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The State Secrets Privilege: Concealing Executive Abuse and Illegalities

On several occasions I have taught a class on the state secrets privilege at the William and Mary law school. Students, in their second or third year, come to class with a confident understanding that the judiciary is an independent branch of government, functions as the guardian of individual rights, and follows the adversary model that requires contending sides to vigorously present their views in briefs and oral argument in order to properly inform the court. Those beliefs are quickly shattered when students learn about the state secrets privilege: a judiciary that agrees to be subservient to the executive branch, does not protect the rights of private plaintiffs, and replaces the adversary process with *ex parte* reliance on executive assertions that are often erroneous. From the Eisenhower to the Obama administration, courts have adopted distorted and historically incorrect interpretations of executive privilege, allowing presidents to maintain secrets for political rather than national security purposes.

CITING THE BURR TRIAL AS PRECEDENT

The major source of the state secrets privilege is the Supreme Court's decision in *United States v. Reynolds* (1953), to be discussed later in detail. According to advocates of the state secrets privilege, it originated more than two centuries ago, a claim that is entirely in error. In its brief in *Reynolds*, the Justice Department cited the Aaron Burr trial of 1807 as a precedent.[1] The department produced a list of what it called successful assertions of the evidentiary privilege, with the second example being: "Confidential information and

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letters relating to Burr's conspiracy."[2] That is false. Apparently guided by the Justice Department, a federal district court in 1977 claimed that the state secrets privilege "can be traced as far back as Aaron Burr's trial in 1807."[3] In 1989, the D.C. Circuit conceded that the "exact origins" of the privilege "are not certain," but nevertheless discovered its "initial roots" in Burr's trial and its "modern roots" in *Reynolds*.[4] 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."[5]

Passages like this are fairly common in court decisions. The Justice Department or some other authority makes an erroneous historical claim and judges fall in the line without independently analyzing the claim and questioning its veracity. The decision in 2004 correctly noted that Burr during the trial sought access to letters that General James Wilkinson—the primary government witness against him—had sent to President Thomas Jefferson. The letters "purportedly contained information" about Burr "of whose guilt," Wilkinson said, "there can be no doubt." Initially, the government objected to producing these documents, asserting that 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."[6]

Think about that. Who could possibly argue that someone accused of a criminal offense, in this case the charge of treason carrying the penalty of death by hanging, could be found guilty on the basis of secret evidence? Chief Justice John Marshall, presiding over the trial in Richmond, Virginia, did not defer to the administration's argument. He made an independent assessment. In a criminal trial, with the death penalty looming, Burr was entitled to see 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."[7]

In response to the subpoena that Marshall issued to the executive branch, Jefferson assured the court of his "readiness" to voluntarily furnish "on all occasions whatever the purposes of justice may require." As to an October 21

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letter from Wilkinson, Jefferson said he had given it to Attorney General Caesar Rodney to be taken to Richmond for the trial. He closed by expressing a "perfect willingness to do what is right."[8] Nothing in the record indicates a decision by Jefferson to prevent Burr from gaining access to documents needed for his defense. Jefferson said 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, D.C.[9]

With Burr and his attorneys able to see the government's evidence, the case against Burr grew so weak that Marshall asked of the government: "gentlemen will 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."[10] When the government moved to discharge the jury, Burr objected and insisted on a verdict. The jury retired and returned with a judgment of "Not guilty."[11] So much for the Justice Department's claim that Burr's trial provides a precedent for the state secrets privilege and the capacity of the government to withhold incriminating documents from a defendant.

There are many reasons why the Burr trial has no application to the state secrets privilege. The principal reason is that Burr was tried in a criminal case for treason. Lawsuits over state secret cases are civil cases brought by private plaintiffs against the government. The Jefferson administration understood that Burr had a right to gain access to evidence used against him. If the administration in a criminal case decides it cannot surrender documents because they contain confidential information that would be injurious to the public interest if released, it has to drop the charges. Convicting someone on secret evidence violates core constitutional rights. As to the charge of treason, Article III, Section 3, of the U.S. Constitution states that no person "shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court." Secret criminal trials have precedents in totalitarian countries but not in the United States.

THE LINCOLN SPY CASE

In *Reynolds*, the Supreme Court described the government's attempt 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 government spy case, *Totten v. United States* (1875).[12]

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However, the circumstances in that case apply only to a very narrow category of state secrets and have nothing to do with the *Reynolds* case in 1953 or most of the state secret cases in contemporary times.

During the Civil War, President Lincoln entered into a contract with William A. Lloyd to proceed South and 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. For his services Lloyd was to be paid $200 a month, but he received funds only to cover his expenses. After he died his family sought to recover compensation for his services. In explaining why it rejected the lawsuit, the Supreme Court offered examples where it would be impermissible in court to disclose matters that needed to remain confidential. Lawsuits could not proceed that would require "a disclosure of the confidences of the confessional, or those between husband and wife, or of communications by a client to his counsel for professional advice, or of a patient to his physician for a similar purpose." 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."[13]

The Court was largely addressing the confidentiality that exists in certain types of communications: between confessor and priest, husband and wife, client and attorney, patient and doctor. To those privileged communications the Court added the confidentiality that exists between a president and someone he hires as a spy. Lincoln paid Lloyd from a contingent account that Congress had placed under presidential control.[14] In *Totten*, the 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 sealed respecting the relation of either to the matter."[15] Any effort in court to publicize the agreement "would itself be a breach of a contract of that kind."[16] Nothing can be drawn from this unique and narrow case to justify automatically withholding state secrets from private litigants and federal courts over the broad domains of national security and foreign affairs, which has been the general effort of the executive branch ever since *Reynolds*.

Many other lawsuits have involved spies or individuals seeking additional compensation from the government for their services. These claims are regularly rejected by federal courts by relying on *Totten*.[17] The decisions underscore the point that *Totten* applies to a unique category of government

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spy cases that are unenforceable in court. In contrast, state secrets can be litigated and require certain procedural steps by the government to withhold documents from plaintiffs. As we will now see with *Reynolds*, the issue in that case was not merely withholding documents from private parties but even from the judiciary.

REYNOLDS: *THREE WIDOWS IN COURT*

In *United States v. Reynolds* (1953), the Supreme Court for the first time recognized and upheld a broad doctrine of state secrets privilege. The case began when three widows sued the government for negligence in the midair explosion of a B-29 bomber on October 6, 1948, over Waycross, Georgia. Five of eight crewmen 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 to the secret equipment tested on the flight, all of which was known to newspaper readers who learned of the crash the next day.[18] The widows requested several key documents, including the official accident report and depositions of the three surviving crewmen.

The manner in which the Court held for the government greatly weakened the duty of the judiciary to analyze executive assertions and protect the right of private plaintiffs who challenge government abuse and illegality. The government warned the Court that disclosure of the accident report would do grave damage to national security. A half century later, after the government had declassified and released the accident report, it was evident that the report contained no state secrets. Instead, it revealed that the government had acted negligently, such as failing to install proper equipment to reduce the risk of engine fires. The Court, misled by the government about national security secrets, never exercised the elementary need to examine documents and form an independent judgment about their contents.

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.[19] 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."[20]

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Other than the exceptions listed in the statute, Congress empowered 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 abdicate the court's duty to protect the rights of private parties to pursue their interests in court. To allow the executive branch to withhold documents that revealed government negligence would make a nullity of the tort claims statute.

Deciding questions of privileges and access to evidence is central to the conduct of a judge at trial. 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."[21] On the duty to provide evidence in court, Wigmore was clear: "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."[22] Equally clear: the judiciary, not the executive, would determine the issue of secrecy: "Both principle and policy demand that the determination of the privilege shall be for the Court."[23]

IN LOWER COURTS

In both the district court and the appellate court, federal judges in *Reynolds* fully recognized the duty of courts to independently decide the issue of secrecy and to properly inform themselves by examining documents claimed by the executive branch to contain secrets. They knew it was their responsibility to protect the interests of private parties in the courtroom. The Supreme Court in *Reynolds* never understood that elementary legal principle.

The lawsuit, filed on June 21, 1949, was assigned to Judge William H. Kirkpatrick in the Eastern District of Pennsylvania. Representing 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.[24] The first question asked whether the government had directed an investigation into the cause of the crash. If so, the government

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should attach to its answer a copy of the reports and findings of the investigation.[25] The government acknowledged there had been an investigation but refused to produce the accident report.[26] No claim of state secrets was invoked at that time.

Question 7 of the interrogatories: "Was any engine trouble experienced with the said B-29 type aircraft on October 6, 1947, prior to the crash?"[27] The 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 the three months immediately preceding the crash. Was it necessary at any time to postpone a scheduled flight of the plane because of defects? The government said "No."[28] The last question asked whether the government had prescribed modifications for the B-29 engines to prevent overheating and reduce fire hazards. If so, when were the modifications prescribed? If any modifications had been carried out, the interrogatory asked for details. The government answered "No."[29] When the declassified accident report was discovered on the Internet in 2000, the falsity of that answer was obvious, as will be discussed later.

The government offered five reasons for withholding the accident report and the statements of three surviving crewmen. 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)."[30] The citation was 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.[31] 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 a statement by someone else not made under oath. According to the government, the statements by the three surviving crewmen were all hearsay. The government invited the plaintiffs to take depositions of the three men.[32]

On June 30, 1950, Judge Kirkpatrick ruled that the B-29 report and the findings of the Air Force investigation "are not privileged."[33] 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."[34] 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."[35] To Kirkpatrick, it was "obvious" that the government "knows more about the accident than this."[36]

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On July 20, Kirkpatrick issued an order permitting the plaintiffs to inspect the requested documents and set a deadline of August 7 for the government to produce the material.[37] 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.[38] 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."[39]

Also on August 9, the government produced an undated claim of privilege by the 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."[40] However, one day after the crash, newspaper readers around the country knew the plane carried confidential equipment.[41] 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. Intentionally or not, Finletter's statement was a red herring.

The Justice Department advised Kirkpatrick that "the findings of the head of the Department are binding and the judiciary cannot waive it."[42] When it came to statutory interpretation of agency authority over access to documents, the government insisted that a departmental judgment "is final."[43] An official from the Justice Department told Judge Kirkpatrick: "In other words, I say that the Executive is the person who must make that determination, not the Judiciary."[44] Who should run the courtroom? To the government, it was the executive branch, not the judge.

On September 12, Kirkpatrick directed the government to produce for his examination in his chambers 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 crewmen.[45] When the government failed to produce the documents, Kirkpatrick ruled in favor of the three widows.[46]

The government, appealing to the Third Circuit, looked to British precedents for guidance: "We believe that all controlling governmental and judicial

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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."[47] Why refer to "disclosure" when Judge Kirkpatrick requested that he examine the documents *in camera*? The analogy to Great Britain was strained 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 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.[48]

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."[49] 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."[50]

Beyond matters of statutory policy, the Third Circuit explained that granting the government its "sweeping privilege" would be "contrary to a sound public policy."[51] It would be a small step, it said, "to assert a privilege against any disclosure of records merely because they might prove embarrassing to governmental officers."[52] 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 of the matter by it. We cannot accede to this proposition."[53] 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."[54]

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 in issues of national security. The case now moved to the Supreme Court, which proceeded to act not as a coequal branch of government but as a facilitator of

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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."[55]

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.[56] 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. 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 judiciary recognized 'state secrets' privilege."[57] *To the extent*? In the case of the accident report and the survivor statements, the extent was zero.[58]

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 confused principles 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."[59] If the government can keep documents from the judge, even for *in camera* inspection, there is no basis for a court to "determine whether the circumstances are appropriate for the claim of privilege." The judge would be forced to accept mere assertions by the government, assertion that in this case proved to be false. Nor was there any reason to treat *in camera*

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inspection as "disclosure." The Supreme Court reasoned that in the case of the privilege against disclosing documents, a court "must be satisfied from all the evidence and circumstances" before it decides to accept the claim of privilege.[60] In fact, unless a court independently evaluates documents it has no "evidence" 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."[61] If an executive officer wanted to act capriciously and arbitrarily, a court would have no way of spotting that behavior unless it personally examined the disputed documents. Denied access to evidence, federal courts necessarily rely on vapors and allusions. 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 served not justice but the executive branch. It sent a clear signal 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 becomes a safe haven for arbitrary and abusive executive power.

In a recent analysis of *Reynolds*, Frederick A. O. Schwarz Jr. concluded that the Court's opinion "makes no sense" and wanders away "from both logic and law."[62] Similarly, a law review article by David Rudenstine in 2013 states that the Court's opinion in *Reynolds* "was riddled with deceit and pretence,"[63] masking the opinion's "own deceptiveness and disguised the many considerations that formed the underpinnings of the opinion." 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."[64]

The majority opinion in *Reynolds* reads more like a decision designed to meet institutional and political needs. Those considerations are always present and important, but not at the cost of constitutional principles and the rights of litigants. In a 6–3 decision, one might expect the three dissenters to expose significant deficiencies in the majority opinion. The dissent by Justices Black, Frankfurter, and Jackson does no such thing. They say not a word about the Court's constitutional analysis. Instead, they dissented "substantially for the reasons set forth in the opinion of Judge Maris below" in the Third Circuit.[65] What does that mean? We have to guess at what parts of the Maris opinion they agreed and disagreed with. Similarly, we have no idea what parts of the majority opinion left them unsatisfied.[66]

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HOODWINKING THE JUDICIARY

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 not stating—that the report contained state secrets. Without reading the report, the Supreme Court was at risk of being deceived by the government. One might ask: Did the executive branch snooker the judiciary or did the Supreme Court allow itself to be snookered? The answer to both questions is yes, but the responsibility falls mainly on the Court for failing to function as an independent branch and protect the rights of plaintiffs.

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. For the first time she entered the combination "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 she wanted. She ordered a copy and was surprised to find it contained no passages on state secrets. It did, however, reveal clear negligence on the part of the Air Force. It failed to install heat shields to reduce the likelihood of engine fires. It also failed to brief the civilian engineers before the flight on the use of parachutes and emergency aircraft evacuation.[67]

Loether notified the other two families involved in the *Reynolds* litigation and they decided to sue the government for deceiving the federal courts. They contacted the Drinker, Biddle law firm, which again agreed to represent them. 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 asking 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."[68]

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."[69] But a second principle demands equal respect. A court needs to revisit a judgment after discovering that fraud cast a shadow over the original ruling. Tolerating fraud in a particular case reduces respect for judges and lowers public confidence in the courts. It is not merely injury to a single litigant. As explained in

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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."[70]

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 as a sanction against the government's misconduct.[71] Without explanation, the Court on June 23, 2003, denied the petition.[72] The three families would have 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. 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]."[73] 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 concluded that the accident report contained secret information. Had Judge Kirkpatrick looked at the report, it would have been obvious that the government had lied on 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 government's answer: "No." Reading the accident report today, one can see other government answers that were either inaccurate or false.

District Judge Legrome D. Davis released his decision on September 10, 2004, granting the government's motion to dismiss.[74] He deferred to the government 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."[75] First, that was an assumption on Judge Davis's part. Second, it also improperly implied that "disclosure" to Judge Kirkpatrick would have been disclosure to the public. There was no such risk. 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.

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The families appealed to the Third Circuit. On September 22, 2005, the appellate court decided for 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."[76] The highest value for the Third Circuit was avoiding the need to cast doubt on the Supreme Court's decision in *Reynolds* even if the government had misled the judiciary, the Court had allowed that to happen, and plaintiffs were denied their right to receive compensation under the Federal Tort Claims Act.[77]

On December 21, 2005, the plaintiffs filed a cert petition with the Supreme Court. The government filed 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.[78] The value given short shrift throughout this *coram nobis* was the need to protect the integrity, independence, and reputation of the federal judiciary. When courts operate in this manner, litigants and citizens lose faith in the judiciary, the rule of law, and the system of checks and balances.

STATE SECRETS AFTER 9/11

The scope of the state secrets privilege has been especially broad after the terrorist attacks of September 11, 2001. The George W. Bush administration relied on the privilege extensively to prevent litigants from challenging the practice of the executive branch to take suspects to other countries for interrogation and torture (extraordinary rendition). There was some expectation that the administration of Barack Obama would place limits on the state secrets privilege. Although President Obama ordered an end to torture, including waterboarding, his administration continued to rely on the state secrets privilege to prevent litigants from challenging abusive, illegal, and unconstitutional actions by the executive branch.

Rendition means surrendering someone to another jurisdiction for trial. It therefore applies to a *judicial* process: someone is accused of a crime and has the assistance of an attorney and full access to procedural rights in court. It has no application to what happened after 9/11: detainees or enemy combatants held indefinitely by executive officials, often subjected to torture and physical abuse, and with no plans to bring them before a federal judge for trial. Putting "extraordinary" in front of rendition changes the meaning fundamentally.

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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. Checks and balances disappeared. Presidents claimed the right not only to act in the absence of statutory or treaty authority but even in violation of them.[79]

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 CIA agents and flown to a secret prison called the "Salt Pit" in Afghanistan. Held for five months, he was repeatedly refused counsel or access to a representative of the German government.

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 asserted 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.[80]

As with many state secrets cases, the district court spoke inconsistently about a plaintiff's rights and executive branch authority. The judge 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."[81] 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.'"[82] Having offered those assurances, 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.'"[83] 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."[84] Through that reasoning, the court decided to blindfold itself.

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Having ruled out a balancing test, the court proceeded to offer one, explaining that El-Masri's "private interests must give way to the national interest in preserving state secrets."[85] 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 analyzes more closely what is meant by "national interest." What national interest is served by picking up the wrong person, keeping him in prison for five months under abusive conditions, with no capacity to seek vindication in court and have the government concede error and award damages? Actually, on El-Masri's side are all individuals, U.S. citizen or alien, who do not want to share his experience. Moreover, it is 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 affirmed El-Masri's account of what happened to him under CIA control. Yet 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."[86] The judiciary certainly cannot search for truth if it uncritically accepts executive assertions about state secrets, blocks access to documents, and eliminates the adversary process that serves to inform a court. 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.[87] 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 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.[88] 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 found no evidence linking him to terrorism.[89]

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

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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."[90] A federal district court held that Arar lacked standing to bring a claim against U.S. officials responsible for holding him incommunicado in New York and removing him to Syria for detention and torture.[91] The court gave this explanation for the need for secrecy 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."[92]

In fact, Canada had no intention of keeping the matter secret. It had been conducting its own 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 $9.75 million in compensation.[93] Arar's appeal to the Second Circuit was unsuccessful. On June 14, 2010, the Supreme Court denied his petition for certiorari. No one in the Bush or Obama administrations expressed any apology or statement of regret for the U.S. role in his mistreatment.

The unwillingness of federal judges to independently examine charges of executive branch illegality is illustrated by the Ninth Circuit's decision in another rendition case, *Mohamed v. Jeppesen Dataplan*, decided on September 8, 2010. The litigation began under President Bush II and continued under President Obama, with each administration invoking the state secrets privilege to conceal executive illegality. A private contractor had 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: "We must make an independent determination whether the information is privileged."[94] 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."[95] Shortly after those encouraging words, the court abandoned any pretense of judicial independence: "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."[96]

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THE OBAMA ADMINISTRATION AND EXECUTIVE PRIVILEGE

In a speech on May 21, 2009, at the National Archives, President Obama raised objections to how previous administrations, including that of George W. Bush, invoked the state secrets privilege. Expressing concerns that "it 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."[97]

Later that 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 . . ."[98] Periodic reports on assertion of the state secrets privilege would be provided to the "appropriate oversight committees of Congress."[99] This reform relied solely on screening within the administration, not on any external checks.

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 that 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*. 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*).

Subsequent examples underscore how the Obama administration's record on state secrets mirrors that of the Bush II administration. 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, only to discover that her name was on the federal government's No Fly List. 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

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situation grew worse, forcing her to file a complaint in federal court in January 2006 to challenge the government's action and seek damages.

The Obama administration wanted the case dismissed on the basis of secret evidence to be shared only with the district judge, a procedure the court found unacceptable. On April 23, 2013, Attorney General Eric Holder signed a declaration that claimed 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, thereby wrongly placing her on the No Fly List. Instead of apologizing to Ibrahim and compensating her for the government's error (and embarrassment), the Obama administration insisted on invoking the state secrets privilege.[100]

On January 14, 2014, in *Ibrahim v. Department of Homeland Security*, District Judge 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 her 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 boarding on a flight returning 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 *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, Judge Anthony J. Trenga denied the government's motion to dismiss. On February 2, 2015, he announced that he would hold an *ex parte*, *in camera*, sealed hearing on February 24 in order to give the government an opportunity to provide the court additional information regarding the claim of state secrets and their relevance to plaintiffs' procedural due process.

In a separate case in Oregon brought by thirteen Muslim Americans who had been prevented from boarding flights, a district court 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

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"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.[101] Details on this case, *Latif v. Holder*, appear in a report issued by the Congressional Research Service.[102]

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 conducted its campaign against him with press releases, posting on social media, and UANI's website. The case involved one private party against another. Nevertheless, the Obama administration intervened by invoking the state secrets privilege, submitting classified declarations and documents to the federal district court and meeting with the judge *ex parte* and *in camera* without ever disclosing to the judge what federal agency had expressed objections.[103] 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. No such requirement applied to the *Restis* case.

Judge Edgardo Ramos released his opinion on March 23, 2015, in *Restis v. UANI*, 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, even to judges in their chambers. 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

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balances because they did not trust human nature and feared 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.

Washington, D.C.

NOTES

1. *Brief for the United States*, *United States v. Reynolds*, No. 21, U.S. Supreme Court, October Term, 1952, 10–11.
2. Ibid., 24.
3. *Jabara v. Kelley*, 75 F.R.D. 475, 483 (D. Mich. 1977).
4. *In re U.S.*, 872 F.2d 472, 474–75 (D.C. Cir. 1989).
5. *Edmonds v. U.S. Dept. of Justice*, 323 F. Supp. 2d 65, 70 (D.D.C. 2004).
6. Ibid., citing *United States v. Burr*, 25 Fed. Cas. 30, 31 (C.C.D. Va. 1807) (No. 14,692d).
7. *United States v. Burr*, 25 Fed. Cas. 30, 37 (C.C.D. Va. 1807) (No. 14,692d).
8. Ibid., 65.
9. Ibid., 69.
10. *United States v. Burr*, 25 Fed. Cas. 201 (C.C.D. Va. 1807) (No. 14,694).
11. Ibid., 201. For further details on Burr's access to executive branch documents, see Louis Fisher, *In the Name of National Security: Unchecked Presidential Power in the* Reynolds *Case* (Lawrence, Kans., 2006), 212–20. The extent to which Jefferson tried (unsuccessfully) to find Burr guilty is covered here: Louis Fisher, "Jefferson and the Burr Conspiracy: Executive Power against the Law," *Presidential Studies Quarterly* 45 (2015): 157.
12. *United States v. Reynolds*, 345 U.S. at 6–7 n. 11.
13. *Totten v. United States*, 92 U.S. 105, 107 (1875).
14. Ibid., 106.
15. Ibid.
16. Ibid., 107.
17. Fisher, *In the Name of National Security*, 223–27.
18. Ibid., 1–2.
19. 60 Stat. 843, sec. 403(1) (1946).
20. Ibid., 843–44, sec. 410(a).
21. John Henry Wigmore, *Evidence in Trials at Common Law*, 3rd ed. (Boston, 1940), 8: § 2212a (emphasis in original).
22. Ibid., § 2370.
23. Ibid., § 2379.
24. Fisher, *In the Name of National Security*, 31–35.
25. *Transcript of Record*, Supreme Court of the United States, October Term 1952, No. 21, *United States v. Reynolds*, 8.

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26. Ibid.,12.
27. Ibid., 9.
28. Ibid., 14.
29. Ibid.
30. Fisher, *In the Name of National Security*, 36.
31. Ibid., 36, 44–48.
32. Ibid., 36.
33. *Brauner v. United States*, 10 F.R.D. 468, 472 (D. Pa. 1950).
34. Ibid., 471.
35. Ibid.
36. Ibid.
37. Fisher, *In the Name of National Security*, 51.
38. Ibid., 51–56.
39. 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 Maj. Gen. Reginald C. Harmon.
40. Claim of Privilege by the Secretary of the Air Force, *Reynolds v. United States*, Civil Action No. 10142 (E.D. Pa. 1950), 2. It was filed with the court on 10 October 1950. Although not filed until October, the government brought it to the 9 August hearing.
41. Fisher, *In the Name of National Security*, 1–2.
42. Proceedings for 9 August 1950, 6.
43. Ibid., 9.
44. Idid., 10.
45. Amended Order, 21 September 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.
46. Fisher, *In the Name of National Security*, 56–57.
47. *Brief for the United States*, *Reynolds v. United States*, No. 10483 (3d Cir. 1951), 6.
48. Louis Fisher, *The Law of the Executive Branch: Presidential Power* (New York, 2014), 5, 73–74, 261–65, 315.
49. *Reynolds v. United States*, 192 F.2d 987, 992 (3d Cir. 1951).
50. Ibid., 994.
51. Ibid., 995.
52. Ibid.
53. Ibid., 996–97.
54. Ibid., 997.
55. *Brief for the United States*, *United States v. Reynolds*, No. 21, U.S. Supreme Court, October Term, 1952, 11.
56. Fisher, *In the Name of National Secrecy*,166–69.
57. *Brief for the United States*, *United States v. Reynolds*, No. 21, U.S. Supreme Court, October Term, 1952, 45.
58. For access to the accident report, see pages 10a–68a of http://www.fas.org/sgp/othergov/reynoldspetapp.pdf.
59. *United States v. Reynolds*, 345 U.S. 1, 8 (1953).
60. Ibid., 9.
61. Ibid., 9–10.

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62. Frederick A. O. Schwarz Jr., *Democracy in the Dark: The Seduction of Government Secrecy* (New York, 2015), 208.

63. David Rudenstine, "The Irony of a Faustian Bargain: A Reconsideration of the Supreme Court's 1953 *United States v. Reynolds* Decision," *Cardozo Law Review* 34 (2013): 1283, 1289.

64. Ibid., 1370.

65. *United States v. Reynolds*, 345 U.S. 1, 12 (1953).

66. For the reluctance of the three Justices to write a full and professional dissent, see Fisher, *In the Name of National Security*, 105 n. 59. For further analysis of the manner in which the Court decided *Reynolds*, see 106–15.

67. Ibid., 166–68, 192–93.

68. *The Palmyra*, 12 Wheat. 1, 10 (1827).

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

70. Ibid., 246.

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

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

73. *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.

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

75. Ibid., 8, citing Halperin v. NSC, 452 F. Supp. 47 (D.D.C 1978). For further details on the district court decision, see Fisher, *In the Name of National Security*, 188–200.

76. *Herring v. United States*, 424 F.3d 384, 386 (3d Cir. 2005).

77. For details on the Third Circuit decision, see Fisher, *In the Name of National Security*, 200–211.

78. *Herring v. United States*, 547 U.S. 1123 (2006).

79. Louis Fisher, "Extraordinary Rendition: The Price of Secrecy," *American University Law Review* 57 (2008): 1405; Fisher, *The Law of the Executive Branch*, 409–13.

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

81. Ibid., 536.

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

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

84. Ibid., 536, 537.

85. Ibid., 539.

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

87. Nicholas Kulish, "Court Finds Rights Violation in C.I.A. Rendition Case," *New York Times*, 14 December 2012, A13.

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90. U.S. Department of Justice, *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. 2005), 2–3.

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

92. Ibid., 281.

93. Prime Minister releases letter of apology to Maher Arar and his family and announces completion of mediation process; http://www.pm.gc.ca/eng/media.asp?id=1510.

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

95. 614 F.3d at 1082.

96. Ibid., 1081–82.

97. https://www.whitehouse.gov/the-press-office/remarks-president-national-security-5-21-09, 9.

98. http://www.justice.gov/opa/documents/state-secret-privileges.pdf, 2.

99. Ibid., 4.

100. Louis Fisher, "Government Errors Are Shrouded in Secrecy," *National Law Journal* 10 (March 2014): 30.

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102. Jared P. Cole, "The No Fly List: Procedural Due Process and Hurdles to Litigation," Congressional Research Service, Report R53730, 18 September 2014, 17–18.

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