SYMPOSIUM

Control over Executive Branch Information: Who "Judges"?

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You may be forgiven if you associate Lou Fisher's name primarily with his robust defense of Congress's preeminent authority in national security and budgetary matters, or with the idea that courts are only one of three co-equal players in the constitutional dialogue that occurs among all of the branches, or with the related effort to disabuse scholars, the press, and the public of the profoundly incorrect notion that courts have "the last word" in constitutional interpretation. All of these themes are, indeed, key components of Fisher's vast body of scholarly work and public testimony, and they will be forever linked to him as their progenitor. Just as solidly grounded in impeccable research and unassailable logic is Fisher's work on executive power. It fits snugly within his Madisonian emphasis on a government of limited and shared powers, enforced through effective checks and balances, where each institution exercises its respective power while overseeing the other branches to ensure respect for constitutional boundaries.

Fisher is a withering and "equal opportunity" critic of uses of executive power that transgress his standards for sound constitutional interpretation: it matters not to him which political party holds the White House—presidents and administrations of both parties are fair game for his rigorous scrutiny. Throughout the years, this has resulted in his attention to issues such as executive privilege, state secrets privilege, domestic surveillance, military detention and trial, whistleblowing, impeachable offenses, item-veto authority, signing statements, and recess appointments, to name only a few of the topics within the category of executive authority (and excluding matters relating to a president's war powers, a subject covered in David Adler's contribution to this symposium).

Fisher's curiosity has extended well beyond the office of the presidency to other executive branch units, such as the Department of Justice (DOJ), and to examination of the work of lawyers within that institution, especially, but not limited to, the Office of Legal Counsel (OLC). It is OLC's function of interpreting the president's constitutional authority that makes it a compelling subject for Fisher's inquiry: not surprisingly, Fisher scours OLC opinions with a skepticism that arises from their reputation for often being "president-friendly," that is, finding authority and selective precedents to support actions, even questionable ones, that a president wishes to take.

Thus, Fisher's contributions to academic scholarship and to the public record on matters of executive branch authority run both deep and wide, unlikely to be matched in scope or influence by the work of any other scholar or public figure. His perch for 40 years at the Library of Congress, first and foremost at the Congressional Research Service (CRS) and, later, at the Law Library, no doubt, gave him unparalleled opportunities to opine on the broadest possible range of governmental actions, and afforded him the unique luxury of becoming immersed in the study of constitutional history and practices. He undertook his duties at CRS with obvious relish and satisfaction at the public service afforded him by this job, but the "payoff" from his rich and vast body of work now reaches far beyond the halls of the Capitol. His work extends to generations of scholars who entered the profession, having "cut their (constitutional) teeth" on his seminal books and articles, in which he led the way in demonstrating how to apply analytical rigor and a deep knowledge of history to contemporary questions of constitutional politics. Above all, one concludes that he imposes on executive officials an uncompromising insistence on adherence to constitutional fidelity and republican principles.

The touchstone for Fisher is the quality and accuracy of legal and constitutional arguments. Presidents or executive branch lawyers (e.g., the White House Counsel or general counsels in executive departments or OLC and other lawyers in the DOJ) present constitutional or statutory justifications for executive branch actions to Congress, the courts, and the public. Fisher has made a career of dissecting these justifications, and identifying their weaknesses, measured against the historical and precedential record. He is motivated by a desire (perhaps, even a demand) to see that government officials "get it right," and he thinks that the American public and its governmental system deserve nothing less. He imposes incisive analysis on these official statements and subjects them to searching standards. Passing muster with Fisher is not easy: but if playing the "bad cop" is the price for keeping officials honest and accurate in their understanding of the scope of their power, Fisher willingly steps up to the plate. There is no room in his world for sloppy or historically incorrect arguments by public officials: to him, the fate of republican government rests on the integrity of those administering it.

The rest of this article focuses on a specific aspect of executive power that Fisher has addressed with considerable urgency in his scholarly work, his testimony before Congress, and in opinion editorials for the public. He has been a consistent critic of executive branch secrecy in all of its forms, whether that policy manifests itself in overclassification of documents deemed necessary by the government for protecting national security, excessive claims of executive privilege or state secrets privilege, or the government's refusal to make public certain legal opinions from OLC in the DOJ. All of these issues have one point in common: all surface as executive claims to

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exclusive control over certain types of information. As each one develops, all soon bring within their respective orbits questions of congressional and/or judicial power, as well. In short, they possess the classic "hallmarks" of a Fisher approach—truly a constitutional dialogue among the branches (Fisher 1988). Moreover, the issue of control over information possessed by the executive branch is an enduring one, and continues unabated, as two potentially high-profile cases of executive branch refusal to provide information are wending their way currently through the federal courts (*Electronic Frontier Foundation*, and *New York Times, Charlie Savage, and Scott Shane v. U.S. Department of Justice; ACLU v. U.S. Department of Justice, Department of Defense, and Central Intelligence Agency*): thus, attention to Fisher's work and findings has particularly pressing relevance in the contemporary political and legal environment.

STATE SECRETS PRIVILEGE

Over the last five years, Fisher has testified before both houses of Congress on bills to reform the state secrets privilege (Fisher 2008a; Fisher 2008b; Fisher 2009). He has documented cases where executive branch officials have asserted a right to withhold secret information from a court, when, on further investigation, it has become clear that the government misrepresented the facts, often to hide embarrassment or fraud. The case of *Reynolds v. U.S.* was just such a case (1953). When family members of the accident victims of a military crash sued in federal court under the Federal Tort Claims Act, the government claimed the right to withhold from the court an accident report of the crash, on the basis that the plane was carrying military secrets. Two lower federal courts ruled in favor of the plaintiffs, ordering the government to produce the documents, but the US Supreme Court, recognizing a state secrets privilege for the first time, reversed the lower courts without ever examining the disputed documents. Forty years later, the government declassified the accident report, which showed that it contained no state secrets (Fisher 2008d). His book, *In the Name of National Security: Unchecked Presidential Power and the Reynolds Case* (Fisher 2006), exposed that misguided 1953 Supreme Court decision (and the government's flawed case) on which executive claims to a state secrets privilege still rest today. His work on this issue was sparked both by a judicial re-examination in 2005 of the claims in the *Reynolds* case (*Herring v. U.S.* 2006), brought by descendants of the original plaintiffs, and by broad assertions of executive branch control over national security information post-September 11 (e.g., regarding such issues as National Security Agency (NSA) surveillance and extraordinary rendition).

Fisher has made the case relentlessly for the need for federal judges to independently review executive claims of state secrets. His argument to support this review is grounded in pragmatic, statutory, and constitutional bases. In his testimony before the Senate Judiciary Committee in 2008, he asserted that "we know that the executive branch regularly overclassifies documents" (Fisher 2008b) and provided as evidence the examples of false or misleading information presented to federal judges in the 1943–44 Supreme Court cases on the relocation of Japanese-Americans (*Hirabayashi v. U.S.* 1943; *Korematsu v. U.S.* 1944), in *Reynolds v. U.S.* (1953) and in *New York Times v. U.S.* (the Pentagon Papers Case) (1971). In 1971, Solicitor General Erwin Griswold argued to the Court that publication of the classified study of the Vietnam War would present a "grave and immediate danger to the security of the United States" (Fisher 2009), yet, 18 years later in a *Washington Post* op-ed, he conceded that publication of the study had not resulted in "any trace of a threat to national security" and that "government embarrassment" rather than national security is the major concern of executive branch officials when classifying documents (Griswold 1989; Fisher 2006).

In his 2008 Senate testimony (Fisher 2008b), Fisher impressed upon Congress that over the last three decades, it had passed specific legislation that had strengthened the role and authority of judges to examine executive branch claims of national security and classified information: the 1974 amendments to the FOIA, the 1978 Foreign Intelligence Surveillance Act, and the 1980 Classified Information Procedures Act. He offered these statutes as examples where Congress had used its constitutional powers from Articles I and III to provide statutory guidelines for judicial review of sensitive information, and urged it to incorporate similar standards in the legislation it was considering in 2008, S. 2533, to include rules of evidence in cases where judges were confronted with executive branch claims of a state secrets privilege.

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Finally, the basic concern that has driven Fisher to urge federal judges to exercise their independent authority derives from his deep respect for separation of powers and checks and balances: those twin principles of limited government, along with the guarantees of an independent judiciary and an adversary process that is fair to all parties, are undermined if the executive branch has exclusive authority to determine the content of the information it presents to the courts. In his own words,

> The courts must take care to restore confidence in the judiciary, in the sanctity of the courtroom, and in the system of checks and balances. The state secrets privilege is qualified, not absolute. Otherwise, there is no adversary process and no fairness accorded to private litigants who challenge the government. In 1971, the D.C. Circuit stated that an "essential ingredient of our rule of law is the authority of the courts to determine whether

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> an executive official or agency has complied with the Constitution and with the mandates of Congress which define and limit the authority of the executive. Any claim to executive absolutism cannot override the duty of the court to assure that an official has not exceeded his charter or flouted the legislative will" (*Committee for Nuclear Responsibility, Inc. v. Seaborg* 1971; Fisher 2007)

The ultimate effect in cases where the government has claimed state secrets privilege and when judges automatically defer to the executive, without at least examining *in camera* the relevant documents, has been to bar cases entirely from court review (*El-Masri v. Tenet* 2006; *Hepting v. AT&T Corp.* 2006; *Arar v. Ashcroft* 2006). Judges have dismissed cases, and plaintiffs are left without the benefit of an independent and impartial assessment of the validity of the government's legal position. This is nothing less than, as Fisher describes it, "govern [ing] by fiat"... executive will over democracy and the constitutional system of checks and balances" (Fisher 2013).

OLC OPINIONS DURING THE GEORGE W. BUSH ADMINISTRATION

A relatively new "front" in the debate over executive branch control of information was the post-September 11 generating of a series of OLC legal opinions that offered justifications for presidential primacy and exclusivity in national security policy making. The "secrecy" here was in the fact that the public was initially unaware of these influential memos and opinions that were grounded in excessive and flawed interpretations of the president's constitutional powers and that provided the legal justifications for highly controversial policies such as NSA domestic surveillance, extraordinary rendition, and torture. These memos advanced a theory of inherent executive power and of a president's preeminent authority in foreign relations as the "sole organ," and interpreted other Article II provisions of Commander-in-Chief and "the executive power" in overly expansive ways. Fisher's concern here lies in the fact that presidential reliance on legal opinions based on "untested theoretical definitions of presidential power...undermines constitutional limits because it encourages the view that when the president acts under Article II and invokes inherent powers, conflicting statutes and treaties may be ignored. The rule of law is further weakened when memos remain secret without the opportunity for colleagues to determine compliance with legal and constitutional standards" (Fisher 2008c).

Many of these OLC memos were ultimately released to the public in the latter years of the Bush administration and early in the Obama administration (OLC FOIA Reading Room 2009; "Withdrawal of Office of Legal Counsel CIA Interrogation Opinions" 2009). Their release, however, does not diminish the fact that they were classified initially while furnishing the operative and legally binding rationales for contentious programs. When hidden from view, there is no opportunity to examine or debate the legal reasoning on which they were constructed. When the public later gained that opportunity, the weakness of the legal arguments and constitutional interpretation in the memos was exposed, and a robust public debate ensued.

For example, in a 2008 article, Fisher questioned why and how legal memos were classified. He examined a March 2003 OLC memo written by John Yoo, titled "Military Interrogation of Alien Unlawful Combatants Held Outside the United States," originally classified, and then declassified five years later. In addition to noting a careless ("remarkably casual and slapdash") error in the numbering of an executive order that authorized its release, Fisher puzzles over the lack of any identifying information about who was responsible for classifying it and the reasons why, both required under Executive Order 12958 and necessary for accountability (Classified National Security Information 1995; Fisher 2008c). He quotes from the executive order that it would be improper to "conceal violations of law, inefficiency or administrative error," and that information should not be classified to "prevent embarrassment to a person, organization or agency" (Fisher 2008c). He offers an opinion that Yoo "encouraged and sanctioned violations of statutes and treaties" (Fisher 2008c) and that the memo was classified possibly to avoid embarrassment to the CIA and the administration—thus, he suggests that two of the executive order's requirements were, in fact, violated, but because the memo was classified, there was no way to judge. He quotes from the congressional testimony of a former director of the Information Security Oversight Office (ISOO), J. William Leonard, who was strongly critical of classification of the Yoo memo, because it was "purely a legal analysis" without any basis for classifying it and because it did not comply with the requirements of the classification process under the executive order (Fisher 2008c).

This gets to the heart of the issue regarding the classification of or denial of access to legal opinions and memos from DOJ or other executive branch agencies when requested by private individuals. Two cases currently on appeal in two circuit courts and, perhaps, headed for the US Supreme Court directly relate to this subject and indicate its contemporary urgency. Private litigants in both cases requested access to sensitive government documents under the FOIA, and those requests were denied. Plaintiffs then brought suit against the government, and in both cases, the DOJ claimed exemptions under FOIA. District court judges, without engaging in *in camera* review, upheld DOJ's claims of FOIA exemptions. Both cases illustrate precisely the critical importance of what Fisher has been urging for years in his writings and congressional testimony: the need for judges to perform independent review of documents claimed by the government as too sensitive to be admitted as evidence in court cases. Unsurprisingly, if such evidence is not available to the court, a plaintiff's case may collapse entirely, and the executive branch "wins," by default—but the fundamental principles of the fair administration of justice and of governmental checks and balances "lose."

ELECTRONIC FRONTIER FOUNDATION VS. U.S. DEPARTMENT OF JUSTICE

The Electronic Frontier Foundation (EFF) filed suit against the DOJ for an 11-page OLC opinion from 2010 that discusses the FBI's authority under federal surveillance laws. The OLC opinion originated when it was asked by the FBI to provide legal analysis of the FBI's authority, without a judicial

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warrant, to request and receive telephone records from telecommunication companies. The FBI initiated its request of OLC while the DOJ's Office of Inspector General (OIG) was conducting an internal inquiry of the FBI, pursuant to the 2005 reauthorization of the USA PATRIOT Act, to examine the FBI's usage of secret administrative subpoenas ("National Security Letters," or NSLs) when requesting records from telephone companies. The OIG final report, issued in March 2008, found that the FBI had abused the records-requesting process by using "exigent letters" to demand immediate disclosure of records from telephone companies, either as a substitute for or prior to the use of statutorily required NSLs ("A Review of the FBI's Use of National Security Letters" 2008).

The EFF submitted a FOIA request to OLC in February 2011 for its 2010 legal opinion on the FBI's authority in national security investigations. OLC denied the request 10 days later, citing Exemptions 1 and 5 under FOIA. After receiving no response from an appeal to DOJ's Office of Information Policy (OIP), EFF filed a complaint in federal district court, asking the court to order disclosure of the OLC opinion. Judge Richard Leon of the US District Court for the District of Columbia issued an opinion on September 21, 2012, granting summary judgment to the DOJ and affirming the validity of OLC's claimed FOIA exemptions (*Electronic Frontier Foundation v. U.S. Department of Justice* 2012).

In his opinion, Judge Leon found that OLC, citing FOIA Exemption 1, had complied with Executive Order 13526. Exemption 1 requires a showing that the withheld information was properly classified if it pertains to "intelligence activities (including covert action), intelligence sources or methods. . . ." (*Electronic Frontier Foundation v. U.S. Department of Justice* 2012, 5–6). Judge Leon stated that the OLC opinion contained "highly specific, classified information relating to FBI sources or methods" (*Electronic Frontier Foundation v. U.S. Department of Justice* 2012, 6), consistent with this requirement under Executive Order 13526 Section 1.4(c). He based his conclusion solely on two declarations, one from the Section Chief of FBI's Records Management Division and one from an OLC Special Counsel. He justified his reliance on these executive branch declarations alone by noting that "our Circuit has consistently emphasized its deferential posture to the executive in FOIA cases involving national security concerns, as judges 'lack the expertise necessary to second-guess such agency opinions in the typical national security FOIA case'" (*Electronic Frontier Foundation v. U.S. Department of Justice* 2012, 9). He quoted from *Larson v. Department of State* (2009) that "Ultimately, an agency's justification for invoking a FOIA exemption is sufficient if it appears logical or plausible" (*Electronic Frontier Foundation v. U.S. Department of Justice* 2012, 9, quoting from *Larson*). Judge Leon was satisfied from the two declarations that "the Department has explained with sufficient detail why the withheld information in the OLC Opinion qualifies as 'intelligence sources or methods' and adequately described the potential harm to national security that could result from the information's public disclosure" (*Electronic Frontier Foundation v. U.S. Department of Justice* 2012, 10).

The decision also affirmed OLC's assertion of Exemption 5, that it was entitled to withhold disclosure on the basis of deliberative process privilege and attorney-client privilege. To qualify for these privileges, OLC needed to convince the judge that its opinion was both "predecisional" and "deliberative." Here, too, the judge relied solely on the two declarations from DOJ officials to reach his conclusion that both of these privileges applied.

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On March 15, 2013, EFF filed an appeal with the US Court of Appeals for the District of Columbia, asking the circuit court to overturn Judge Leon's ruling. EFF argued that the district court had misconstrued the role of OLC and the nature of the OLC opinion when that court found that Exemption 5's deliberative process and attorney-client privileges applied to OLC (Page Proof Brief of Appellant 2013). On March 22, 2013, an amicus brief on behalf of EFF was filed by six groups: Citizens for Responsibility and Ethics in Washington (CREW), American Civil Liberties Union (ACLU), The Constitution Project, Open the Government.org, Project on Government Oversight, Brennan Center for Justice, and the *Washington Post* (Brief of Amici Curiae 2013). In its amicus brief to the court, CREW et al. described OLC's opinion as "setting forth the final, definitive interpretation of the executive branch on the scope of the FBI's authority under federal surveillance laws" (Brief of Amici Curiae 2013, 6). The brief referenced OLC's own memos and that of other agencies to confirm that OLC's opinions bind the executive branch: it cites from internal OLC memos that describe its function as providing "controlling advice" on "questions of law within the Executive Branch" (Brief of Amici Curiae 2013, 10 [footnotes #4, 5, 6]). The brief succinctly frames the issue here:

> Although OLC has made many of these opinions public, it has refused to release others, such as the one at issue here. As a result, there exists a body of unpublished legal opinions to which the executive branch must adhere, but to which the public has no access. This case brings to the fore OLC's central role in developing and maintaining a body of secret law, and the

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> corresponding harm to our constitutional democracy. Only by requiring the disclosure of the OLC Opinion at issue can this Court stop the escalating secrecy that threatens to undermine the proper functioning of our government. (Brief of Amici Curiae 2013, 8)

One week later, the *Washington Post* weighed in with an editorial urging the appeals court to hear the case and to determine if classification was, in fact, proper. The *Post* reiterated the argument from the amicus brief that the appeals court "should recognize the critical interest that the public has in knowing how the executive branch interprets the laws the Constitution tasks it to enforce" ("Open Justice Department's Legal Interpretations to the Public" 2013).

NEW YORK TIMES, CHARLIE SAVAGE, AND SCOTT SHANE V. U.S. DEPARTMENT OF JUSTICE AND *ACLU V. U.S. DEPARTMENT OF JUSTICE, DEPARTMENT OF DEFENSE AND CENTRAL INTELLIGENCE AGENCY*

This case consolidates two efforts, one by reporters Scott Shane and Charlie Savage of *The New York Times*, and the other by the ACLU, to gain access to legal opinions from the OLC that provide the precise legal justification for the conclusion of the Obama administration (*New York Times, Charlie Savage, and Scott Shane v. U.S. Department of Justice* 2013; *ACLU v. U.S. Department of Justice, Department of Defense and Central Intelligence Agency* 2013) and the Bush administration before it (since the request is for OLC opinions dating back to 2001) that targeted killing, including of American citizens, is a lawful activity for the government or government contractors to undertake. The ACLU's request seeks, in addition to OLC opinions, documents from the Department of Defense (DoD) and the CIA. Both sets of plaintiffs followed the same process of (1) requesting OLC opinions that address the legality of a program of the targeted killing of people with suspected ties to terrorist groups; (2) OLC denial of their request, citing FOIA exemptions; (3) appeal of OLC's denial to DOJ's Office of Information Policy (OIP); (4) no response from OIP; and (5) filing of a suit in federal district court against DOJ and, in the ACLU's suit, against the other two government agencies, as well.

On January 2, 2013, Judge Colleen McMahon of the federal district court in the southeastern district of New York ruled in favor of granting summary judgment to DOJ and, thus, affirming the government's denial of these FOIA requests (*New York Times, Charlie Savage, and Scott Shane v. U.S. Department of Justice* 2013; *ACLU v. U.S. Department of Justice, Department of Defense and Central Intelligence Agency* 2013). Judge McMahon's 75-page opinion was an odd mixture of close analysis of the legal issues and the relevant precedents interspersed with expressions of seeming frustration at her inability to find a legal basis for ruling for greater government transparency: for example, she proclaims that "The Alice-in-Wonderland nature of this pronouncement is not lost on me; but . . . I find myself stuck in a paradoxical situation . . . a veritable Catch-22" (*New York Times, Charlie Savage, and Scott Shane v. U.S. Department of Justice* 2013; *ACLU v. U.S. Department of Justice, Department of Defense and Central Intelligence Agency* 2013, 3). Yet, despite her admission of skepticism at the government's position, she is able to "conclude that the Government has not violated FOIA by refusing to turn over the documents sought in the FOIA requests, and so cannot be compelled by this court of law to explain in detail the reasons why its actions do not violate the Constitution and laws of the United States. . . I can find no way around the thicket of laws and precedents that effectively allow the Executive Branch of our Government to proclaim as perfectly lawful certain actions that seem on their face incompatible with our Constitution and laws while keeping the reasons for its conclusions a secret" (*New York Times, Charlie Savage, and Scott Shane v. U.S. Department of Justice* 2013; *ACLU v. U.S. Department of Justice, Department of Defense and Central Intelligence Agency* 2013, 3).

Fisher commented in an article that Judge McMahon's explicit concession of a lack of ability to force the government to disclose, despite her own misgivings in reaching that conclusion, was "an extraordinary statement from a federal court," and he expressed alarm at the practical consequence of that decision: that, now, "a mere ipse dixit *by the executive branch is enough to keep a legal memo secret" (Fisher 2013).*

Fisher commented in an article that Judge McMahon's explicit concession of a lack of ability to force the government to disclose, despite her own misgivings in reaching that conclusion, was "an extraordinary statement from a federal court," and he expressed alarm at the practical consequence of that decision: that, now, "a mere *ipse dixit* by the executive branch is enough to keep a legal memo secret" (Fisher 2013). He further noted that there was no shortage of ways that she could have ruled for greater transparency. Even if a memo *did* contain sensitive information about intelligence sources and methods, Fisher notes that even Judge McMahon acknowledged in her opinion that it would have been possible to examine the memo *in camera* to separate or redact from the pure legal analysis any material that met statutory requirements for protection from disclosure (Fisher 2013). But she did not do that, and her decision here only furthered the efforts of those favoring executive control over information.

Plaintiffs challenged on a few different bases the government's position that it was entitled to FOIA exemptions. For one, they claimed, as in the *EFF v. DOJ* case, that OLC legal analysis does not qualify as a proper subject of classification under Exemption 1. Judge McMahon wasted little time on this argument, and, based on the wording of Executive Order

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13526 that it applies to any information that "pertains to" categories listed in Section 1.4 of the order, she simply concluded that, "legal analysis that 'pertains to' military plans or intelligence activities (including covert action), sources or methods—all of which are classified matters—can indeed be classified" (*New York Times, Charlie Savage, and Scott Shane v. U.S. Department of Justice* 2013; *ACLU v. U.S. Department of Justice, Department of Defense and Central Intelligence Agency* 2013, 37).

She spent considerably more time in addressing the claim from plaintiffs that the government had waived the benefit of classification, and, thus, could not invoke Exemption 1. Plaintiffs supported this claim with two arguments: (1) the government had waged a "relentless public relations campaign" with public speeches and statements by senior administration spokespersons over the previous months that specifically addressed the practice of targeted killing. These officials included President Obama, Attorney General Holder, then-presidential counterterrorism advisor John Brennan, then-State Department Legal Adviser Harold Koh, then-Department of Defense General Counsel Jeh Johnson, and then-Secretary of the Department of Defense Leon Panetta (Speeches 2009–2012); and (2) consequently, the public discussion by administration officials demonstrated that the legal analysis being sought (and withheld) here was now official government policy, thereby, disqualifying it for inclusion under a FOIA exemption.

Judge McMahon described Attorney General Holder's speech at Northwestern University School of Law on March 5, 2012 as the most complete discussion of the legal basis for the government's targeted killing program. But she found that Holder's speech recites only "general principles of law and the Government's legal conclusions" (*New York Times, Charlie Savage, and Scott Shane v. U.S. Department of Justice* 2013; *ACLU v. U.S. Department of Justice, Department of Defense and Central Intelligence Agency* 2013, 41), and does not meet the necessary requirement of "exactitude" in Exemption 1 to satisfy as a waiver of the government's right to assert a FOIA exemption (*New York Times, Charlie Savage, and Scott Shane v. U.S. Department of Justice* 2013; *ACLU v. U.S. Department of Justice, Department of Defense and Central Intelligence Agency* 2013, 38). Moreover, she notes that the exclusion in Holder's speech of reliance on any specific authority to justify targeted killings satisfies her that the OLC opinion requested by plaintiffs "could not possibly be *the exact* legal analysis purportedly contained in the OLC-DoD memo (unless standards at OLC have slipped dramatically)" (emphasis in original, *New York Times, Charlie Savage, and Scott Shane v. U.S. Department of Justice* 2013; *ACLU v. U.S. Department of Justice, Department of Defense and Central Intelligence Agency* 2013, 42).

As to Exemption 5 that allows for withholding under deliberative process and attorney-client privileges, Judge McMahon found that the government's invocation of both was valid. More specifically, she undertook considerable analysis as to whether, as plaintiffs charged, the government had waived its right to deliberative process privilege when it engaged in extensive public speeches and statements about targeted killings, demonstrating that it had adopted this program as a final policy. She notes that (1) "OLC has never been mentioned in any public statement; none of the speeches attribute any legal principles announced to OLC or to any opinion it has issued" (*New York Times, Charlie Savage, and Scott Shane v. U.S. Department of Justice* 2013; *ACLU v. U.S. Department of Justice, Department of Defense and Central Intelligence Agency* 2013, 59); (2) "there is no suggestion, in any of those speeches or interviews, that the legal reasoning being discussed is the reasoning set out in the OLC-DoD Memo" (*New York Times, Charlie Savage, and Scott Shane v. U.S. Department of Justice* 2013; *ACLU v. U.S. Department of Justice, Department of Defense and Central Intelligence Agency* 2013, 58–59); and (3) "... it is sheer speculation that this particular OLC memorandum ... contains the legal analysis that justifies the Executive Branch's conclusion that it is legal in certain instances to target suspected terrorists, including U.S. citizens, for killing away from a 'hot' field of battle" (*New York Times, Charlie Savage, and Scott Shane v. U.S. Department of Justice* 2013; *ACLU v. U.S. Department of Justice, Department of Defense and Central Intelligence Agency* 2013, 60).

Regarding *in camera* review of a withheld document, Judge McMahon concludes that "it is not appropriate here. *In camera* review is pointless where there has been no public reference to a particular document. Review of the OLC-DoD Memo would not answer the question of whether the Attorney General...relied on *this document specifically*. Even if the OLC-DoD Memo contains language *identical* to that uttered by the Attorney General and others in the various public statements on which Plaintiffs rely, that would still not necessarily constitute proof that the Government had adopted *this document in particular* as its policy" (emphasis in original, *New York Times, Charlie Savage, and Scott Shane v. U.S. Department of Justice* 2013; *ACLU v. U.S. Department of Justice, Department of Defense and Central Intelligence Agency* 2013, 61).

In the words of Fisher, one hopes that the Court, if given this opportunity, will "get it right" this time.

The New York Times filed an appeal from this decision to the Second Circuit Court of Appeals on February 2, 2013. The ACLU filed its appeal on April 15, 2013.

Both the NSA case (*Electronic Frontier Foundation v. U.S. Department of Justice*) and the targeted killings case (*Scott Shane, Charlie Savage and the New York Times v. U.S. Department of Justice: ACLU v. U.S. Department of Justice*) present the identical question for review to the respective appeals courts: namely, were the FOIA exemptions affirmed by the district courts in these cases—where private plaintiffs were seeking sensitive, secret executive branch documents regarding national security policy—valid? Neither district court judge

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engaged in *in camera* review to reach the decision in these cases, thereby, deferring wholly to the executive branch's judgment of its own actions.

At bottom, these cases suggest that courts have not developed any sense of obligation since the *Reynolds* case to conduct an independent inquiry, even with statutory authorization to do so, when faced with the issue of determining the validity of executive branch control over national security information. Fisher's work on this issue is, perhaps, more relevant now than ever, as these two cases march forward, leading to the prospect that the Supreme Court might have a chance to put its own stamp, once again, on this matter—one that, after all, implicates the authority of its own branch to step up to its constitutional and statutory responsibilities. In the words of Fisher, one hopes that the Court, if given this opportunity, will "get it right" this time. ■

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