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before the
Subcommittee on the Constitution, Civil Rights and Civil Liberties

House Committee on the Judiciary

"Reform of the State Secrets Privilege"

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Mr. Chairman, thank you for inviting me to offer my views on the "state secrets privilege." My statement explains how the privilege has emerged as such a central issue and why Congress is the most appropriate branch to supply much needed procedures and governing principles.

There have been many state secrets cases over the years. The stakes today, however, are much higher. Following the terrorist attacks of 9/11, assertions of the privilege pose a greater threat to constitutional government and individual liberties in such cases as NSA surveillance and extraordinary rendition. The administration invokes the state secrets privilege to block efforts in court by private litigants who claim that executive actions violate statutes, treaties, and the Constitution. The executive branch argues that the President possesses certain "inherent" powers in times of emergency that override and countervail limits set by statutes, treaties, and constitutional provisions. Even if it appears that the administration has acted illegally, the executive branch advises federal judges that a case cannot allow access to documents without jeopardizing national security.

The interest of Congress in this issue is clear. Self-interested executive claims may override the independence we expect of federal courts, the corrective mechanism of checks and balances, and the right of private litigants to have their day in court. Unless federal judges look at disputed documents, we do not know if national security interests are actually at stake or whether the administration seeks to conceal not only embarrassments but violations of law.

Concealing Executive Mistakes

Administrations have invoked the claim of state secrets to hide misrepresentations and falsehoods. In the Japanese-American cases of 1943 and 1944, the Roosevelt administration told federal courts that Japanese-Americans were attempting to signal offshore to Japanese vessels in the Pacific, providing information to support military attacks along the coast. Analyses by the Federal Bureau of Investigation and the Federal Communications Commissions disproved those assertions by the War Department. Justice Department attorneys recognized that they had a legal obligation to alert the Supreme Court to false accusations and misconceptions, but the footnote designed for that purpose was so watered down that Justices could not have understood the extent to which they had been misled. Scholarship and archival discoveries in later years uncovered this fraud on the court and led to *coram nobis* (fraud against the court) cases that reversed the conviction of Fred Korematsu.[1]

A second *coram nobis* lawsuit came from Gordon Hirabayashi, who had been convicted during World War II for violating a curfew order. The Justice Department told

[1] Korematsu v. United States, 584 F.Supp. 1406 (D. Cal. 1984). See Louis Fisher, In the Name of National Security: Unchecked Presidential Power and the *Reynolds* Case 172 (2006).

the Supreme Court in 1943 that the exclusion of everyone of Japanese ancestry from the West Coast was due solely to military necessity and the lack of time to separate loyal Japanese from those who might be disloyal. The Roosevelt administration did not disclose to the Court that a report by General John L. DeWitt, the commanding general of the Western Defense Command, had taken the position that because of racial ties, filial piety, and strong bonds of common tradition, culture, and customs, it was impossible to distinguish between loyal and disloyal Japanese-Americans. To General DeWitt, there was no "such a thing as a loyal Japanese."[2] Because this racial theory had been withheld from the courts, Hirabayashi's conviction was reversed in the 1980s.[3]

Insights into executive secrecy also come from the Pentagon Papers Case of 1971. This was not technically a state secrets case. It was primarily an issue of whether the Nixon administration could prevent newspapers from continuing to publish a Pentagon study on the Vietnam War. Solicitor General Erwin N. Griswold warned the Supreme Court that publication would pose a "grave and immediate danger to the security of the United States" (with "immediate" meaning "irreparable"). Releasing the study to the public, he warned the Court, "would be of extraordinary seriousness to the security of the United States" and "will affect lives," the "termination of the war," and the "process of recovering prisoners of war." In an op-ed piece, published in 1989, he admitted that he had never seen "any trace of a threat to the national security" from the publication and that the principal concern of executive officials in classifying documents "is not with national security, but rather with governmental embarrassment of one sort or another."[4]

During the October 18, 2007 hearing before the House Foreign Affairs and Judiciary subcommittees, Kent Roach of the University of Toronto law school reflected on similar problems in Canada of executive misuse of secrecy claims. He served on the advisory committee that investigated the treatment by the United States of Maher Arar, who was sent to Syria for interrogation and torture. Mr. Roach said the experience of the Canadian commission "suggests that governments may be tempted to make overbroad claims of secrecy to protect themselves from embarrassment and to hinder accountability processes." The commission concluded that much of the information about contemporary national security activities "can be made public without harming national security." A court decision in Canada authorized the release "of the majority of disputed passages."[5] The Royal Canadian Mounted Police (RCMP) described Arar and his wife as "Islamic Extremist individuals suspected of being linked to the Al Qaeda terrorist

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[2] Hirabayashi v. United States, 627 F.Supp. 1445, 1452 (W.D. Wash. 1986); Fisher, In the Name of National Security, at 173.

[3] Hirabayashi v. United States, 828 F.2d 591 (9th Cir. 1987).

[4] Erwin N. Griswold, "Secrets Not Worth Keeping," Washington Post, February 15, 1989, at A25; Fisher, In the Name of National Security, at 154-57.

[5] Kent Roach, Professor of Law and Prichard and Wilson Chair in Law and Public Policy, Witness Statement for Appearance before Foreign Affairs Subcommittees on International Organizations, Human Rights and Oversight and Judiciary's Subcommittee on the Constitution, Civil Rights, and Civil Liberties on Rendition to Torture: The Case of Maher Arar, October 18, 2007, at 2.

movement." The Canadian commission concluded that the RCMP "had no basis for this description."[6]

The *Reynolds* Case

The pattern of misrepresentations by executive officials described above applies to the Supreme Court decision that first recognized the state secrets privilege, *United States* v. *Reynolds* (1953). On October 6, 1948, a B-29 plane exploded over Waycross, Georgia, killing five of eight crewmen and four of the five civilian engineers who were assisting with secret equipment on board. Three widows of the civilian engineers sued the government under the recently enacted Federal Tort Claims Act of 1946. Under that statute, Congress established the policy that when individuals bring lawsuits the federal government is to be treated like any private party. The United States would 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."[7] Thus, private parties who sued the government were entitled to submit a list of questions (interrogatories) and request documents. The wives asked for the statements of the three surviving crewmen and the official accident report.

District Judge William H. Kirkpatrick of the Eastern District of Pennsylvania directed the government to produce for his examination the crew statements and the accident report. When the government failed to release the documents for the court's inspection, he ruled in favor of the widows.[8] The Third Circuit upheld his decision. The appellate court said that "considerations of justice may well demand that the plaintiffs should have had 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."[9] In so deciding, the Third Circuit supported congressional policy expressed in the Federal Tort Claims Act and the Federal Rules of Civil Procedure, all designed to give private parties a fair opportunity to establish negligence in tort cases. Because the government had consented to be sued as a private person, whatever claims of public interest might exist in withholding accident reports "must yield to what Congress evidently regarded as the greater public interest involved in seeing that justice is done to persons injured by governmental operations whom it has authorized to enforce their claims by suit against the United States."[10]

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[6] Id. at 3.

[7] 60 Stat. 843, §410(a) (1948).

[8] Fisher, In the Name of National Security, at 29-58,

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

[10] Id. at 994.

In addition to deciding questions of law, the Third Circuit considered the case from the standpoint of public policy. To grant the government the "sweeping privilege" it claimed would be contrary to "a sound public policy." It would be a small step, said the court, "to assert a privilege against any disclosure of records merely because they might be embarrassing to government officers."[11] The court reviewed the choices available to government when it decides to withhold information. In a criminal case, if the government does not want to reveal evidence within its control (such as the identity of an informer), it can drop the charges. To the court, the Federal Tort Claims Act "offers the Government an analogous choice" in civil cases. It could produce relevant documents under Rule 34 and allow the case to move forward, or withhold the documents at the risk of losing the case under Rule 37. In *Reynolds*, at the district and appellate levels, the government decided to withhold documents.

On the question of which branch has the final say on disclosure and access to evidence, the Third Circuit summarized the government's position in this manner: "it is 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."[12] A claim of privilege against disclosing evidence "involves a justiciable question, traditionally within the competence of the courts, which is to be determined in accordance with the appropriate rules of evidence, upon the submission of the documents in question to the judge for his examination *in camera*."[13] To hold that an agency head in a suit to which the government is a part "may conclusively determine the Government's claim of privilege is to abdicate the judicial function and permit the executive branch of the Government to infringe the independent province of the judiciary as laid down by the Constitution."[14]

Were there risks in sharing confidential documents with a federal judge? The Third Circuit dismissed the argument that judges could not be trusted to review sensitive or classified materials: "The judges of the United States are public officers whose responsibility under the Constitution is just as great as that of the heads of executive departments." Judges may be depended upon to protect against disclosure those matters that would do damage to the public interest. If, as the government argued, "a knowledge of background facts is necessary to enable one properly to pass on the claim of privilege those facts also may be presented to the judge *in camera*."[15]

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[11] Id. at 995.

[12] Id. at 996-97.

[13] Id. at 997.

[14] Id.

[15] Id. at 998.

The Supreme Court's Opinion

The government's insistence in the *Reynolds* case that it has a duty to protect military secrets came at the height of revelations about Americans charged with leaking sensitive and classified information to the Soviet Union. During this period Julius and Ethel Rosenberg were prosecuted and convicted for sending atomic bomb secrets to Russia. They were convicted in 1951, pursued an appeal to the Second Circuit the following year, and after a failed effort to have the Supreme Court hear their case they were executed on June 19, 1953. The years after World War II were dominated by congressional hearings into communist activities, the Attorney General's list of subversive organizations, loyalty oaths, security indexes, reports of espionage, and counterintelligence efforts. Alger Hiss, convicted of perjury in 1950 concerning his relationship to the Communist Party, served three and a half years in prison. The government pursued J. Robert Oppenheimer for possible espionage, leading to the loss of his security clearance in 1954.

In *Reynolds*, the government argued that it had exclusive control over what documents to release to the courts. Its brief stated that courts "lack power to compel disclosure by means of a direct demand on the department head" and "the same result may not be achieved by the indirect method of an order against the United States, resulting in judgment when compliance is not forthcoming."[16] It interpreted the Housekeeping Statute (giving department heads custody over agency documents) "as a statutory affirmation of a constitutional privilege against disclosure" and one that "protects the executive against direct court orders for disclosure by giving the department heads sole power to determine to what extent withholding of particular documents is required by the public interest."[17] Congress had never provided that authority and earlier judicial rulings specifically rejected that interpretation.[18]

In its brief, the government for the first time pressed 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 to be carrying secret equipment, and the second because the secrecy necessary to encourage full disclosure by informants is also necessary in order to encourage the freest possible discussion by survivors before Accident Investigation Boards."[19]

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[16] "Brief for the United States," United States v. Reynolds, No. 21, October Term 1952, at 9 (hereafter "Government's Brief").

[17] Id. at 9-10.

[18] Fisher, In the Name of National Security, at 44-48, 54-55, 61, 64-68, 78, 80-81.

[19] "Government's Brief," at 11.

The fact that the plane was carrying secret equipment was known by newspaper readers the day after the crash. The fundamental issue, which the government repeatedly muddled, was whether the accident report and the survivor statements contained secret information. Because those documents were declassified in the 1990s and made available to the public, we now know that secret information about the equipment did not appear either in the accident report or the survivor statements. As to the second point, about the role of informants in contributing to an accident report, that issue had been analyzed in previous judicial rulings and dismissed as grounds for withholding evidence from a court .[20]

Toward the end of the brief, the government returned to "the so-called 'state secrets' privilege."[21] The claim of privilege by Secretary of the Air Force Finletter "falls squarely" under that privilege for these reasons: "He based his claim, in part, on the fact that the aircraft was engaged 'in a highly secret military mission' and, again, on the 'reason that the aircraft in question, together with the personnel on board, were engaged in a highly secret mission of the Air Force. The airplane likewise carried confidential equipment on board and any disclosure of its mission or information concerning its operation on performance would be prejudicial to this Department and would not be in the public interest."[22]

Nothing in this language has anything to do with the *contents* of the accident report or the survivors' statements. Had those documents been made available to the trial judge, he would have seen nothing that related to military secrets or any details about the confidential equipment. He could have passed them on the plaintiffs, possibly by making a few redactions.

At various points in the litigation the government misled the Court on the contents of the accident report. It asserted: "to the extent that the report reveals military secrets concerning the structure or performance of the plane that crashed or deals with these factors in relation to projected or suggested secret improvements it falls within the judicially recognized 'state secrets' privilege."[23] *To the extent*? In the case of the accident report the extent was zero. The report contained nothing about military secrets or military improvements. Nor did the survivor statements.

On March 9, 1953, Chief Justice Vinson for a 6 to 3 majority ruled that the government had presented a valid claim of privilege. He reached that judgment without ever looking at the accident report or the survivor statements. He identified two "broad propositions pressed upon us for decision." The government "urged that the executive department heads have power to withhold any documents in their custody from judicial review if they deem it to be in the public interest." The plaintiffs asserted that "the

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[20] Fisher, In the Name of National Security, at 39-42.

[21] "Government's Brief," at 42.

[22] Id. at 42-43.

[23] Id. at 45.

executive's power to withhold documents was waived by the Tort Claims Act." Chief Justice Vinson found that both positions "have constitutional overtones which we find it unnecessary to pass upon, there being a narrower ground for decision."[24] When a formal claim of privilege is lodged by the head of a department, 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."[25]

That point is unclear. If the government can keep disputed documents from the judge, even for *in camera* inspection, how can the judge "determine whether the circumstances are appropriate for the claim of privilege"? The judge would be arms-length from making an informed decision. Moreover, there is no reason to regard *in camera* inspection as "disclosure." As pointed out by the district judge and the Third Circuit in *Reynolds*, judges take the same oath to protect the Constitution as do executive officials. Chief Justice Vinson said that in the case of the privilege against disclosing documents, the court "must be satisfied from all the evidence and circumstances" before accepting the claim of privilege.[26] Denied disputed documents, a judge has no "evidence" other than claims and assertions by executive officials.

In his opinion, Chief Justice Vinson stated that judicial control "over the evidence in a case cannot be abdicated to the caprice of executive officers."[27] If an executive officer acted capriciously and arbitrarily, a court would have no independent basis for perceiving that conduct unless it asked for and examined the evidence. Chief Justice Vinson said that the Court "will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case."[28] Under some circumstances there would be no opportunity for *in camera* inspection: "the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers."[29] On what grounds would *in camera* inspection jeopardize national security? It is more likely that national security is damaged by executive assertions that are never checked and evaluated by other branches.

Chief Justice Vinson further stated: "On the record before the trial court it appeared that this accident occurred to a military plane which had gone aloft to test secret electronic equipment."[30] On the day following the crash, newspaper readers around the

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[24] United States v. Reynolds, 345 U.S. 1, 6 (1953).

[25] Id. at 8.

[26] Id. at 9.

[27] Id. at 9-10.

[28] Id. at 10.

[29] Id.

[30] Id.

country knew that the plane had been testing secret electronic equipment.[31] Chief Justice Vinson concluded that there was a "reasonable danger" that the accident report "would contain references to the secret electronic equipment which was the primary concern of the mission."[32] There was no reasonable danger that he accident report would discuss the secret electronic equipment. The report was designed to determine the cause of the accident. There were no grounds to believe that the electronic equipment caused the crash. Instead of speculating about what the accident report included and did not include, the Court needed to inform itself by examining the report and not accept vague assertions by the executive branch. Without access to evidence and documents, federal courts necessarily abdicate their powers "to the caprice of executive officers."

The Declassified Accident Report

Judith Loether was seven weeks old when her father, Albert Palya, died in the B-29 accident. On February 10, 2000, using a friend's computer, she entered a combination of words into a search engine and was brought into a Web site that kept military accident reports. By checking that site, she discovered that the accident report withheld from federal courts in the *Reynolds* litigation was now publicly available. Expecting to find national security secrets in the report, she found none. After contacting the other two families, it was agreed to return to court by charging that the government had misled the Supreme Court and committed fraud against it.[33]

Unlike the successful *coram nobis* cases brought by Fred Korematsu and Gordon Hirabayashi, Loether and the other family members lost at every level. Initially they went directly to the Supreme Court. Later they returned to district court and the Third Circuit. Their appeal to the Court was denied on May 1, 2006. When the Third Circuit ruled on the issue, only one value was present: judicial finality. The case had been decided in 1953 and the Third Circuit was not going to revisit it, even if the evidence was substantial that the judiciary had been misled by the government.[34] There appeared to be no value for judicial integrity and judicial independence.

The Third Circuit pointed to three pieces of information in the accident report that might have been "sensitive." The report revealed "that the project was being carried out by 'the 3150th Electronics Squadron,' that the mission required an 'aircraft capable of dropping bombs' and that the mission required an airplane capable of 'operating at altitudes of 20,000 feet and above.'"[35]

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[31] Fisher, In the Name of National Security, at 1-2.

[32] United States v. Reynolds, 345 U.S. at 10.

[33] Fisher, In the Name of National Security, at 166-69.

[34] Herring v. United States, 424 F.3d 384, 386 (3d Cir. 2005).

[35] Id. at 391, n.3.

If those pieces of information were actually sensitive, they could have been easily redacted and the balance of the report given to the trial judge and to the plaintiffs. They were looking for evidence of negligence by the government, not for the name of the squadron, bomb-dropping capability, or flying altitude. As for the sensitivity, newspaper readers the day after the crash understood that the plane was flying at 20,000 feet, it carried confidential equipment, and it was capable of dropping bombs. That is what bombers do.

Conclusions

The experience with state secrets cases underscores the need for judicial independence in assessing executive claims. Assertions are assertions, nothing more. Judges need to look at disputed documents and not rely on how the executive branch characterizes them. Affidavits and declarations signed by executive officials, even when classified, are not sufficient.

For more than fifty years, lower courts have tried to apply the inconsistent principles announced by the Supreme Court in *Reynolds*. Congress needs to enact statutory standards to restore judicial independence, provide effective checks against executive mischaracterizations and abuse, and strengthen the adversary process that we use to pursue truth in the courtroom. Otherwise, private plaintiffs have no effective way to challenge the government through lawsuits that might involve sensitive documents.

There should be little doubt that Congress has constitutional authority to provide new guidelines for the courts. It has full authority to adopt rules of evidence and assure private parties that they have a reasonable opportunity to bring claims in court. What is at stake is more than the claim or assertion by the executive branch regarding state secrets. Congress needs to protect the vitality of a political system that is based on separation of powers, checks and balances, and safeguards to individual rights.

In the past-half century, Congress has repeatedly passed legislation to fortify judicial independence in cases involving national security and classified information. Federal judges now gain access to and make judgments about highly sensitive documents. Congressional action with the FOIA amendments of 1974, the FISA statute of 1978, and the CIPA statute of 1980 were conscious decisions by Congress to empower federal judges to review and evaluate highly classified information. Congress now has an opportunity to pass effective state secrets legislation.

Biosketch

Louis Fisher is a Specialist in Constitutional Law with the Law Library of the Library of Congress, after working for the Congressional Research Service from 1970 to March 3, 2006. During his service with CRS he was research director of the House Iran-Contra Committee in 1987, writing major sections of the final report. Fisher received his doctorate in political science from the New School for Social Research and has taught at a number of universities and law schools.

He is the author of seventeen books, including *In the Name of National Security: Unchecked Presidential Power and the* Reynolds *Case* (2006), *Presidential War Power* (2d ed. 2004), *American Constitutional Law* (with David Gray Adler, 7th ed. 2007), and the forthcoming *The Constitution and 9/11: Recurrent Threats to America's Freedoms*. He has received a number of book awards.

Dr. Fisher has been invited to testify before Congress on such issues as war powers, CIA whistleblowing, covert spending, NSA surveillance, executive privilege, executive spending discretion, presidential reorganization authority, Congress and the Constitution, the legislative veto, the item veto, the pocket veto, recess appointments, the budget process, the Gramm-Rudman-Hollings Act, the balanced budget amendment, biennial budgeting, presidential impoundment powers, and executive lobbying.