Why the Government Can Legally Lie

In the Name of National Security: Unchecked Presidential Power and the *Reynolds* Case
by Louis Fisher.
University Press of Kansas,
282 pp., $34.95

Claim of Privilege: A Mysterious Plane Crash, a Landmark Supreme Court Case, and the Rise of State Secrets
by Barry Siegel.
Harper, 384 pp., $25.95

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One of the principal marks of the George W. Bush administration has been the inability to hold investigations, congressional inquiries, or trials in so many cases because evidence required for any of these processes is classified secret, or otherwise privileged. This is a growth industry. In 1997, there were three million officials empowered to classify documents. From 1952 to 1976, the privilege of withholding state secrets was invoked in five court cases. From 1977 to 2001, it was used sixty-two times. In the first four years of the Bush administration, it was used thirty-nine times, more than in any preceding administration, and still counting.[1]

It can be argued, of course, that the war on terror has made state secrets more central to our national life and judicial proceedings. But it has long been suspected, and even asserted by those in a position to know, that the withholding of privileged information is a very convenient way to cover up executive crimes and bungling. As early as 1953, Attorney General Herbert Brownell told President Eisenhower that classification procedures were "so broadly drawn and loosely administered as to make it possible for government officials to cover up their own mistakes and even their wrongdoing under the guise of protecting national security."[2] And in 1989, Erwin Griswold, who as solicitor general had argued against publication of the Pentagon Papers, confessed that there were no state secrets in those papers, and published an Op-Ed column in *The Washington Post* saying:

> It quickly becomes apparent to any person who has considerable experience with classified material that there is massive overclassification, and that the *principal concern of the classifiers* is not with national security, but rather *with governmental embarrassment* of one sort of another [emphasis added].[3]

If any suspect that Griswold was exaggerating, they should reflect on the fact that the principal Supreme Court case justifying the invocation of the national security privilege was based on a governmental lie. That case is *U.S.* v. *Reynolds* (1953), the subject of two outstanding books, one by Louis Fisher, senior scholar of the Law Library in the Library of Congress, the other by Pulitzer Prize–winning journalist Barry Siegel, who is now the director of the literary journalism program at the University of California, Irvine. The tale they have to tell is a disheartening one, of government lying and the willingness of courts to accept it.

The B-29 Crash

On October 6, 1948, an Air Force plane exploded and fell out of the sky in Georgia. It was doing experimental work on a guided missile system called Banshee. Five of the eight crew members aboard and four of the five civilians died.

The other four parachuted to safety. It came out in an interview with the one surviving civilian that he and his non–Air Force fellows had not been instructed in the use of escape hatches; and there had been trouble with fires on other B-29s, so there seemed a prima facie case of criminal neglect in the civilians' deaths. Three of them were electrical engineers working on Banshee under contract with the Radio Company of America (RCA). Their young widows decided to sue the Air Force in a Pennsylvania district court. Their lawyer, Charles Biddle, asked for information in the Air Force's keeping—the official accident report and depositions from the three surviving crewmen. The Air Force refused to surrender the documents, saying that the report was classified and the depositions were "hearsay." If the plaintiffs wanted such "hearsay," they could take their own depositions from the survivors.

The right to classify the report was said to derive from the Housekeeping Privilege, which dates back to a 1789 statute known as the Housekeeping Statute, which directs agency heads to keep custody of their records (but does not say that their information cannot be shared for good reason). Biddle, a very sharp lawyer, probably wondered why this statute was cited, rather than some more exigent form of executive privilege. He did not know what later came out—that, sure enough, the accident report was routinely classified, as were all crash reports, but it was at the lowest grade of secrecy at the time—Restricted—not Secret or Top Secret. Restricted is defined as "for official use only, or when disclosure should be limited for reasons of administrative privacy."

Since the report had been routinely classified in 1948, it and other accident reports were routinely declassified when their time limit expired in 1996. All Biddle knew at this point was that the Air Force showed a ferocious determination not to give up the documents that were requested. Could they really have state secrets in them? Was the accident caused by secret Banshee activities? Did the Air Force depositions of survivors have things the survivors would not say now to the plaintiffs' lawyers? There was no way of knowing any of this, since the government blocked all access to information.

The Pennsylvania district judge, William Kirkpatrick, was not impressed by the Air Force argument. He ordered it to turn over the documents or pay the damages the plaintiffs were demanding, saying he would review the material in camera to see if their release would be dangerous (the solution John Marshall reached when he called for Thomas Jefferson to turn over letters in the Aaron Burr case).

George Skadding/Time Life Pictures/Getty Images

Chief Justice Fred Vinson, who in 1953 wrote the majority opinion in U.S. *v.* Reynolds, *the principal Supreme Court case justifying the invocation of national security privilege. This privilege was invoked more times during the first four years of the George W. Bush administration than during any preceding administration.*

The Air Force argued that testimony by the three surviving crewmen should be enough for the plaintiffs' purposes, without their first depositions. (Why these first depositions, of people in the plane, were called "hearsay" when they spoke just after the crash, but not a year later, was not explained.) The Air Force was now so wedded to the idea of new depositions that it would fly the crewmen to the trial at its own expense. Biddle claimed that he could not knowledgeably question them without the accident report. Judge Kirkpatrick agreed. He wryly noted that the crewmen "are employees of the defendant, in military service and subject to military authority... they will not be encouraged to disclose, voluntarily, any information which might fix responsibility upon the Air Force." Still the Air Force refused to release the documents, and Judge Kirkpatrick awarded the women their damages.

The Air Force appealed this decision to the Third Circuit Court, with a famous jurist, Albert Maris, presiding over its three-judge panel. Here the Air Force went beyond the Housekeeping Privilege and alleged that there were state secrets that had to be protected, for the sake of national security. Judge Maris said he would therefore review the information in camera before releasing it, but the Air Force refused to produce it even for this purpose, so the panel affirmed the women's award. The Air Force lawyers took their appeal to the final arbiter, the Supreme Court.

The Vinson Court

The Court that accepted the case was headed by Chief Justice Fred Vinson, the only chief justice to be ranked "Failure" in a 1970 poll of sixty-five law deans and other legal scholars, and one of only eight "Failures" in the first one hundred Supreme Court justices.[4] When Harry Truman wanted to seize the steel mills in 1952, his friend Justice Vinson assured him beforehand that he had every right to do it.[5] When the Court came to rule on the mill seizures, Vinson was joined by another "Failure" (Sherman Minton) and an "Average" in the ratings (Stanley Reed) to make up the minority supporting Truman. The majority of six justices opposing the seizure had two "Greats" (Hugo Black and Felix Frankfurter) and two "Near-Greats" (William O. Douglas and Robert Jackson) in its number. Since the Court had ruled against the government in the steel case, Biddle probably thought he had a good shot at winning when the same men decided his case the very next year.

But an odd inversion occurred. This time the lightweights were in the majority supporting the Air Force, and the heavy hitters were in the minority. Black, Frankfurter, and Jackson stood with the lower courts, and Douglas at first voted with them—though at the last minute he said Vinson could add his name to that of the majority, made up of Vinson, Minton, Reed, Tom Clark, and Harold Burton. Vinson wrote the majority decision, saying that the plaintiffs forfeited their claim to more information when they declined to take what was offered them (new depositions from the crewmen). Vinson refused to call for an in camera look at the Air Force documents, and wrote that the Korean War made it important to respect state secrets:

> In the instant case we cannot escape judicial notice that this is a time of vigorous preparation for national defense. Experience in the past war has made it common

[1]The second-highest count (twenty-five) was during the Reagan administration.

[2]Herbert Brownell, letter to Eisenhower, June 15,1953, cited in Kenneth R. Mayer, *With the Stroke of a Pen: Executive Orders and Presidential Power* (Princeton University Press, 2001), p. 145.

[3]Erwin N. Griswold, *The Washington Post*, February 15, 1989.

[4]Albert P. Blaustein and Roy M. Murray. *The First One Hundred Justices: Statistical Studies on the Supreme Court of the United States* (Archon, 1978), pp. 37–40.

[5]David McCullough, *Truman* (Simon and Schuster, 1992), p. 897.

knowledge that air power is one of the most potent weapons in our scheme of defense, and that newly developing electronic devices have greatly enhanced the effective use of air power. It is equally apparent that these electronic devices must be kept secret if their full military advantage is to be exploited in the national interests. 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. Certainly there was a reasonable danger that the accident investigation report would contain references to the secret electronic equipment which was the primary concern of the mission.[6]

In reversing the appeal, the majority sent the case back to the original court for any further proceedings "consistent with the views expressed in this opinion." Biddle saw little point in going back. But the Air Force was very anxious to get rid of this case, and it agreed to settle for an award not far from the one first granted if the women would agree to a "final release" of all claims against the government. The story seemed to be over, and it was—for roughly half a century (forty-seven years).

The Accident Report Revealed

The daughter of one of the RCA engineers who died in the crash, Judy Palya Loether, who was only seven weeks old at the time of the accident, grew up with a great curiosity about the father she never knew. She was also a constant surfer of all things online. In 2000, while looking around on her computer for information on what her father did and how he died, she came across an entry, Accident-Report.com, which promised to supply people with reports of government airplane crashes. She did not know that there had been a Supreme Court case that hinged on the production of this report, but she wanted to know if she could learn more about her father's work.

Accident-Report.com belonged to Michael Stowe, a studious collector of aviation information. He had learned in 1996 that the Clinton administration, fighting the overclassification of documents, had declassified the Air Force accident reports with low (Restricted) rank. Stowe determined, at great cost, to acquire the microfilms of these reports—one thousand reels of them, at thirty dollars each. To help support his hobby, he began supplying information on crashes, for a small sum, over the Internet. From this fortuitous connection between Loether and Stowe, the whole story of the Air Force's concern with the cause of a particular crash was finally revealed.

Loether purchased the report of her father's last flight, and sought out other relatives of the RCA engineers to show them the report—all 220 pages of it (with fifteen photos of the wreckage). They read the report carefully, looking for details of any secret project the plane was involved in. There were none. Instead, the report told a horror story of incompetence, bungling, and tragic error.

The plane had a troubled history, and it took off without heat shields that would keep the engines from overheating. When the outer left engine lost power during the plane's climb, the pilot tried to turn it off but inadvertently turned off the outer right engine. The copilot cut power to the left engine, but it was soon in flames. The inner left engine then went out, and the one working engine on the right side kicked the plane into a hard swerve to the left. The pilot, with only one of his four engines working, could not feed that engine more power without accelerating a spin. An expert who studied the report later said that the only way he could maintain speed and avoid a stall was to dive, down to an altitude where it was safe to bail out. Meanwhile, the first engine that caused trouble was about to explode.

The front tire bay, one of the escape routes, was blocked, and the opening of the bomb bay, the main escape route, created a drag that increased the plane's spin and threatened to stall it. The copilot kicked his way through the front wheel bay, but the pilot's chute caught on the plane and was disabled as he got out. Only two of the five civilians were close enough to the front bay to follow the copilot out, but one of them, Judy Loether's father, had died because his parachute had not fully opened. This story was disgraceful to the Air Force, and that, not national security, explains the hard determination of the government not to let the story come out. The only protection of the wronged women would have been a Supreme Court that would follow the path of the excellent lower judgments and demand a look at the evidence in camera. The Court failed that test.

Loether, who didn't know at first that there had been a Supreme Court case, learned about it from relatives, and asked several lawyers to look at the new evidence, at first without success. But when she went to the firm that had originally pled the case before the Court, she found a man who would take up again the cause of Charles Biddle (now dead)—Wilson Brown. It took Brown a while to find a strategy for reopening the case. The firm could not bring a new action against the Air Force, since the plaintiffs had signed a pledge not to do that. Instead, it could ask the Supreme Court to restore the first judgment on damages awarded the women, on the grounds that they had been deprived of them by a fraud practiced on the Court itself.

The vehicle for this was the little-used writ of *error coram nobis*, which shows that a judgment was based on fraudulent information. The difference between the award for the women first granted by the court and what the Air Force settled for was not great ($55,000), but with compound interest over the years it had reached over a million dollars in 2003 currency. But for Brown the important thing was to show that all decisions reached on the basis of *U.S.* v. *Reynolds* were based on a governmental lie.

The Rehnquist Court

Between 1977 and 2001 there were sixty-two cases where the government withheld evidence by citing *U.S.* v. *Reynolds*, and in using the case some courts not only reaffirmed the decision but broadened its application by a "mosaic theory," saying that information not directly concerned with national security may be pieced together with other pieces of the "mosaic" to give a different picture. Only government experts, not lay observers or even judges, are qualified to see such technical connections. By this test, almost any information can be presumed to have a subtle connection with national security. The government now had a greater stake than ever in retaining the validity of *U.S.* v. *Reynolds*.

The Rehnquist Court was very deferential to the government in 2003. In fact, it asked the solicitor general, Theodore Olson, whether it should take the Reynolds petition *coram nobis*. Olson, before becoming solicitor general, had successfully pled George W. Bush's case in *Bush* v. *Gore* that gave him the Florida election and the presidency. Not surprisingly, Olson said the Court should not take the case, and he used the mosaic theory to argue this. The accident report did not have national security information, but it "might lead to disclosure" of connected things that would pertain to national security.

Chief Justice Rehnquist, when he was assistant attorney general during the Nixon administration, wrote a legal defense of Nixon's invasion of Cambodia in 1970, done without congressional authorization, saying that the Constitution gave presidents "a grant of substantive authority" to send troops "into conflict with foreign powers on their own initiative"—the same claim that Vice President Cheney and his counsel David Addington would make under President George W. Bush.[7] On national security, it was as little likely that Chief Justice Rehnquist would rule against the president who appointed him as that Chief Justice Vinson would buck the president who appointed him on matters of prerogative. On June 23, 2003, in one sentence, the Court denied Brown the right to file the writ *coram nobis*. Brown then took the case back to the district court, where he lost, as he did at the appeal level. The case now was, finally, over.

But *U.S.* v. *Reynolds* is one part of a different mosaic—a larger picture of executive usurpation that has sealed off the presidency behind walls of secrecy, unaccountability, and extreme legal theories of detention, torture, defiance of Congress, and spying on citizens. It is as part of that larger scene that *U.S.* v. *Reynolds* remains important, as a major early step in letting governments lie with court sanction. Because of this, the appearance of two such excellent books on the case is especially welcome. Fisher is strong on points of law and their historical background. Siegel spent a great deal of time with the persons involved in the case, and brings out the dramatic nature of the B-29 accident, the withholding of the accident report, the rediscovery of it, and judicial disregard for it. If the constitutional imbalance created by the present administration is ever to be remedied, the true story of the *Reynolds* decision must be part of the assessment leading to a cure. □

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

[7] Arthur M. Schlesinger Jr., *The Imperial Presidency* (Houghton Mifflin, 1973), p. 190.