdicated to the caprice of executive officers."[82] If an executive officer acted capriciously and arbitrarily, a court would have no way of discerning that behavior unless it personally examined in camera the disputed documents. Without access to evidence, federal courts necessarily rely on vapors and allusions. Through the process adopted by the Court, judicial control was clearly "abdicated to the caprice of executive officers." The Court surrendered to the executive branch quintessential judicial duties over questions of privileges and evidence. The Court served not justice but the executive branch. It signaled that in this type of national security case, the courtroom tilts away from the private litigant and becomes a safe house for executive power.

The Supreme Court had two valid avenues before it. It could have followed the path taken by the district court and the Third Circuit, deciding in favor of the three widows because the government declined to release the accident report and the survivor statements. As an alternative, it could have asked the government to submit the disputed documents to the district court for in camera review. Instead, the Court selected a third option that was the least justified, assuming on the basis of ambiguous statements produced by the government that the claim of state secrets had merit. In so doing, it resorted to a jumbled reasoning process that in the hands of some lower courts, injured the rights of private citizens and did damage to fair procedures and the rule of law. By failing to examine the documents, the Court took the risk of being fooled. As it turned out, it was, raising disturbing questions about the capacity of the judiciary to function as an independent, trusted branch in the field of national security.

[80] *United States v. Reynolds*, 345 U.S. at 8.
[81] Ibid., 9.
[82] Ibid., 9–10.

Fraud Against the Court

Judith Loether was seven weeks old when her father, Albert Palya, died in the B-29 crash. As she grew up, she learned that he had been killed in an effort to develop secret equipment. After she had her first son in 1975, she began thinking more about her father's death. By the time she turned 41, she had a better appreciation of how young her father was at the time of the accident. She began researching the B-29 and the special equipment it carried.

On 10 February 2000, she stayed overnight with friends and decided to sit down at the computer. For the first time, she entered the combination "B-29" plus "accident" into a search engine. The first hit that came up was a Web site run by Michael Stowe, Accident-Report.com. He had a hobby of collecting and selling military accident reports.[83] He told Judy Loether he had the accident report she wanted. Within a couple of weeks she had the report and began reading it with great care, expecting to find passages on state secrets. To her surprise, there were none. The report contained a few references to "secret equipment," but she already knew that from newspaper stories that appeared the day after the crash. She began sending out postcards to find the other two civilian families involved in the B-29 crash: the Brauners and Patricia J. Herring.[84]

Loether, the Brauners, and Herring decided to sue the government for deceiving the federal courts. Eventually they turned to the law firm that had brought the original case, Drinker Biddle. The firm filed a motion for a writ of *coram nobis*, charging that the government had misled the Supreme Court and committed fraud against it. The writ is a motion to a court to review and correct its judgment because it was based on an error of fact. In 1827, Justice Joseph Story recognized the fundamental principle at play: "Every Court must be presumed to exercise those powers belonging to it, which are necessary for the promotion of public justice; and we do not doubt that this Court possesses the power to reinstate any cause, dismissed by mistake."[85]

Two principles of law compete. One is the general rule of judicial finality. As expressed by the Supreme Court in 1944, society is well served "by putting an end to litigation after a case has been tried and judgment entered."[86] Bringing finality to a legal dispute offers important benefits, but a second principle also demands respect. A court needs to revisit a judgment after discovering that fraud has cast a shadow over the original ruling. Tolerating fraud in a particular case reduces respect for judges and lowers confidence in the courts. Serious consequences follow in allowing fraud to infect a ruling: "Tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot

[83] Fisher, *In the Name of National Security*, 166.
[84] E-mail to author from Patricia J. Herring.
[85] *The Palmyra*, 12 Wheat. 1, 10 (1827).
[86] *Hazel-Atlas Co. v. Hartford Co.*, 322 U.S. 238, 244 (1944).

complacently be tolerated consistently with the good order of society.... The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpful victims of deception and fraud."[87]

On 4 March 2003, Wilson M. Brown III, of Drinker Biddle & Reath, petitioned the Supreme Court for a "writ of error *coram nobis* to remedy fraud upon this Court." The petition asked the Court to vacate its decision in *Reynolds* and reinstate the original judgment by the district court; award the widows and their families damages to compensate them for their losses; and award them attorneys fees and single or double costs as a sanction against the government's misconduct.[88] With the benefit of the declassified accident report and survivor statements, the petition detailed specific negligence by the Air Force that led to the accident.[89] The government filed a brief opposing the petition.[90] Without explanation, the Court on 23 June 2003 issued this ruling: "Motion for leave to file a petition for writ of error *coram nobis* denied."[91] The three families would have to start over again in the lower courts.

On 1 October 2003, the families filed an action in district court for relief from judgment in order to remedy fraud on the court. They argued that the government's action "was intended to and did subvert the processes of this Court, the Court of Appeals, and the United States Supreme Court."[92] In an opposing brief, the government denied that the statements signed by Finletter and Harmon constituted lies: "Neither Secretary Finletter's claim of privilege, nor General Harmon's affidavit, makes any specific representation concerning the contents of those documents [the accident report and witness statements]."[93] Yet it was because of the Finletter–Harmon statements that both the district court and the Third Circuit supported in camera review and the Supreme Court was convinced that the accident report contained secret information.

There was a reason for the government to withhold the accident report from Judge Kirkpatrick. The report revealed clear negligence on the part of the Air Force, which had not installed heat shields and had failed to brief the civilian engineers before the flight on the use of parachutes and emergency aircraft evacuation.[94] Had Kirkpatrick looked at the report, it would have been clear that the government had lied in its response to Question 31 of the interrogatories, which asked whether any modifications had been prescribed for the B-29 engines to prevent overheating and reduce the risk of fire hazard. The

[87] Ibid., 246. For examples of *coram nobis* cases, see Fisher, *In the Name of National Security*, 170–176.

[88] Petition for a Writ of Error *Coram Nobis* to Remedy Fraud upon This Court, In re Patricia J. Herring, No. 02M76, i.

[89] Fisher, *In the Name of National Security*, 177–182.

[90] Ibid., 182–186.

[91] *In re Herring*, 539 U.S. 940 (2003).

[92] Independent Action for Relief from Judgment to Remedy Fraud on the Court, *Herring v. United States* (E.D. Pa. 2003), 14.

[93] Brief in Support of Defendant's Motion to Dismiss, *Herring v. United States*, Civil Action No. 03-5500 (LDD) (E.D. Pa. 2004), 18 n.6.

[94] Fisher, *In the Name of National Security*, 192–193.

government's answer: no.[95] Reading the declassified accident report today, it is obvious that other answers by the government were either inaccurate or false.

Through its own doing, the government faced serious problems. The first was negligence by the Air Force. Why not simply concede mistakes and pay the widows the sums that Judge Kirkpatrick had awarded: $80,000 each to Phyllis Brauner and Elizabeth Palya, and $65,000 to Patricia Herring?[96] The answer to the three families in 2003 was the desire of the government to "fabricat[e] a 'test case' for a favorable judicial ruling on claims of an executive or 'state secrets' privilege—a case built on the fraudulent premise that the documents in question contained 'secret' military or national security information."[97]

District Judge Legrome D. Davis held oral argument on 11 May 2004. Both sides spent considerable time trying to divine the meaning of the Finletter–Harmon statements. Wilson Brown said that the Finletter statement "could not have been clearer" in saying that the Air Force objected to releasing the documents because they were "concerned with this confidential mission and equipment of the Air Force," and that there was an intent on the part of the government to suggest to the courts that these documents "contained references to confidential missions and descriptions of confidential equipment that were secret."[98] The government denied that the Finletter statement made representations "regarding the contents of the report or … that the report actually contains any specific description of the equipment or the nature of the mission, although there actually is an allusion to the nature of the mission."[99]

In the original litigation, apparently none of the judges or justices ever said to the government: "We have no idea what those statements mean. Do they say that the accident report and the survivor statements contain military secrets or state secrets?" Would the government have replied: "Why, no, Your Honor. Those documents, requested by the plaintiffs, do not contain any military secrets or state secrets"? It was to the government's advantage to allow the statements to remain ambiguous. It was the responsibility of the plaintiffs and the judiciary to remove the cloud. Instead, they left it there.

Judge Davis released his decision on 10 September 2004, granting the government's motion to dismiss and instructing the Clerk of Court to "statistically close this matter."[100] He deferred to the government in this manner: "In all likelihood, fifty years ago the government had a more accurate understanding 'on the prospect of danger to [national security] from the disclosure of secret

[95] Plaintiffs' Memorandum in Opposition to Defendant's Motion to Dismiss, *Herring v. United States*, Civil Action No. 03-5500 (LDD) (E.D. Pa. 2004), 11 (hereafter "Plaintiffs' Memorandum").

[96] Fisher, *In the Name of National Security*, 58.

[97] Plaintiffs' Memorandum, 12.

[98] Transcript of Hearing Before the Honorable Legrome D. Davis, *Herring v. United States*, CV-03-5500 LDD (E.D. 11 May 2004), 18.

[99] Ibid., 41.

[100] Memorandum and Order, *Herring v. United States*, Civil Action No. 03-CV-5500-LDD (E.D. Pa. 20 September 2004), 21.

and sensitive information' than lay persons could appreciate or that hindsight now allows."[101] That is not only pure assumption on Davis's part but improperly implies that "disclosure" to Judge Kirkpatrick would have been disclosure to the public.[102]

The families appealed to the Third Circuit. On 22 September 2005, the appellate court decided in favor of the government. The second paragraph made it clear where the court would end up: "Actions for fraud upon the court are so rare that this Court has not previously had the occasion to articulate legal definition of the concept. The concept of fraud upon the court challenges the very principle upon which our judicial system is based: the finality of a judgment."[103] What counted most for the Third Circuit was not having to revisit and redo an earlier decision, even if the government had misled the judiciary.

When the government invokes the state secrets privilege, one expects information that is so crucial and sensitive to national security that it cannot be shared even with a judge in chambers. The Third Circuit pointed to three possible state secrets: "The accident report revealed, for example, that the project was being carried out by 'the 3150th Electronics Squadron,' that the mission required an 'aircraft capable of dropping bombs' and that the mission required an airplane capable of 'operating at altitudes of 20,000 feet and above.'"[104] The last two elements cannot be a state secret. It was public knowledge that the confidential equipment was on board a B-29 flying at 20,000 feet and that the aircraft was capable of dropping bombs. That's what bombers do. It is implausible to regard the other two elements as so sensitive in nature that they could not have been submitted for in camera review. On 1 May 2006, the Supreme Court refused to take the case.[105]

The value given short shrift in this *coram nobis* case is the need to protect the integrity, independence, and reputation of the federal judiciary. The Supreme Court in *Reynolds* accepted at face value the government's assertion that the accident report and survivors' statements contained state secrets. That assertion was false. By accepting the government's claim and by not examining the documents, the Court appeared to function as an arm of the executive branch and failed to exercise independent judgment. When courts operate in that manner, litigants and citizens lose faith in the judiciary, the rule of law, and the system of checks and balances.

The Judge Runs the Courtroom

Deciding questions of privileges and access to evidence is central to the conduct of a trial by the judge. In his standard treatise on evidence, John Henry

[101] Ibid., 8 (citing *Halperin v. NSC*, 452 F.Supp. 47 [D.D.C. 1978]).
[102] Fisher, *In the Name of National Security*, 198–200.
[103] *Herring v. United States*, 424 F.3d 384, 386 (3d Cir. 2005).
[104] Ibid., 391 n.3.
[105] 126 S.Ct. 1909 (2006).

Wigmore recognized the existence of "state secrets" but also concluded that the scope of that privilege had to be decided by a judge, not executive officials. He agreed that there "must be a privilege for *secrets of State,* i.e. matters whose disclosure would endager [sic] the Nation's governmental requirements or its relations of friendship and profit with other nations." Yet he cautioned that this privilege "has been so often improperly invoked and so loosely misapplied that a strict definition of its legitimate limits must be made."[106] On the duty to give evidence, Wigmore was unambiguous: "Let it be understood, then, that there is no exemption, for officials as such, or for the Executive as such, from the universal testimonial duty to give evidence in judicial investigations."[107] Wigmore posed the key question: Who should determine the necessity for secrecy? The executive or the judiciary? As with other privileges, it should be the court: "Both principle and policy demand that the determination of the privilege shall be for the Court."[108]

The issues explored by Wigmore resurfaced in the late 1960s and early 1970s, when expert committees attempted to define "state secrets" and determine which branch should decide the scope and application of privileges in court. An Advisory Committee on Rules of Evidence, appointed by Chief Justice Earl Warren in March 1965, held its initial meeting and began work three months later. In December 1968, the committee completed a preliminary draft of rules of evidence. Among the many proposals was Rule 5-09, covering "secrets of state," defined as "information not open or theretofore officially disclosed to the public concerning the national defense or the international relations of the United States."[109] Nothing in that definition prevented the executive branch from releasing state secrets to a judge to be read in chambers. It merely restricted the disclosure of information *to the public*.

The committee recognized that the government "has a privilege to refuse to give evidence and to prevent any person from giving evidence upon a showing of substantial danger that the evidence will disclose a secret of state."[110] Drawing language and ideas from *Reynolds*, the committee said that the privilege may be claimed only by the chief officer of the department administering the subject matter that the secret concerned. That officer would be required to make a showing to the judge, "in whole or in part in the form of a written statement." The trial judge "may hear the matter in chambers, but all counsel are entitled to inspect the claim and showing and to be heard thereon."[111] The judge "may take any protective measure which the interests of the government and the furtherance of justice may require."[112]

[106] Wigmore, *Evidence in Trials at Common Law*, § 2212a (emphasis in original).
[107] Ibid., § 2370.
[108] Ibid., § 2379.
[109] 46 F.R.D. 161, 272 (1969).
[110] Ibid., 273.
[111] Ibid.
[112] Ibid.

If the judge sustained a claim of privilege for a state secret involving the government as a party, the court would have several options. When the claim deprived a private party of "material evidence," the judge could make "any further orders which the interests of justice require, including striking the testimony of a witness, declaring a mistrial, finding against the government upon an issue as to which the evidence is relevant, or dismissing the action."[113] The draft report placed final control with the judge, not the agency head.

Because of that feature and others, the Justice Department vigorously opposed the draft. It wanted the proposed rule changed to recognize that the executive's classification of information as a state secret was final and binding on judges.[114] A revised draft, renumbering the rule from 5-09 to 509, was released in March 1972. It eliminated the definition of "a secret of state" and therefore had to strike "secret" from various places in the rule. The new draft rewrote the general rule of privilege to prevent any person from giving evidence upon a showing of "reasonable likelihood of danger that the disclosure of the evidence will be detrimental or injurious to the national defense or the international relations of the United States."[115] Final control remained with the judge.

In addition to opposition from the Justice Department, several prominent members of Congress voiced their objections, partly because of the legislative procedure used to adopt rules of evidence for the courts (giving Congress only 90 days to disapprove). Objections were aimed at Rule 509, which some lawmakers thought weakened the Court's decision in *Reynolds*.[116] Deputy Attorney General Richard Kleindienst wanted the rule rewritten to recognize that the government had the privilege not to disclose "official information if such disclosure would be contrary to the public interest."[117] The Justice Department insisted that once a department official, pursuant to executive order, decided to classify information as affecting national security, that judgment must be regarded as having "conclusive weight" in determining state secrets unless the classification was "clearly arbitrary and capricious."[118]

How would that procedure work? Which branch would decide that the classification was clearly arbitrary and capricious, and on what grounds? Would final judgment be left to the self-interest of the executive branch? Only a court could provide an effective, credible, and independent check. To reach an informed conclusion, the judge had to examine the document.

The Supreme Court sent the proposed rules of evidence to Congress on 5 February 1973, to take effect 1 July 1973. New language for Rule 509 included a redrafted definition of "secret of state": "A 'secret of state' is a governmental

[113] Ibid., 273–274.

[114] Charles Alan Wright and Kenneth W. Graham, Jr., eds., *Federal Practice and Procedure*, vol. 26 (St. Paul, MI: West Publishing Co., 1992), 423.

[115] 51 F.R.D. 315, 375 (1971).

[116] 117 Congressional Record 29894–29896 (1971).

[117] Ibid., 33648.

[118] Ibid., 33652–33653.

secret relating to the national defense or the international relations of the United States."[119] Congress concluded that it lacked time to thoroughly review all the proposed rules of evidence within 90 days and vote to disapprove particular ones. It passed legislation to provide that the proposed rules "shall have no force or effect" unless expressly approved by Congress.[120] Approval never came. Among the rejected rules was Rule 509.

Congress passed the rules of evidence in 1975, including Rule 501 on privileges. It comes down squarely on the side of authorizing courts to decide the scope of a privilege. The rule covers all parties to a case, including the government. It does not recognize any authority on the part of the executive branch to dictate the reach of a privilege. There is no acknowledgment of state secrets. The only exception in Rule 501 concerns civil actions at the state level. Rule 501 provides: "Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law *as they may be interpreted by the courts* of the United States in the light of reason and experience."[121]

The legislative history of Rule 501 explains how and why the provisions on state secrets were deleted.[122] When the bill reached the House floor, it came with a closed rule that prohibited amendments. The privileges covered by the rule (including government secrets, husband and wife, physician and patient, and reporters) were considered "matters of substantive law" rather than rules of evidence: "We were so divided on that subject ourselves, let alone what the House would be, that we would never get a bill if we got bogged down in that subject matter which really ought to be taken up separately in separate legislation."[123] The Senate Judiciary Committee also reported on the fractious nature of the rule on privileges: "Critics attacked, and proponents defended, the secrets of state and official information privileges," the husband-wife privilege "drew fire," the doctor-patient privilege "seemed to satisfy no one," the attorney-client privilege "came in for its share of criticism," and many objections were raised over the failure to include a reporter's privilege.[124] Under those cross-pressures, Congress abandoned Rule 509.[125]

Executive officials who invoke the state secrets privilege often understand that the branch that decides questions of privileges and evidence is the judi-

[119] 56 F.R.D. 183, 251 (1972).

[120] 119 Congressional Record 3755, 7651–7652 (1973); Act of 30 March 1973, Public Law 93-12, 87 Stat. 9 (1973).

[121] 88 Stat. 1934 (1975) (emphasis added).

[122] H. Rept. No. 93-650, 93d Cong., 1st sess. (1973), 8.

[123] 120 Congressional Record 1409 (1974) (statement by Rep. Dennis).

[124] S. Rept. No. 93-1277, 93d Cong., 2d sess. (1974), 6.

[125] Louis Fisher, "State Your Secrets: When the Government Cloaks Itself in Privilege, Judges Must Rule," *Legal Times*, 26 June 2006, 68-69.

ciary, not the executive. On 10 February 2000, CIA Director George J. Tenet signed a formal claim of state secrets in the case of Richard M. Barlow, adding: "I recognize it is the Court's decision rather than mine to determine whether requested material is relevant to matters being addressed in litigation."[126] That language stands as a model of executive subordination to the rule of law and undergirds the constitutional principle of judicial independence.

Invoking the Privilege at a Cost

If the government decides to invoke the state secrets privilege, courts have many effective methods to protect their integrity. They can advise the executive branch that if it persists in asserting the privilege, to the point of withholding requested documents from in camera inspection, it will lose the case. That was the position taken by the district court and the Third Circuit in *Reynolds*. It was the proper position, and the Supreme Court would have protected its dignity and independence by following the same course. It failed to do so and paid a price, as did the three widows. Telling the executive branch it will lose a case applies to three categories of cases: when the government brings a criminal case, when it brings a civil case, and when it is a defendant, as it was in the tort claims case of *Reynolds*.

In criminal cases, it has long been recognized that if federal prosecutors want to charge someone with a crime, the defendant has a right of access to documents to establish innocence. In *Reynolds*, the government's brief to the Supreme Court cited the trial of Aaron Burr in 1807 as an example of when the government had "refused to divulge, in response to subpoenas, confidential portions of documents in the possession of the executive."[127] Later in the brief, the government produced a list of "successful assertions of the [evidentiary] privilege," including the Burr trial.[128] The facts are otherwise. Aaron Burr was charged with treason and faced the death penalty. For that reason, the administration of Thomas Jefferson understood that he had a right to whatever documents were needed to clear his name. The presiding judge at the trial, Chief Justice John Marshall, stated his willingness to suppress certain documents upon learning "it is not the wish of the executive to disclose," but immediately added: "if it be not immediately and essentially applicable to the point."[129] Marshall was concerned that the judiciary would lose respect if it failed to give an accused access to information needed for his defense. Withholding docu-

[126] Declaration of Formal Claim of State Secrets Privilege and Statutory Privilege by George J. Tenet, Director of Central Intelligence, *Richard M. Barlow v. United States*, Congressional Reference No. 98-887X, U.S. Court of Federal Claims, 7.

[127] Brief for the United States, *United States v. Reynolds*, No. 21, U.S. Supreme Court, October Term, 1952, 10–11.

[128] Ibid., 24.

[129] *United States v. Burr*, 25 Fed. Cas. 30, 37 (C.C.D. Va. 1807) (Case No. 14,692d).

ments in a criminal case would "tarnish the reputation of the court which had given its sanction to its being withheld." Were he a party to this withholding, Marshall said he would be compelled "to look back on any part of my official conduct with so much self-reproach as I should feel."[130]

The record shows that Jefferson was ready "to furnish on all occasions whatever the purposes of justice may require" and had given one letter to Attorney General Caesar Rodney to be taken to Richmond for the trial, and expressed "a perfect willingness to do what is right."[131] George Hay, one of the government attorneys handling the prosecution, thought there might be some matters in the letters "which ought not to be made public," but was willing to put them "in the hands of the clerk confidentially, and he could copy all those parts which had relation to the cause."[132] Hay stood ready to show the letters to Burr's attorneys for examination, and he "would depend on their candor and integrity to make no improper disclosures; and if there should be any difference of opinion as to what were confidential passages, the court should decide."[133] In the end, the jury found Burr not guilty on the charge of treason and not guilty on a second charge, a misdemeanor.[134]

In the decade before *Reynolds*, federal courts had reviewed procedures for allowing access to documents in a criminal case. They disagreed that judicial deference to executive departments could allow the suppression of documents in a criminal proceeding that might "tend to exculpate."[135] In such situations, the government must choose: "Either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully."[136] If the government decides to prosecute someone, it must either release documents that are exculpatory or drop the case. In 1946, the Second Circuit reminded the government that when it "institutes criminal proceedings in which evidence, otherwise privileged under a statute or regulation, becomes importantly relevant, it abandons the privilege."[137]

The Watergate tapes case involved executive privilege, not state secrets, but in ruling against President Richard Nixon, the Supreme Court recognized that in a criminal case, where defendants need information to protect their rights in court, the president's general authority over agency information cannot override the specific need for evidence.[138] "The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public

[130] Ibid.
[131] Ibid., 65.
[132] Ibid., 190.
[133] Ibid.
[134] Fisher, *In the Name of National Security*, 212–220.
[135] *United States v. Andolschek*, 142 F.2d 503, 506 (2d Cir. 1944).
[136] Ibid.
[137] *United States v. Beekman*, 155 F.2d 580, 584 (2d Cir. 1946).
[138] *United States v. Nixon*, 418 U.S. 683 (1974).

confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence."[139]

In the Watergate tapes case, the Court noted: "We are not here concerned with the balance between the President's generalized interest in confidentiality and the need for relevant evidence in civil litigation."[140] Still, lower courts frequently tell the government that when it brings a civil case against a private party, it must be prepared to either surrender documents sought by the defendant or drop the charges. Once a government official seeks relief in a court of law, the official "must be held to have waived any privilege, which he otherwise might have had, to withhold testimony required by the rules of pleading or evidence as a basis for such relief."[141] The choice: give up the privilege or abandon the case.

In 1958, the Eighth Circuit dismissed a lawsuit brought by the Secretary of Labor after he refused to obey court orders directing him to produce for the defendants four statements taken by the Secretary's investigators. The government argued that the statements were privileged. To the court, the issue of privilege was one for the judiciary.[142] In 1961, the government lost a case when the National Labor Relations Board refused to permit testimony sought by a company charged with unfair labor practices. The Fifth Circuit insisted that "fundamental fairness" required that the company "be allowed to introduce testimony that may impeach the evidence offered against it. The N.L.R.B. cannot hide behind a self-erected wall evidence adverse to its interest as a litigant."[143] Other decisions underscore the principle that when the government brings a civil suit, it waives any privilege.[144]

When a private party brings a case against the government, as in a tort claims action, the government may be put in the position of either releasing requested documents or losing the case. In *Reynolds*, both the district court and the Third Circuit told the government that if it insisted on withholding the accident report and the survivor statements, it would lose. Only at the level of the Supreme Court was the government allowed to both withhold documents and prevail on the merits. To prevent abuse of the judiciary, a trial court must at least conduct in camera review to judge the government's claim of privilege, including state secrets. "Any other rule would permit the Government to classify documents just to avoid their production even though there is need for their production and no true need for secrecy."[145]

[139] Ibid., 709.

[140] Ibid., 712 n.19.

[141] Ibid. See also *United States v. Cotton Valley Operators Committee*, 9 F.R.D. 719 (D. La. 1949), judgment aff'd, 339 U.S. 940 (1950).

[142] *Mitchell v. Bass*, 252 F.2d 513, 517 (8th Cir. 1958).

[143] *NLRB v. Capitol Fish Co.*, 294 F.2d 868, 875 (5th Cir. 1961).

[144] *United States v. San Antonio Portland Cement Co.*, 33 F.R.D. 513, 515 (D. Tex. 1963); *United States v. Gates*, 35 F.R.D. 524, 529 (D. Colo. 1964); *General Engineering, Inc. v. NLRB*, 341 F.2d 367, 376 (9th Cir. 1965).

[145] *American Civil Liberties U. v. Brown*, 619 F.2d 1170, 1173 (7th Cir. 1980).

In 1977, private citizens sued the government after the arrest of over a thousand persons who demonstrated against the Vietnam War. The plaintiffs subpoenaed White House tapes. The D.C. Circuit rejected the position that a presidential privilege of confidentiality "was absolute in the context of civil litigation."[146] The court emphasized that there is "a strong constitutional value in the need for disclosure in order to provide the kind of enforcement of constitutional rights that is presented by a civil action for damages, at least where, as here, the action is tantamount to a charge of civil conspiracy among high officers of government to deny a class of citizens their constitutional rights and where there has been sufficient evidentiary substantiation to avoid the inference that the demand reflects mere harassment."[147]

Conclusions

The courts must take care to restore confidence in the judiciary, in the sanctity of the courtroom, and in the system of checks and balances. The state secrets privilege is qualified, not absolute. Otherwise there is no adversary process in court, no exercise of judicial independence over what evidence is needed, and no fairness accorded to private litigants who challenge the government. In 1971, the D.C. Circuit stated that an "essential ingredient of our rule of law is the authority of the courts to determine whether an executive official or agency has complied with the Constitution and with the mandates of Congress which define and limit the authority of the executive. Any claim to executive absolutism cannot override the duty of the court to assure that an official has not exceeded his charter or flouted the legislative will."[148] To grant an executive official absolute authority over agency documents would empower the government "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."[149]

There is no justification in law or history for a court to acquiesce to the accuracy of affidavits, statements, and declarations submitted by the executive branch. To defer to agency claims about privileged documents and state secrets is to abandon the independence that the Constitution vests in the courts and place in jeopardy the individual liberties that depend on institutional and public checks.

[146] *Dellums v. Powell*, 561 F.2d 242, 244 (D.C. Cir. 1977).

[147] Ibid., 247; see Louis Fisher, "State Secrets Privilege: Invoke It at a Cost," *National Law Journal* 31 (July 2006): 23.

[148] *Committee for Nuclear Responsibility, Inc. v. Seaborg*, 463 F.2d 788, 793 (D.C. Cir. 1971).

[149] Ibid., 794.