The Law

The State Secrets Privilege: From Bush II to Obama

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Following the terrorist attacks of 9/11, the Bush administration relied heavily on the state secrets privilege to defend executive actions. When Barack Obama entered office, he announced that the privilege had been "over-used" by the Bush administration and offered this as a first principle: "We must not protect information merely because it reveals the violation of a law or embarrassments to the government." Yet the Obama administration continued to rely on the privilege to protect litigants from challenging abusive, illegal, and unconstitutional actions by the Bush administration and applied the privilege to entirely new assertions of executive power.

Although the state secrets privilege dates back to a poorly reasoned Supreme Court decision in *United States v. Reynolds* (1953), proponents of the privilege claim it can be traced much further back to the Aaron Burr trial of 1807. As will be explained, that interpretation is entirely in error, so it is best to initially explain what the privilege is intended to cover and why the Burr trial supplies no support. This article will closely analyze *Reynolds* and its application during the Bush II and Obama administrations.

In most trials, litigants are expected to argue publicly and vigorously in their briefs and during oral argument. These unrestrained exchanges are needed to properly inform the court, give contending parties an opportunity to present their case, and check governmental abuse. Under the state secrets privilege, a court might accept the government's assertion that certain evidence may not be publicly revealed because it would risk national security. One option is for the court to ask the executive branch to share the sensitive document in camera, with the other side excluded. However, a court may also decide not to examine the document

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AUTHOR'S NOTE: I express appreciation to Chris Edelson for a close read of this article and sharing thoughts about the patterns in constitutional interpretations from the administration of George W. Bush to Barack Obama. Thanks also to Steve Aftergood for providing close attention to the state secrets privilege in his valuable online "Secrecy News."

at all, preferring to defer entirely to executive claims. In subsequent years, as with the *Reynolds* case, it is possible for a court to discover that a contested document not only contains no sensitive information but reveals government negligence and abuse. There is substantial risk that the executive branch will deceive the courts.

The Aaron Burr Trial

In its brief submitted to the Supreme Court in 1952 in the *Reynolds* case, the Justice Department cited the Aaron Burr trial of 1807 as a precedent for the state secrets privilege (U.S. Department of Justice 1952, 10-11). The department produced a list of what it called successful assertions of the evidentiary privilege, offering this as the second example: "Confidential information and letters relating to Burr's conspiracy" (ibid., 24). That statement is false, but in 1977 a federal district court, apparently guided by the Justice Department, claimed that the state secrets privilege "can be traced as far back as Aaron Burr's trial in 1807."[1] In 1989, the D.C. Circuit acknowledged that the "exact origins" of the privilege "are not certain," but nevertheless placed its "initial roots" in Burr's trial and its "modern roots" in *Reynolds*.[2] According to a different federal district court in 2004, the origins of the privilege "can be traced back to the treason trial of Aaron Burr."[3]

The decision in 2004 correctly noted that during the trial Burr sought access to letters that General James Wilkinson—the primary government witness against him—had sent to President Thomas Jefferson. According to the Jefferson administration, the letters "purportedly contained information" about Burr "of whose guilt," Wilkinson said, "there can be no doubt." Initially, the government objected to producing those documents, asserting it was "improper to call upon the president to produce the letter of Gen. Wilkinson, because it was a private letter, and probably contained confidential communications, which the president ought not and could not be compelled to disclose. It might contain state secrets, which could not be divulged without endangering the national safety." The government further argued that "[i]f the letter contained state secrets which it would be inconsistent with the public safety to disclose, the president could say so in the return to the subpoena."[4]

According to the Jefferson administration, even before the trial began and evidence could be introduced and evaluated, there could be "no doubt" about Burr's guilt. The private letter "probably" contained confidential information. The letter "might" contain state secrets, and if by some chance it did have state secrets its disclosure would "endanger" the nation. Why would anyone give credence to such vague, speculative, and undocumented arguments? A very important person did: President Jefferson.

In his annual address of December 1, 1806, Jefferson notified Congress that armed individuals in the Western Territory (west of the Allegheny Mountains) had planned to carry out a military expedition against Spanish possessions.[5] Representative John

1. *Jabara v. Kelley*, 75 F.R.D. 475, 483 (D. Mich. 1977).
2. In re U.S., 872 F.2d 472, 474-75 (D.C. Cir. 1989).
3. *Edmonds v. U.S. Dept. of Justice*, 323 F. Supp. 2d 65, 70 (D.D.C. 2004).
4. Ibid., citing *United States v. Burr*, 25 Fed. Cas. 30, 31 (C.C.D. Va. 1807) (No. 14,692d).
5. 16 Annals of Cong. 12 (1806).

Randolph introduced a resolution on January 16, 1807, calling upon Jefferson to lay before Congress information he possessed on these actions by private citizens. The resolution passed, 109 to 14.[6]

On January 22, Jefferson submitted to Congress a message placed in the legislative record under the heading "Burr's Conspiracy." Jefferson cautioned that little of the evidence he possessed had been given "under the sanction of an oath, so as to constitute formal and legal evidence."[7] The letters he possessed often contained "such a mixture of rumors, conjectures, and suspicions, as renders it difficult to sift out the real facts, and unadvisable to hazard more than general outlines, strengthened by current information, on the particular credibility of the relator." To protect their reputations, he said that neither "safety nor justice will permit the exposing of names, except that of the principal actor, whose guilt is placed beyond question."[8] The "prime mover," he said was Aaron Burr.[9]

Despite the uncertainty about available evidence, the administration decided to publicly declare Burr guilty of the crime of treason, which at that time carried the penalty of death by hanging. Later, at trial, Wilkinson's credibility would be severely challenged under cross-examination by Burr's lawyers and the jury (Fisher 2015, 169-72). Chief Justice John Marshall, presiding over the trial in Richmond, Virginia, did not defer to executive branch judgments about secret evidence. In a criminal trial, with the death penalty looming, Marshall understood that Burr was entitled to see the documents that supposedly incriminated him.

As Marshall noted, any failure on his part to let Burr and his attorneys see relevant documents "would justly tarnish the reputation of the court which had given its sanction to its being withheld." If Marshall were a party to the withholding of documents needed by a defendant, "it would be to deplore, most earnestly, the occasion which should compel me to look back on any part of my official conduct with so much self-reproach as I should feel, could I declare, on the information now possessed, that the accused is not entitled to the letter in question, if it should be really important to him."[10]

Upon receiving Marshall's subpoena to the executive branch, Jefferson assured the court of his "readiness" to yield documents "on all occasions whatever the purposes of justice may require." Regarding an October 21 letter he received from Wilkinson, Jefferson said that Attorney General Caesar Rodney would bring the letter to Richmond for the trial. He closed by expressing a "perfect willingness to do what is right."[11] Jefferson added that if Burr believed "there are any facts within the knowledge of the heads of department or of myself, which can be useful for his defense, from a desire of doing anything our situation will permit in furtherance of justice," those officials would be available for deposition in Washington, DC.[12]

6. Ibid., 334-59 (1807).
7. Ibid., 39.
8. Ibid., 39-40.
9. Ibid., 40.
10. *United States v. Burr*, 25 Fed. Cas. 30, 37 (C.C.D. Va. 1807) (No. 14,692d).
11. Ibid., 65.
12. Ibid., 69.

After Burr and his attorneys were able to analyze the evidence, including the Wilkinson letter, the case grew so weak that Marshall asked the government to "consider whether they are wasting the time and money of the United States, and of all those persons who are forced to attend here, whilst they are producing a mass of testimony which does not bear upon the cause."[13] The government offered a motion to discharge the jury, but Burr objected, insisting on a verdict. The jury retired and returned with a judgment of "Not guilty."[14]

The Lincoln Spy Case

In *Reynolds*, the Supreme Court justified the government's decision to invoke the state secrets privilege as a doctrine "well established in the law of evidence." Among the cases the Court cited for that proposition—and standing first in line—is the Civil War spy case, *Totten v. United States* (1875).[15] However, the circumstances in that case apply only to a very narrow category of cases involving state secrets and have nothing to do with *Reynolds* or the state secret cases litigated during the Bush II and Obama administrations.

During the Civil War President Lincoln entered into a contract with William A. Lloyd to collect data on the number of Confederate troops stationed in different areas, plans of forts and fortifications, and other information that might be useful to the federal government. Lloyd was supposed to be paid $200 a month but received funds only to cover his expenses. Following his death, family members sought compensation for his services. The Supreme Court gave examples where it would be impermissible in court to disclose matters that need to remain confidential: communications between a confessor and priest, between husband and wife, what a client says to his counsel, and what a patient confides to a physician. Even greater reason existed for cases involving contracts for "secret services with the government, as the existence of a contract of that kind is itself a fact not to be disclosed."[16]

Moreover, Lincoln paid Lloyd from a contingent account that Congress had placed under presidential control.[17] The Supreme Court described the service stipulated in Lloyd's contract as "a secret service; the information sought was to be obtained clandestinely, and was to be communicated privately; the employment and the service were to be equally concealed." Both Lincoln and Lloyd, said the Court, "must have understood that the lips of the other were to be for ever [sic] sealed respecting the relation of either to the matter."[18] Efforts to publicize the agreement "would itself be a breach of a contract of that kind."[19] This unique case does not justify automatically withholding state secrets

13. *United States v. Burr*, 25 Fed. Cas. 201 (C.C.D. Va. 1807) (No. 14,694).

14. Ibid., 201. For further details on Burr's access to executive branch documents, see Fisher (2006, 212-20) and Fisher (2015, 168-71).

15. *United States v. Reynolds*, 345 U.S. at 6-7, n.11

16. *Totten v. United States*, 92 U.S. 105, 107 (1875).

17. Ibid., 106.

18. Ibid.

19. Ibid., 107.

from private litigants and federal courts over the broad domains of national security and foreign affairs.

A number of lawsuits have involved spies or individuals seeking compensation from the government for their services. Those claims are regularly rejected by federal courts by relying on *Totten* (Fisher 2006, 223-27). The decisions underscore that *Totten* covers spy cases (espionage contracts) that are unenforceable in court. In contrast, state secrets claims that arise in cases unrelated to espionage contracts can be litigated and involve procedural steps by the government when seeking to withhold documents from plaintiffs. Courts can and must be part of that procedure. The issue in *Reynolds* was not merely withholding documents from private parties but even from the judiciary.

Reynolds: A Lawsuit by Three Widows

In *United States v. Reynolds* (1953), the Supreme Court for the first time announced a broad doctrine of the state secrets privilege. Three widows sued the government after a B-29 bomber exploded over Waycross, Ga., on October 6, 1948. Five of eight crew members perished. Also on board were five civilian engineers who provided technical assistance to secret equipment being tested on the flight. All of this was known to newspaper readers who learned of the crash the next day (Fisher 2006, 1-2). The widows of three of the civilian engineers requested several key documents, including the official accident report and depositions of the three surviving crew members.

In accepting the government's position in this case, the Supreme Court greatly weakened the role of the judiciary to independently analyze executive claims and safeguard the right of private plaintiffs to challenge government actions. Repeatedly, the government warned that allowing access to the accident report could seriously damage national security. A half-century later, after the government had declassified and released the report, it was evident that it contained no state secrets. Instead, it revealed that the government had acted negligently in allowing the plane to fly. The Justices who decided the case in 1953 did not know that because they chose not to look at the report. Instead, they simply took the government's word, failing to exercise independent judicial authority.

The widows sued under the Federal Tort Claims Act of 1946, which authorized federal agencies to settle claims against the United States caused by negligent or wrongful acts of federal employees acting within the scope of their official duties.[20] Congress directed federal courts to treat the government in the same manner as a private individual, deciding disputes 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."[21]

20. 60 Stat. 843, sec. 403(1) (1946).
21. Ibid., 843-44, sec. 410(a).

Other than the exceptions listed in the statute, Congress directed courts to exercise independent judgment. Judges were not supposed to automatically defer to whatever the government claimed about an agency document requested by plaintiffs. Courts had a duty to examine documents to verify the government's assertion and protect the rights of private parties to pursue their legal interests.

Deciding access to evidence is central to judicial duties. John Henry Wigmore, author of the standard treatise on evidence, recognized the existence of "state secrets" but insisted that the scope of that privilege must be determined by a judge, not executive officials. He warned that the "privilege for *secrets of State*, i.e., matters whose disclosure would endager [sic] the Nation's governmental requirements," had been "so often improperly invoked and so loosely misapplied that a strict definition of its legitimate limits must be made" by judges (Wigmore 1940, 8: § 2212a). There was no exemption for executive officials "from the universal testimonial duty to give evidence in judicial investigations" (ibid., § 2370). Issues of secrecy were left to the court (ibid., § 2379).

Scrutiny in the Lower Courts

In both the district court and the appellate court, federal judges in the *Reynolds* case fully recognized the independent duty of the judiciary to decide questions of secrecy by personally examining documents claimed by the executive branch to contain confidential information. These judges knew it was their responsibility to protect the interests of private parties who sue the government. However, once the case reached the Supreme Court, it became clear that the Justices never understood or valued that elementary legal principle. Rather than protect judicial independence and the rights of plaintiffs, the Court simply deferred to executive claims later found to be fabricated.

The lawsuit, filed on June 21, 1949, was assigned to Judge William H. Kirkpatrick in the Eastern District of Pennsylvania. Providing legal counsel to the three widows were Charles J. Biddle and Francis Hopkinson of Drinker, Biddle & Reath, a prominent law firm in Philadelphia. Biddle submitted thirty questions to the government, requesting that it provide answers and submit copies of identified records and documents. The government responded to the interrogatories on January 5, 1950 (Fisher 2006, 31-35). The first question asked if the government had investigated the cause of the crash and, if it had, to attach a copy of the reports and findings.[22] The government acknowledged there had been an investigation but refused to produce the accident report.[23] Only later did the government advance a claim of state secrets.

Question 7 of the interrogatories asked: "Was any engine trouble experienced with the said B-29 type aircraft on October 6, 1948, prior to the crash?".[24] The government replied: "Yes, almost immediately before the crash." The last question asked whether the government had prescribed modifications for the B-29 engines to prevent overheating

22. U.S. Supreme Court, *Transcript of Record*, *United States v. Reynolds*, No. 21, October Term, 1952, 8.

23. Ibid., 12.

24. Ibid., 9.

and reduce fire hazards. If so, when were the modifications prescribed? The government answered "No."[25] As will be explained, when the declassified accident report was discovered during an Internet search in 2000, the falsity of that answer became evident.

The government gave five reasons for withholding the accident report and statements of three surviving crew members. 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)" (Fisher 2006, 36). The citation is to the Housekeeping Statute, which dates to 1789 and merely directs agency heads to keep custody of official documents. It does not in any way authorize the executive branch to withhold documents from litigants or the courts (ibid., 36, 44-48). The other four reasons relied on hearsay rules. The government did not elaborate on this claim. Hearsay is usually considered to be evidence not from a witness's personal knowledge but based on an out-of-court statement by someone else not made under oath. According to the government, the statements by the three surviving crew members were all hearsay. The government invited the plaintiffs to take depositions of the three men (ibid., 36).

On June 30, 1950, Judge Kirkpatrick ruled that the B-29 report and the findings of the Air Force investigation "are not privileged."[26] Although the interrogatories had supplied some basic facts, the government's answers "are far short of the full and complete disclosure of facts which the spirit of the rules requires."[27] On July 20, he issued an order permitting the plaintiffs to inspect the requested documents, setting a deadline of August 7 for the government to produce the material (Fisher 2006, 51).

On July 24, the Justice Department presented to Kirkpatrick a number of letters, affidavits, and statements, explaining why the documents could not be released to the plaintiffs (ibid., 51-56). On August 9, the government produced an affidavit signed by Maj. Gen. Reginald C. Harmon, Judge Advocate General of the U.S. Air Force, stating that information and findings of the accident report and survivor statements "cannot be furnished without seriously hampering national security, flying safety and the development of highly technical and secret military equipment."[28]

Also on August 9, the government produced an undated claim of privilege by Secretary of the Air Force Thomas K. Finletter. He said 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" (Finletter 1950, 2). Why did Finletter warn about the dangers of disclosing the plane's mission? Was that information in the accident report sought by the widows? A half-century later, it would be discovered that the report disclosed nothing about the plane's mission or the confidential equipment.

25. Ibid., 14.

26. *Brauner v. United States*, 10 F.R.D. 468, 472 (D. Pa. 1950).

27. Ibid., 471.

28. Maj. Gen. Reginald C. Harmon, *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, August 7, 1950, 2.

At a court hearing on August 9, Finletter cited twenty-one examples from 1796 to 1948 where presidents supposedly refused to furnish documents to Congress or the courts. None of the examples had anything to do with the right of plaintiffs under the Federal Tort Claims Act to gain access to government documents. Some items on the list were plainly false, such as this: "President Jefferson in 1807 refused to furnish confidential letters relative to the Burr conspiracy" (Fisher 2006, 54). Others related to presidential discretion conferred not by the Constitution but by statute (ibid.). To the government, issues of evidence and documents would be resolved by the executive branch, not the judge. On September 12, Kirkpatrick directed the government to produce for his examination several documents, including the accident report and statements of the three surviving crew members.[29] When the government failed to produce the documents, Kirkpatrick ruled in favor of the three widows (ibid., 56-57).

In its appeal to the Third Circuit, the government cited British precedents for legal and constitutional 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."[30] Why refer to "disclosure" when Judge Kirkpatrick simply ordered that he examine the documents *in camera*? The analogy to Great Britain was misleading because the U.S. Constitution recognizes values and principles that broke decisively with British history and practice, including an independent judiciary capable of countering the executive branch in both domestic and external affairs. The American framers were well aware of the British legal model, which placed all of external affairs, foreign policy, and the war power in the executive, and they firmly rejected it (Fisher 2014a, 5, 73-74, 261-65, 315).

On December 11, 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."[31] In tort claims cases, with the government consenting 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."[32]

Beyond matters of statutory policy, the Third Circuit explained that granting the government its "sweeping privilege" would be "contrary to a sound public policy."[33] It would be a small and easy step, it said, "to assert a privilege against any disclosure of records merely because they might prove embarrassing to governmental officers."[34] The court rejected the government's position that it was within "the sole province of the

29. Amended Order, Sept. 21, 1950, *Brauner and Palya v. United States*, Civil Action No. 9793, and Reynolds v. United States, Civil Action No. 10142 (E.D. Pa. 1950), 2.

30. *Brief for the United States*, *Reynolds v. United States*, No. 10483 (3d Cir. 1951), 6.

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

32. Ibid., 994.

33. Ibid., 995.

34. Ibid.

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 of the matter by it. We cannot accede to this proposition."[35] To allow the government as a party to "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."[36]

Both the district court and the Third Circuit understood the constitutional principles that established an independent judiciary as a check on arbitrary and illegal actions by the executive branch, including issues involving national security. Neither lower court forced the executive branch to release the documents publicly or to the plaintiffs. They simply gave the government a choice: either disclose the documents to judges for in camera inspection or pay judgment to the three widows. The case now moved to the Supreme Court, which proceeded to act not as a coequal branch of government but as a facilitator of executive claims and assertions. It never took the elementary step of looking at the accident report to see if it contained state secrets or evidence of government negligence.

The Supreme Court Decides

After the Court granted certiorari to hear the case, the government's brief relied on history, state practices, and British rulings 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 the encourage the freest possible discussion by survivors before Accident Investigation Boards."[37] Note the word "alleged." A mere claim by the government lacking proof and evidence?

The fact that the plane was carrying secret equipment was known to newspaper readers the day after the crash. There was nothing confidential about that. The fundamental issue, which the government repeatedly muddled, was whether the accident report contained secret information. As it turns out, it did not (Fisher 2006, 166-69). Had the report and survivor statements been made available to the district court, it would have seen nothing that related to military secrets or confidential equipment. The government's brief described the accident report in this manner: "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

35. Ibid., 996-97.

36. Ibid., 997.

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

the judiciary recognized 'state secrets' privilege."[38] *To the extent?* In the case of the accident report and the survivor statements, the extent was zero.[39]

On March 9, 1953, the Supreme Court ruled that the government had presented a valid claim of privilege. It did so without looking at the documents, including the accident report. Divided 6 to 3, the Court offered conflicting principles of judicial authority: "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."[40] If the government can withhold a document from a court, even for in camera inspection, a judge would be unable to determine if circumstances "are appropriate for the claim of privilege." Moreover, there are no grounds to regard *in camera* inspection by a judge as "disclosure." The Supreme Court reasoned that with regard to disclosing documents, a court "must be satisfied from all the evidence and circumstances" before it decides to accept the claim of privilege.[41] However, unless a court independently evaluates documents, it has no "evidence" to make a judgment other than self-serving and possibly misleading assertions from executive officials.

The Supreme Court cautioned that judicial control "over the evidence of a case cannot be abdicated to the caprice of executive officers."[42] If an executive officer did act capriciously, a court would have no way of knowing that unless it independently examines the documents. Through the procedures adopted by the Court, judicial control was clearly "abdicated to the caprice of executive officers." The Court surrendered to the executive branch fundamental judicial duties over questions of privileges and evidence. The Court chose to serve not justice but the executive branch. It announced that in this type of national security case, the courtroom tilts away from the statutory rights of private litigants in a tort claims case and provides a safe haven for executive assertions and deception.

In a recent analysis of *Reynolds*, Frederick A. O. Schwartz, Jr. concluded that the Court's opinion "makes no sense" and wanders away "from both logic and law" (Schwartz 2015, 208). Similarly, a law review article states that the Court's opinion in *Reynolds* "was riddled with deceit and pretence" (Rudenstine 2013, 1289). The result constituted "a betrayal by the Court of its responsibility to uphold the rule of law, to provide a remedy to an injured party asserting a legal right, to fulfill its role in a scheme of government dependent upon checks and balances, and to set forth a candid statement of the reasons for its judgment" (ibid., 1370).

With the Court divided 6-3, one might expect the dissenters to highlight weaknesses in the majority opinion. They did not do so. Nothing in the dissent by Black, Frankfurter, and Jackson discussed any part of the Court's analysis. Instead, they dissented "substantially for the reasons set forth in the opinion of Judge Maris below" in the

38. Ibid., 45.

39. For access to the accident report, see pages 10a-68a of http://www.fas.org/sgp/othergov/reynoldspetapp.pdf (accessed November 4, 2015).

40. *United States v. Reynolds*, 345 U.S. 1, 8 (1953).

41. Ibid., 9.

42. Ibid., 9-10.

Third Circuit.[43] The Maris opinion could not possibly shed light on the quality of Supreme Court reasoning. Also, one has to guess at what parts of the Maris opinion the dissenters agreed and disagreed with. By failing to address the majority opinion, we do not know why three justices found the Court's opinion not worth joining.[44]

The Accident Report Becomes Public

The key document in the *Reynolds* litigation was the statement by Secretary of the Air Force Finletter. At various points he referred to the accident report and the existence of state secrets, implying—but never stating—that the report contained state secrets. By failing to read the report, the Supreme Court was at risk of being deceived by the government. The Court decided not to function as an independent branch, protect the rights of plaintiffs, and play its role in the American system of checks and balances. Nearly a half-century elapsed before the full scope of judicial failure would be uncovered.

On February 10, 2000, Judith Loether, daughter of Albert Palya (one of the civilian engineers who died in the B-29 crash), stayed overnight with friends and used their computer. Entering "B-29" plus "accident" into the search engine, the first hit took her to a website run by Michael Stowe, who bought and sold military accident reports. He had the report on the B-29 that crashed in 1948. The government had declassified it in 1995 along with many other documents. In reading the report, Loether could see that the Air Force failed to install heat shields to reduce the likelihood of engine fires. It also failed to brief the civilian engineers on how to use parachutes and evacuate in case of an emergency (Fisher 2006, 166-68, 192-93).

Loether and the other two families involved in the *Reynolds* litigation decided to sue the government for deceiving the federal courts. The Drinker, Biddle law firm, agreeing to once again represent them, 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 asking a court to review and correct its judgment because it was based not on an error of law, but rather on an error of fact. In 1827, Justice Joseph Story explained the fundamental value: "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."[45]

Courts are supposed to balance conflicting values. One principle 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."[46] But a competing value exists. Courts need to revisit a judgment when they discover that fraud has cast a shadow over the initial ruling. Tolerating fraud undermines respect for the

43. Ibid., 12.

44. For the reluctance of the three justices to confront the majority in *Reynolds*, see Fisher 2006, 105-15.

45. The Palmyra, 12 Wheat. 1, 10 (1827).

46. *Hazel-Atlas Co. v. Hartford Co.*, 322 U.S. 238, 244 (1944).

judiciary and reduces public confidence in the courts. The injury is not merely to a single litigant. As explained in the 1944 decision, it is "wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot 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 helpless victims of deception and fraud."[47]

On March 4, 2003, Wilson M. Brown III of Drinker, Biddle 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*, compensate the widows and their families for their losses, and award them attorneys' fees and single or double costs to sanction the government's misconduct.[48] Without any explanation, the Court on June 23, 2003, denied the petition.[49] The three families had to begin again in the lower courts.

On October 1, 2003, Wilson Brown filed an action in district court in Pennsylvania to remedy fraud on the court. The government's brief 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]."[50] Yet the Finletter–Harmon statements prompted both Judge Kirkpatrick and the Third Circuit to insist on in camera review to judge the contents of the accident report and survivor statements. In its ruling, the Supreme Court appeared to accept, without verifying, that the accident report contained secret information.

District Judge Legrome D. Davis released his decision on September 10, 2004, granting the government's motion to dismiss.[51] He deferred to the executive branch with this reasoning: "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 and sensitive information' than lay persons could appreciate or that hindsight now allows."[52] Judge Davis inaccurately implied that "disclosure" to Judge Kirkpatrick in his chambers would have meant disclosure to the public. Even if the accident report had been made public in 1951, as it was in the mid-1990s, there was no information that was "secret and sensitive" other than negligence by the government.

The families appealed to the Third Circuit. On September 22, 2005, the appellate court decided for the government. The second paragraph offered this judgment: "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

47. Ibid., 246.

48. *Petition for a Writ of Error* Coram Nobis *to Remedy Fraud upon This Court*, In re Patricia J. Herring, No. 02M76, March 4, 2003.

49. In re Herring, 539 U.S. 940 (2003).

50. *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.

51. *Memorandum and Order*, *Herring v. United States*, Civil Action No. 03-CV-5500-LDD (E.D. Pa. Sept. 10, 2004), 21.

52. Ibid., 8, citing *Halperin v. NSC*, 452 F. Supp. 47 (D.D.C 1978). For further details on the district court decision: Fisher 2006, 188-200.

the very principle upon which our judicial system is based: the finality of a judgment."[53] To the Third Circuit, courts did not need to consider and balance two values: judicial finality and the need to root out fraud against the courts. The single and overriding value was judicial finality, no matter how much in error (Fisher 2006, 200-11).

On December 21, 2005, the three families filed a cert petition with the Supreme Court. The government responded with a brief in opposition on March 31, 2006. The case went to conference on April 28, and on May 1 the Supreme Court refused to take the case.[54] Key values were given short shrift throughout this *coram nobis*: the need to protect the integrity, independence, and reputation of the federal judiciary and the statutory right of citizens to sue under the Federal Tort Claims Act. When courts function in this manner, litigants and citizens lose faith in the judiciary, the rule of law, and the system of checks and balances. Judicial failure to correct errors that arise when the government makes misleading statements sends a signal that executive officials are free to deceive the judiciary with impunity.

State Secrets after 9/11

The scope of the state secrets privilege has been especially broad after the terrorist attacks of 9/11. In response to lawsuits alleging various constitutional and human rights violations, the George W. Bush administration refused "to disclose information during discovery and, in some cases, requested dismissal of suits altogether on national security grounds" (Donohue 2010, 78). The administration invoked the privilege to prevent litigants from challenging the practice of the executive branch transferring suspects to other countries for interrogation and torture ("extraordinary rendition"), warrantless surveillance by the National Security Agency (NSA), and other executive actions. The Obama administration continued to rely on the state secrets privilege to prevent litigants from effectively challenging abusive, illegal, and unconstitutional actions by the executive branch.

Extraordinary Rendition

Rendition means surrendering someone to another jurisdiction for trial. It therefore applies to a *judicial* process. Someone accused of a crime receives assistance from an attorney and has full access to procedural rights in court. The word rendition has no application to what happened after 9/11. Detainees or "enemy combatants" were held indefinitely by executive officials, often subjected to torture and physical abuse, with no access to judicial process. Placing the word "extraordinary" in front of rendition changes the meaning fundamentally. A process formerly bound by statutory and treaty law—reinforced by procedural safeguards in court—now entered the realm of independent and arbitrary executive law. Presidents claimed the right not only to act in the absence

53. *Herring v. United States*, 424 F.3d 384, 386 (3d Cir. 2005).
54. *Herring v. United States*, 547 U.S. 1123 (2006).

of statutory or treaty authority but even in violation of them (Fisher 2008a; Fisher 2014a, 409-13).

Khaled El-Masri, born in Kuwait of Lebanese parents, moved to Germany in 1985 and became a German citizen. At the end of 2003 he traveled to Macedonia for vacation. Border guards detained him because of confusion about his name. They thought he was Khalid al-Masri, a suspect from the al-Qaeda Hamburg cell. There was also suspicion (later shown to be false) that El-Masri's passport was a forgery. In early January 2004, he was transferred to Central Intelligence Agency (CIA) agents and flown to a secret prison called the "Salt Pit" in Afghanistan, where he was subject to abuse and violence (Mayer 2008, 282-87). Held for five months, he was repeatedly refused counsel or access to a representative of the German government (Fisher 2008a, 1442-43).

Eventually, the CIA concluded that his passport was genuine and they had imprisoned the wrong person. On May 28, 2004, he was flown to Albania and taken to an airport for his return to Frankfurt. On December 6, 2005, he sued CIA Director George Tenet, the airlines used by the CIA, and current and former employees of the agency. The Bush administration invoked the state secrets privilege to block his case from moving toward discovery and gaining access to government documents. On May 21, 2006, a federal district court held that the privilege had been validly asserted and dismissed El-Masri's case.[55]

The district court said that courts "must not blindly accept the Executive Branch's assertion" about state secrets but "must instead independently and carefully determine whether, in the circumstances, the claimed secrets deserve the protection of the privilege."[56] Courts "must carefully scrutinize the assertion of the privilege lest it be used by the government to shield 'material not strictly necessary to prevent injury to national security.'"[57] Having offered these assurances about judicial independence and interbranch checks, the court then said it "must bear in mind the Executive Branch's preeminent authority over military and diplomatic matters" and must accept the executive branch's assertion of the privilege "whenever its independent inquiry discloses a '*reasonable danger* that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged.'"[58] Once a court is satisfied that the claim is validly asserted, "the privilege is not subject to a judicial balancing of the various interests at stake."[59]

Yet the court offered a balancing test, explaining that El-Masri's "private interests must give way to the national interest in preserving state secrets."[60] The private interest of one individual, no matter how mistreated, is unlikely to outweigh the claimed interest of the entire government or the nation, unless one defines "national interest" more broadly. There is no national interest in apprehending the wrong person, keeping him in

55. *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 539 (E.D. Va. 2006).

56. Ibid., 536.

57. Ibid., citing *Ellsberg v. Mitchell*, 709 F.2d 51, 58 (D.C. Cir. 1983).

58. Ibid., 536-37, citing *United States v. Reynolds*, 345 U.S. 1, 10 (1953) (emphasis added by district court).

59. Ibid., 536, 537.

60. Ibid., 539.

prison for five months under abusive conditions, with no capacity to seek vindication in court and have the government concede error and award damages. Most individuals, U.S. citizen and alien, would not want to share El-Masri's experience. It is also in the national interest to have an independent court pass judgment on abusive and illegal executive actions. Checks and balances are in the national interest. Government apologies and restitution for wrongs inflicted are in the national interest.

El-Masri appealed his case to the Fourth Circuit, which noted that a draft report by the Council of Europe substantially supported El-Masri's account of what happened to him under CIA control. Even so, the Fourth Circuit affirmed the district court decision, in part because the case "pits the judiciary's search for truth against the Executive's duty to maintain the nation's security."[61] The judiciary cannot search for truth by automatically accepting executive assertions about state secrets.

On December 13, 2012, a unanimous opinion from the European Court of Human Rights ruled that El-Masri was an innocent victim of torture and abuse. It held Macedonia responsible for his ill treatment and transfer to U.S. authorities. The Court ordered Macedonia to pay about $78,000 in damages. Macedonia's Ministry of Justice said it would comply (Kulish 2012, A13). This process held Macedonia accountable but not the United States, which played the lead role in the abuse.

The Bush administration inflicted much greater harm to Maher Arar, a Canadian citizen. Upon returning home to Ottawa in September 2002, he was questioned at the JFK airport by New York police and Federal Bureau of Investigation (FBI) agents. The next day he was transferred to the Metropolitan Detention Center and several weeks later the administration sent him to Syria, which the State Department lists as a country with a known record of torture.[62] For nearly a year he was subjected to beatings and threatened with electric shocks and other abuse. He was never formally charged with anything. Syria, finding no evidence linking him to terrorism, eventually released him (Fisher 2008b, 346-49).

Arar filed a civil suit seeking money damages and declaratory relief from a number of U.S. officials. The Justice Department invoked the state secrets privilege, claiming that the documents he sought were "properly classified" and that disclosure "would interfere with foreign relations, reveal intelligence-gathering sources or methods, and be detrimental to national security."[63] A federal district court held that Arar lacked standing to sue the U.S. officials responsible for holding him incommunicado in New York and sending him to Syria for detention and torture.[64] The court offered this explanation why secrecy is important in foreign affairs: "One need not have much imagination to contemplate the negative effect on our relations with Canada if discovery were to proceed in this case and were it to turn out that certain high Canadian officials had, despite public denials, acquiesced in Arar's removal to Syria."[65]

61. *El-Masri v. United States*, 479 F.3d 296, 304 (4th Cir. 2007).

62. U.S. Department of State, *Country Reports on Human Rights Practices, Syria*, 2002, 1; http://www.state.gov/g/drl/rls/hrrpt/2002/18289.htm (accessed November 4, 2015).

63. U.S. Justice Department, *Memorandum in Support of the United States' Assertion of State Secrets Privilege*, *Arar v. Ashcroft*, C.A. No. 04-CV-249-DG-VVP (E.D. N.Y.), 2-3.

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

65. Ibid., 281.

To Canada's credit, it had no intention of keeping the matter secret. Instead, it conducted a detailed investigation to determine its culpability in the matter. Seven months after the district court's ruling, a three-volume, 822-page judicial report concluded that Canadian intelligence officials had passed false warnings and unreliable information about Arar to the United States. On January 26, 2007, Prime Minister Stephen Harper released a public apology to Arar and his family and provided $10.5 million in compensation.[66] When the litigation continued under the Obama administration, the Justice Department agreed to invoke the state secrets privilege. Arar's appeal to the Second Circuit was unsuccessful.[67] The Second Circuit divided, 7-4. Judge Calabresi, in one of the dissents, referred to the majority's "utter subservience to the executive branch." On June 14, 2010, the Supreme Court denied Arar's petition for certiorari. Unlike Canada, the U.S. government has never expressed an apology for its role in his torture.

The unwillingness of federal judges to independently examine charges of executive branch illegality is highlighted by the Ninth Circuit's decision in another extraordinary rendition case which began in the Bush administration and carried forward to the Obama administration. Throughout that period, the Justice Department invoked the state secrets privilege to conceal executive illegality. *Mohamed v. Jeppesen Dataplan*, decided by the Ninth Circuit on September 8, 2010, involved a private contractor who provided assistance to what were called CIA torture flights. The court began with what appeared to be a position of coequal institutional power by citing an earlier case: "[W]e must make an independent determination whether the information is privileged."[68] From that same case, it expressed its understanding that federal courts "take very seriously our obligation to review the [government's claims] with a very careful, indeed a skeptical, eye, and not to accept at face value the government's claim or justification of privilege."[69] Despite those encouraging words about judicial independence, the court chose to entirely acquiesce to executive claims, citing once again from the earlier case: "In evaluating the need for secrecy, "we acknowledge the need to defer to the Executive on matters of foreign policy and national security and surely cannot legitimately find ourselves second guessing the Executive in this arena."[70]

In this case the Ninth Circuit divided 6-5. The dissent, by Judge Hawkins joined by Judges Schroeder, Canby, Thomas, and Paez, is not well argued. Although it says the state secrets doctrine "is a judicial construct without foundation in the Constitution"[71] and warns that courts "should be concerned to prevent a concentration of unchecked power" that would permit abuses,[72] it does little more than recommend that the case be remanded to the district court to determine what evidence is privileged "and whether any

66. Prime Minister releases letter of apology to Maher Arar and his family and announces completion of mediation process; http://www.cbc.ca/news/canada/harper-s-apology-means-the-world-arar-1.646481 (accessed November 4, 2015).

67. *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009).

68. *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1080 (9th Cir. 2010), citing Al-Haramain, 507 F.3d 1190, 1202 (9th Cir. 2007).

69. 614 F.3d at 1082.

70. Ibid., 1081-82.

71. Ibid., 1094.

72. Ibid., Note 1.

such evidence is indispensable either to Plaintiffs' prima facie case or to a valid defense otherwise available to Jeppesen."[73] The dissent does repudiate the majority's deference to the executive branch: "Permitting the executive to police its own errors and determine the remedy dispensed would not only deprive the judiciary of its role, but also deprive Plaintiffs of a fair assessment of their claims by a neutral arbiter."[74]

The Obama Administration

In his first action as president, Barack Obama issued a memorandum on "Transparency and Open Government" on January 21, 2009. The opening paragraph began: "My Administration is committed to creating an unprecedented level of openness in Government. We will work together to ensure the public trust and establish a system of transparency, public participation, and collaboration. Openness will strengthen our democracy and promote efficiency and effectiveness in Government."[75]

Those general comments about openness in government were followed by a speech on May 21, 2009, at the National Archives, where President Obama raised specific objections to how previous administrations, including that of George W. Bush, invoked the state secrets privilege. Expressing concern that "is has been over-used," he offered as his first principle: "We must not protect information merely because it reveals the violation of a law or embarrassments to the government." Announcing that his administration was "nearing completion of a thorough review of this practice," he pledged to "apply a stricter legal test to material that can be protected under the state secrets privilege." Each year, he said, "we will voluntarily report to Congress when we have invoked the privilege and why because, as I said before, there must be proper oversight over our actions."[76]

Later than year, on September 23, the Office of the Attorney General released new policies and procedures for state secrets. A State Secrets Review Committee would be formed to evaluate claims of state secrets within the government. The final recommendation would be referred to the attorney general or his designee for approval. The Justice Department "will not defend an invocation of the privilege in order to: (i) conceal violations of the law, inefficiency, or administrative error; (ii) prevent embarrassment to a person, organization, or agency of the United States government . . ."[77] Periodic reports on assertion of the state secrets privilege would be provided to the "appropriate oversight committees of Congress."[78]

73. Ibid., 1101.

74. Ibid.

75. https://www.whitehouse.gov/the-press-office/transparency-and-open-government (accessed November 4, 2015).

76. https://www.whitehouse.gov/the-press-office/remarks-president-national-security-5-21-09, 9 (accessed November 4, 2015).

77. http://www.justice.gov/opa/documents/state-secret-privileges.pdf, 2 (accessed November 4, 2015).

78. Ibid., 4.

This reform relied solely on screening within the administration, not on any external checks. The new policy was "entirely self-imposed and self-enforced" (Kitrosser 2015, 100). It depended on the executive branch policing itself. The Obama Justice Department continued to rely on the state secrets privilege invoked during the Bush administration. On April 29, 2011, Assistant Attorney General Ronald Weich submitted to Congress the first periodic report to congressional committees on assertions of the state secrets privilege. He said the Justice Department concluded that no change was warranted with respect to assertions of the privilege in pending cases, such as the extraordinary rendition cases of *El-Masri*, *Maher Arar*, and *Jeppesen Dataplan*. Moreover, Weich identified new uses of the privilege in the case of NSA surveillance (*Shubert v. Obama*) and the use of drones to kill U.S. citizens abroad (*Al-Aulaki v. Obama*).

In subsequent actions, the Obama administration depended on the state secrets privilege to block private lawsuits. Rahinah Ibrahim, a Malaysian Muslim pursuing her graduate studies at Stanford University, arrived at the San Francisco airport on January 2, 2005, to fly to Malaysia. Discovering that her name was on the federal government's No Fly List, she was taken to the police and held overnight. The belief that she was a security risk was an apparent mistake because she was allowed to board a plane the next day to return to Malaysia. Yet her situation grew worse when the Bush administration revoked her visa to travel to the United States. In January 2006, she filed a complaint in federal court to challenge the government's action and seek damages.[79]

The Obama administration proposed that secret evidence be shared only with the district judge, a procedure the court found unacceptable. On April 23, 2013, Attorney General Eric Holder signed a declaration claiming the state secrets privilege over certain documents. As the litigation continued, it was discovered that an FBI agent admitted he had improperly filled out a form on Ibrahim, doing it "exactly the opposite way" from the instructions given him. The result: she was wrongly placed on the No Fly List. Instead of apologizing to Ibrahim and compensating her for the government's error (and embarrassment), the Obama administration chose to invoke the state secrets privilege (Fisher 2014b, 30).

On January 14, 2014, in *Ibrahim v. Department of Homeland Security*, a federal district judge in California, William Alsup, ordered the government to remove all references to the mistaken designations by the FBI agent and make other corrections to the erroneous 2004 designations. The government was to inform Ibrahim of the specific charges that had rendered her ineligible for a visa in 2009 and 2013, tell her she is eligible to fly again, and complete those actions by April 15, 2014.

Another no-fly case involved Gulet Mohamed, a naturalized U.S. citizen who left the United States in 2009 to travel to Yemen, Somalia, and Kuwait. During that trip he claimed he was interrogated and tortured with the complicity of unnamed U.S. officials. In January 2011, he was denied the right to board a flight to the United States, but shortly after that he did return to the United States. He filed a lawsuit to determine if his name was currently on the No Fly List. The government refused to confirm or deny that he was on the list. On May 27, 2014, Attorney General Holder signed a declaration in

79. *Ibrahim v. Department of Homeland Security*, 538 F.3d 1250 (9th Cir. 2008).

Mohamed v. Holder, invoking the state secrets privilege to deny Mohamed the information he sought. In addition, the government filed a classified FBI declaration, making it available to the court for ex parte, in camera review.

On October 30, 2014, U.S. District Judge Anthony J. Trenga in Virginia denied the government's motion to dismiss the case. On February 2, 2015, he announced that he would hold an ex parte, in camera, sealed hearing on February 24 in order to allow the government to provide additional information regarding claims of state secrets and their relevance to plaintiffs' procedural due process. On April 13, the administration notified the court that it was in the process of revising its procedures for the No Fly List to increase transparency and improve chances for redress to harmed individuals. Through this procedure, individuals can find out whether they are on the list and possibly receive the reasons for the government's decision (Goldman 2015, A3). On July 16, 2015, the court held that the No Fly List procedures were unconstitutional because they did not permit adequate opportunity to challenge a denial of boarding (Zapotosky 2015, B4).

In a separate case, brought by thirteen Muslim Americans who had been prevented from boarding flights, a U.S. district court in Oregon on June 24, 2014, struck down the no-fly procedures. Judge Anna J. Brown held that the procedures violated the Fifth Amendment right to due process by creating a "high risk of erroneous deprivation" of individual rights, leaving plaintiffs potentially "doomed to indefinite placement on the no-fly list." Plaintiffs lacked meaningful opportunities to contest their placement on the list (Savage 2014, A15). Details on this case, *Latif v. Holder*, appear in a report issued by Congressional Research Service (Cole 2015, 17-18).

In yet another challenge to the Obama administration, four Muslims filed a case in New York district court in 2014, claiming that the FBI threatened to put them on the No Fly List unless they agreed to spy on their own American Muslim communities and other innocent people. In this litigation, *Tanvir v. Holder*, the plaintiffs sought injunctive and monetary relief against executive officials who placed them on the No Fly List and declaratory and injunctive relief against officials who maintained a list that lacked due process and permitted misuse.

On July 19, 2013, Victor Restis filed a complaint that United Against Nuclear Iran (UANI) had engaged in defamation by accusing him of engaging in prohibited business transactions with Iran. UANI's conducted its campaign against him with press releases, postings on social media, and UANI's website. The case appeared to involve one private party against another. Nevertheless, the Obama administration intervened by invoking the state secrets privilege. It submitted classified declarations and documents to the federal district court and met with the judge ex parte and in camera without ever disclosing to the judge what federal agency had expressed objections (Apuzzo 2014, A13). In other state secrets cases, as in *Reynolds*, the head of an agency or department is required to make a public statement why evidence must not be disclosed. To the Obama administration, no such requirement applied to the *Restis* case.

In *Restis v. UANI*, U.S. District Judge Edgardo Ramos in New York released his opinion on March 23, 2015, granting the administration's motion to dismiss the case. He stated that the state secrets privilege required federal courts to grant "utmost deference" to the executive branch determination that disclosure would damage military or

diplomatic security, effectively eliminating any exercise of judicial independence. Under this decision, UANI can continue to defame Restis without any judicial restraint. Important questions are left unanswered. If UANI has classified or secret information, how did it obtain it? From a federal agency? Through that process, the government would be in a position to permit private parties to defame individuals with no accountability and with no possibility of judicial relief to those injured.

Conclusion

The state secrets privilege continues to be grounded in the 1953 *Reynolds* decision, a case in which the Supreme Court refused to read a contested accident report because it accepted the false assertion of the executive branch that it contained state secrets that could not be disclosed. There is no justification for a court to take at face value affidavits and declarations signed by agency heads and no justification to allow agencies to excise materials from documents before they are submitted to courts for in camera review. The framers adopted separation of powers and checks and balances because they did not trust human nature and feared the abuse that comes from concentrated power. To defer to agency claims about privileged documents and state secrets is to abandon the independence that the Constitution vests in Congress and the courts, placing in jeopardy the individual liberties that depend on institutional checks.

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