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"Examining the State Secrets Privilege: Protecting National Security While Preserving Accountability"

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Mr. Chairman, thank you for inviting me to testify on the "state secrets privilege." I want to express my appreciation to Senators Kennedy and Specter for their leadership in drafting remedial legislation, S. 2533. It is a very thoughtful, constructive bill. The state secrets privilege is now a central issue and Congress is the appropriate branch of government to supply much needed procedures and governing principles.

My interest in state secrets is a natural one. For the past 38 years I have helped Congress with separation of power issues, working first with Senator Sam Ervin in the early 1970s on the impoundment of funds dispute. In recent decades I have focused my research on questions of presidential power in the field of national security. My book on the state secrets case, *United States* v. *Reynolds* (1953), was published in 2006 and I have worked closely with the Constitution Project on its efforts to reform the state secrets privilege.[1]

What Constitutional Principles Guide Us?

Reforming the state secrets privilege is necessary to protect constitutional principles, particularly the system of checks and balances. It is critical that we be able to rely on an independent judiciary to weigh the competing claims of litigants and preserve the adversary process. No litigant, including the executive branch, should be presumed in advance to be superior to another. A sense of fairness in the courtroom is essential in protecting the integrity and credibility of the judiciary.

We all understand the need to protect state secrets and recognize an appropriate role for the state secrets privilege. The U.S. Code is filled with penalties to be applied to those who misuse classified information. That value, however, is balanced by another. We know that the executive branch regularly overclassifies documents. We have seen documents stamped "secret" and "top secret" that, once released, should never have been classified in the first place. Moreover, whichever party is in power, the executive branch has a pattern of presenting false and unreliable information to the judiciary. The Japanese-American cases of 1943-44 and the Pentagon Papers Case of 1971 are examples of administrations making misrepresentations to federal judges. Other countries, such as Canada, recognize that there is a natural tendency for executive officials to exaggerate the sensitivity of government documents in order to hide embarrassments (Appendix A).

Some court decisions and private studies date the state secrets privilege to the Aaron Burr trial of 1807 and the *Totten* case of 1875. For reasons I provide at the end of this statement, those precedents have no application to the kinds of state secrets cases that concern us today and that prompted the need for this hearing and a legislative remedy (Appendix B).

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[1] Louis Fisher, In the Name of National Security: Unchecked Presidential Power and the *Reynolds* Case (2006); The Constitution Project, "Reforming the State Secrets Privilege," May 31, 2007, available at http://www.constitutionproject.org/pdf/Reforming_the_State_Secrets_Privilege_Statement1.pdf

How the Judiciary was Misled in *Reynolds*

The executive branch made misrepresentations in *United States* v. *Reynolds* (1953), the very case in which the Supreme Court first recognized the state secrets privilege. In that lawsuit, the widows of three civilian engineers killed in the crash of a B-29 sought production of an Air Force accident report. The trial court and the Third Circuit gave the government a choice: either turn over the requested documents to the trial judge, to be read in chambers, or you lose the case. The lower courts understood that Congress, in the Federal Tort Claims Act, had established the policy that when private individuals sue the United States, the government is to be treated like any private party. When the government chose to withhold the documents, the district court and the Third Circuit ruled in favor of the three widows (Appendix C).

Those decisions were reversed by the Supreme Court, which produced a decision with many inconsistent principles. It claimed that judicial control over evidence "cannot be abdicated to the caprice of executive officers," but did precisely that by holding for the government without ever looking at the disputed documents, including the accident report. Instead, the Court relied entirely on assertions by executive officials about the content of the documents (Appendix D). We now know, by looking at the documents, that they contain no state secrets (Appendix E). The Court was misled by the executive branch and allowed itself to be misled.

Deference?

In state secrets cases, federal judges have at times treated executive assertions about state secrets with "deference" or "utmost deference." Either standard undermines the principle of judicial independence, the essential safeguard of checks and balances, and the right of private litigants to have a fair hearing 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.

Executive officials have unquestioned expertise and experience in the field of national security, but they also have a record of making misleading and false claims to the public, to Congress, and the courts. Executive claims inevitably have a quality of self-interest, as would be expected of any litigant. The duty of a federal court is to assure that all litigants to a lawsuit are properly heard and that the judge is sufficiently informed before reaching a judgment. The executive branch already has a decided advantage in state secrets cases when judges look at documents *in camera* and *ex parte*, with private parties and their counsel excluded. There is a need to restore the independence and integrity of court proceedings when state secrets are involved. As noted in the statement by William Webster, former CIA Director, FBI Director, and federal judge: "It is judges, more so than executive branch officials, who are best qualified to balance the risks of disclosing evidence with the interests of justice. . . . Granting executive branch officials

unchecked discretion to determine whether evidence should be subject to the state secrets privilege provides too great a temptation for abuse."[2]

There have been many state secrets cases over the years. The stakes today are much higher. Following the terrorist attacks of 9/11, the administration has invoked the state secrets privilege to block efforts in court by private litigants who claim that the government, in such cases as NSA surveillance and extraordinary rendition, has violated statutes, treaties, and the Constitution. The use of the privilege is no longer limited to efforts to prohibit disclosure of particular documents, as in the *Reynolds* case. It is now relied on to bar challenges to government national security programs. The executive branch argues that the President possesses certain "inherent" powers in times of emergency that override and countervail limits set by the other branches. Even if it appears that the administration has acted illegally, the executive branch advises federal judges that a case cannot allow access to secret documents without jeopardizing national security.

Deference has several meanings. It can imply a partiality and favoritism toward someone or an agency. That should not be the position of federal courts in state secrets cases. It has been suggested that the proper standard for deference is the *Chevron* standard, used by courts to review the reasonableness of agency regulations. Yet unlike the field of administrative law, in which Congress plays an active role in monitoring and checking executive actions, the sole check over state secrets is the judiciary. State secrets are not part of an open, public political process, as is the case with agency regulations.

Deference has a second meaning: indicating respect toward a party. That is the appropriate posture for the courts in state secrets cases, respect not only toward the executive branch but respect toward private parties bringing a case.

Defining "State Secret"

These comments lead me to some thoughts about the definition of "state secret" that appears in S. 2533. Section 4051 provides: "In this chapter, the term 'state secret' refers to any information that, if disclosed publicly, would be reasonably likely to cause significant harm to the national defense or foreign relations of the United States." Even with these qualifiers ("reasonably likely" and "significant harm"), I think the definition favors executive power over private plaintiffs. Few judges, reading this definition, will feel comfortable in substituting their opinions about national defense or foreign relations for those of the executive branch. The very solid sections later in the bill, giving judges access to evidence and establishing procedures for redacted and non-privileged substitutes, do not erase the advantage the definition gives to the executive branch. As a result, the principles of judicial independence, checks and balances, and fairness in the courtroom are endangered.

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[2] Statement of William H. Webster, submitted to the Senate Committee on the Judiciary, February 13, 2008, at 2.

I would prefer to add a second sentence to the definition: "The assertion of a state secret by the executive branch is to be tested by independent judicial review." I think those two sentences accurately reflect the content and purpose of the bill. Courts would be directed to treat executive claims about state secrets initially as an assertion, subject to independent judicial analysis. This definition protects the integrity of the courtroom and gives private parties the hope of fair treatment. Even those who generally support a broad view of executive power over state secrets, such as recent testimony by Patrick Philbin, recognize that the "mere assertion of the privilege by the Executive does not require a court to accept without question that the material involved is a state secret."[3]

Immunity?

I would also like to see a third sentence added to the definition: "The 'state secrets privilege' may not shield illegal or unconstitutional activities." We all recognize the need for state secrets. I see no reason why the state secrets privilege should sanction violations of statutes, treaties, or the Constitution (violations either by the government or by private parties). If I read Section 4055 of S. 2533 correctly, it seems to open the possibility that the state secrets privilege could be used to shield and immunize illegal conduct. The section authorizes a federal court to dismiss a claim or counterclaim brought by a private party against the government if continuing with the litigation "in the absence of the privileged material evidence would substantially impair the ability of a party to pursue a valid defense to the claim or counterclaim." The language appears to allow private parties like the telecoms to violate FISA or other laws and be immunized on the ground that the existence of state secrets in the case prevents them from mounting a valid defense. Is that the intent or effect of the bill?

Conclusions

Our 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 solely 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 or evidence. Judges, not the executive branch, must have the final say about whether disputed evidence is subject to the state secrets privilege.

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[3] Prepared Statement by Patrick F. Philbin, former Associate Deputy Attorney General, Department of Justice, "Oversight Hearing on the Reform of State Secrets," House Committee on the Judiciary, Subcommittee on the Constitution, Civil Rights, and Civil Liberties, January 29, 2008, at 6.

Congress has constitutional authority to provide new guidelines for the courts. Article III, section 2, of the Constitution specifically grants Congress the power to enact "regulations" regarding the jurisdiction of federal courts. Article I empowers Congress to "constitute Tribunals inferior to the supreme Court" and to enact all laws necessary and proper to carry into effect that power. Congress has full authority to adopt rules of evidence and to assure private parties that they have a reasonable opportunity to bring claims in court. What is at stake is more than the assertion by the executive branch regarding state secrets. Congress has a duty to protect the health of a political system that depends 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.

Appendix A:
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) lawsuit that reversed the conviction of Fred Korematsu.[4]

A second *coram nobis* case was brought by Gordon Hirabayashi, who had been convicted during World War II for violating a curfew order. The Justice Department told 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

[4] 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).

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."[5] Because this racial theory had been withheld from the courts, Hirabayashi's conviction was reversed in the 1980s.[6]

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."[7]

During a 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."[8] The Royal Canadian Mounted Police (RCMP) described Arar and his wife as "Islamic Extremist individuals suspected of being linked to the Al Qaeda terrorist movement." The Canadian commission concluded that the RCMP "had no basis for this description."[9]

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

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

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

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

[9] Id. at 3.

Appendix B
Aaron Burr and *Totten*

There are many reasons why the Aaron Burr trial of 1807 has no application to current state secrets cases. A main reason is that he was tried in a criminal case for treason. Lawsuits over state secrets are civil cases. It is true that at one point the Jefferson administration claimed that some of the letters sought by Burr for his defense contained "state secrets," but the administration and the court understood that a defendant in a criminal case had a right to gain access to evidence used against him. If the government declines to surrender the evidence, it must drop the charges against the defendant. The administration took steps to place the documents in the hands of the court and his attorneys. In the end, Burr was found not guilty.[10]

Totten involves a very narrow and special category of cases where individuals enter into secret agreements with the government to spy. President Lincoln had agreed to a contract with William A. Lloyd to have him proceed south and collect data on the number of Confederate troops stationed in different places, plans of forts and fortifications, and other information that might be useful to the Union government. For his services, he was to be paid $200 a month, but he received funds only to cover his expenses. His heirs tried to collect for the monthly allowance. The Supreme Court held that any individual who enters into a secret contract cannot expect relief from the courts.[11] A distinction exists between ordinary contracts (enforceable in court) and secret contracts (which are not). The *Totten* type of case is not justiciable; state secrets cases are.[12]

Totten was recently at issue in the case of *Tenet* v. *Doe* (2005).[13] Once again private parties alleged that they had not received promised assistance for espionage work. The Court found that the lawsuit was barred by *Totten*. In the current NSA cases, there have been arguments that the telecoms had entered into a secret espionage agreement with the government, but in the *Totten/Tenet* cases the private parties are plaintiffs; the telecoms are defendants.[14]

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[10] Fisher, In the Name of National Security, at 212-20.

[11] Totten v. United States, 92 U.S. 105, 107 (1875).

[12] Fisher, In the Name of National Security, at 221-27.

[13] 544 U.S. 1 (2005).

[14] *Totten* "precludes judicial review in cases such as respondents' [plaintiffs] where success depends upon the existence of their secret espionage relationship with the Government." 544 U.S. at 8.

Appendix C
Reynolds: Trial Court and Third Circuit

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."[15] 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.[16] 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."[17] 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."[18]

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

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[15] 60 Stat. 843, §410(a) (1948).

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

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

[18] Id. at 994.

might be embarrassing to government officers."[19] 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."[20] 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*."[21] 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."[22]

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*."[23]

Appendix D:
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

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[19] Id. at 995.

[20] Id. at 996-97.

[21] Id. at 997.

[22] Id.

[23] Id. at 998.

sensitive and classified information to the Soviet Union. During this period Julius and Ethel Rosenberg were prosecuted 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."[24] 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."[25] Congress had never provided that authority and earlier judicial rulings specifically rejected that interpretation.[26]

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."[27]

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

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

[25] Id. at 9-10.

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

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

analyzed in previous judicial rulings and dismissed as grounds for withholding evidence from a court.[28]

Toward the end of the brief, the government returned to "the so-called 'state secrets' privilege."[29] 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."[30]

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."[31] *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 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."[32] When a formal claim of privilege is lodged by the head of a department, the "court itself must determine

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

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

[30] Id. at 42-43.

[31] Id. at 45.

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

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."[33]

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 by a judge as "disclosure." As pointed out by Judge Kirkpatrick and the Third Circuit in *Reynolds*, judges take the same oath to protect the Constitution as do executive officials. In the Supreme Court, 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.[34] Denied disputed documents, a judge has no "evidence" other than claims and assertions by executive officials.

Chief Justice Vinson stated that judicial control "over the evidence in a case cannot be abdicated to the caprice of executive officers."[35] 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."[36] He anticipated circumstances where there would be no opportunity even 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."[37] 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."[38] There was nothing sensitive about that information. On the day following the crash, newspaper readers around the country knew that the plane had been testing secret electronic equipment.[39] Chief Justice Vinson concluded that there was a "reasonable danger" that the accident report "would contain references to the secret

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[33] Id. at 8.

[34] Id. at 9.

[35] Id. at 9-10.

[36] Id. at 10.

[37] Id.

[38] Id.

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

electronic equipment which was the primary concern of the mission."[40] There was no reasonable danger that the accident report would discuss the secret electronic equipment. The purpose of the report was 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."

Appendix E:
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.[41]

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 went 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.[42] 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.'"[43]

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

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

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

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

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

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.

Biosketch

Louis Fisher is a Specialist in Constitutional Law with the Law Library of the Library of Congress. Earlier he worked for the Congressional Research Service from 1970 to March 3, 2006. During his service with CRS he was Senior Specialist in Separation of Powers and 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, state secrets, 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.