

AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 8: The New Deal and Great Society Era – Separation of Powers

United States v. Reynolds, 345 U.S. 1 (1953)

Three civilian observers (and three military crewmen) died in a crash of a test flight of a B-29 bomber in Georgia in 1948. The flight was intended to test electronic surveillance equipment. The widows of the civilians sued the government under the Tort Claims Act and in discovery sought access to the Air Force's official accident report and the surviving crewmen. The government moved to quash the inquiry, claiming a national security privilege against revealing classified information in a civil suit. The federal district court concluded that the existence of the Tort Claims Act effectively waived any claim of privilege. The government refused to produce the classified documents for even in camera review by the judge, and a judgment was rendered in favor of the widows. On appeal, the circuit court affirmed the trial court. In a 6–3 decision, the Supreme Court reversed.

The Court determined that a national security privilege survived the enactment of the Tort Claims Act and that the government could not be held liable if privileged material could not be brought into evidence. The Court avoided specific constitutional analysis by reading into the statute a recognition of a traditional claim of state secrets privilege. Such a privilege must be explicitly claimed by the government and should be read narrowly, but judges should treat such claims of state secrets with deference.

What might be the constitutional background to the Court's analysis? How might the specific context of the Cold War have influenced the Court's decision? How constrained is the executive in its ability to claim state secrets in this opinion? Should the existence of the Tort Claims Act be taken as a waiver of any privilege? Could the executive still claim a national security privilege even if Congress explicitly opened the government to liability in such cases? How might a judge critically evaluate the military's assertion of state secrets? Is in camera review by a trial judge a credible way of sifting evidence that might damage national security from evidence that might not? Can even judges be safely given access to classified materials?

CHIEF JUSTICE VINSON delivered the opinion of the Court.

....
We have had broad propositions pressed upon us for decision. On behalf of the Government it has been urged that the executive department heads have power to withhold any documents in their custody from judicial view if they deem it to be in the public interest. Respondents have asserted that the executive's power to withhold documents was waived by the Tort Claims Act. Both positions have constitutional overtones which we find it unnecessary to pass upon, there being a narrower ground for decision.

The Tort Claims Act expressly makes the Federal Rules of Civil Procedure applicable to suits against the United States. The judgment in this case imposed liability upon the Government by operation of Rule 37, for refusal to produce documents under Rule 34. Since Rule 34 compels production only of matters "not privileged," the essential question is whether there was a valid claim of privilege under the Rule. We hold that there was, and that, therefore, the judgment below subjected the United States to liability on terms to which Congress did not consent by the Tort Claims Act.

. . . . When the Secretary of the Air Force lodged his formal "Claim of Privilege," he attempted therein to invoke the privilege against revealing military secrets, a privilege which is well established in the law of evidence. . . .

Judicial experience with the privilege which protects military and state secrets has been limited in this country. . . . Nevertheless, the principles which control the application of the privilege emerge quite clearly from the available precedents. The privilege belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party. It is not to be lightly invoked. There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer. 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. . . .

. . . .
Regardless of how it is articulated, some . . . formula of compromise must be applied here. Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers. Yet we 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. It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and 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.

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 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.

Of course, even with this information before him, the trial judge was in no position to decide that the report was privileged until there had been a formal claim of privilege. Thus it was entirely proper to rule initially that petitioner had shown probable cause for discovery of the documents. Thereafter, when the formal claim of privilege was filed by the Secretary of the Air Force, under circumstances indicating a reasonable possibility that military secrets were involved, there was certainly a sufficient showing of privilege to cut off further demand for the documents on the showing of necessity for its compulsion that had then been made.

. . . . Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake. . . .

There is nothing to suggest that the electronic equipment, in this case, had any causal connection with the accident. Therefore, it should be possible for respondents to adduce the essential facts as to causation without resort to material touching upon military secrets. Respondents were given a reasonable opportunity to do just that, when petitioner formally offered to make the surviving crew members available for examination. We think that offer should have been accepted.

. . . .
The decision of the Court of Appeals is *reversed*

JUSTICE BLACK, JUSTICE FRANKFURTER, and JUSTICE JACKSON dissent, substantially for the reasons set forth in the opinion of Judge Maris below.

[Circuit Court Judge Maris had concluded that the state secrets doctrine asserted by the government was too broad and the trial judge could adequately protect national security interests by *in camera* review of the evidence.]



OXFORD
UNIVERSITY PRESS