The Constitution Project

CONSTITUTIONAL COMMENTARY

ABUSING THE SECRETS SHIELD

By David Kay and Michael German
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In 1953 the widows of three civilian contractors killed when the military aircraft on which they were testing equipment crashed sought government documents to support their claim of negligence. The Air Force refused to produce the accident report, even for private review by the judge, asserting the "state secrets privilege" to withhold evidence that would jeopardize national security. The trial court ruled in favor of the widows, but the Supreme Court sided with the government and blocked review of the documents.

The Reynolds decision, as that case came to be known, set a precedent establishing the executive branch's ability to restrict, in the name of national security, what evidence can be considered at trial. As veterans of the fight against domestic and international terrorism since before that war had a name, we appreciate the need to keep sensitive national security information from the public eye for reasonable periods of time to protect ongoing operations. However, the executive branch should not be allowed to extend that shield to hide evidence that is "sensitive" simply because it is embarrassing or, worse, demonstrates wrongdoing.

Lately the line between sensitive national security information and information that the government would, for other reasons, prefer to keep secret has been blurred. In December 2003, Khaled el-Masri, a German citizen, was detained by the CIA, drugged, beaten, flown to Afghanistan and held without charge in a squalid prison for four months. The CIA, under the leadership of George Tenet, realized that it had the wrong man, but rather than apologize, agents abandoned Masri on a hilltop in Albania, apparently hoping that no one would believe his story. When Masri filed a lawsuit, Tenet's successor, Porter Goss, stepped in and asserted the state secrets privilege. Without demanding production of a single document allegedly subject to the privilege, the judge dismissed the case.

In recent months, the Justice Department has claimed the privilege in lawsuits brought against Verizon and AT&T for providing subscribers' telecommunications records to the National Security Agency as part of its domestic surveillance program. Justice Department lawyers cited the Masri decision in arguing for dismissal, claiming that the evidence the plaintiffs would need to litigate the case was so sensitive that not even the judge should review it. Such twisted logic would be laughable were the stakes not so high.

Those whose search for justice has been quashed by such executive bullying are often shocked to learn that Congress has never acted to codify the state secrets privilege. It considered doing so in the 1970s but specifically chose not to include the privilege in the federal rules of evidence. Nonetheless, dating from its application in the Reynolds case, the state secrets privilege has been repeatedly invoked, often with disturbing results. This is why we, in cooperation with the Constitution Project, have joined with a bipartisan

coalition of policy experts, legal scholars and former government officials in calling on Congress to limit the privilege's use.

Congress should establish that the executive branch's ability to restrict disclosure of evidence is qualified, not absolute. Federal agencies should not be allowed to dodge even a judge's scrutiny by crying "state secret." And Congress should instruct judges to privately review all the evidence that the executive claims is privileged and independently determine if releasing it would harm national security.

In the 1990s, the privileged documents of the Reynolds case were declassified. The only "sensitive" information in the accident report was that the aircraft carrying those contractors was in miserable condition before it took off. We may never know the full details of the CIA's treatment of Khaled el-Masri (who is seeking review of his case by the Supreme Court) or of the NSA's eavesdropping on U.S. citizens. If an independent judge reviews the evidence in those cases and finds that its disclosure would jeopardize national security, we will support protecting such intelligence, whenever possible in a way that does not deny justice to those harmed by government wrongdoing. The founders of this nation trusted judges to serve as a check against the abuse of executive power; surely we must do the same.

Liberty and security are mutually reinforcing. We can -- and, to remain true to our American values, must -- demand both from our government. An independent judge should determine what information would be harmful if released and what would demonstrate wrongdoing or simply be embarrassing. History has shown that those who have something to lose are remarkably poor judges of the difference.

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