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THE IRONY OF A FAUSTIAN BARGAIN:
A RECONSIDERATION OF THE SUPREME COURT’S 1953
UNITED STATES V. REYNOLDS DECISION

David Rudenstine[†]

TABLE OF CONTENTS

INTRODUCTION 1285

I. NOT SAFE FOR FLIGHT 1294

 A. *Always Engine Fires* 1294

 B. *Bomber #866* 1299

 C. *First Investigation* 1302

 D. *Frank M. Folsom’s Letter* 1306

 E. *Second Air Force Investigation* 1308

 F. *Air Force’s Response to Folsom* 1310

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This Article is part of a larger study that examines the expansion of the judicial expansion of the state secrets privilege from roughly 1975 to today and places that important development in a broader context that focuses on the many legal doctrines that comprise what I term the “Age of Deference.” The title of the larger study is *The Age of Deference: The Supreme Court, the National Security State and the Rule of Law*.

This Article is dedicated to the memory of Maite Aquino, 1969–2011, who always asked about it.

II. A LAWSUIT	1312
A. <i>The Filing</i>	1312
B. <i>Executive's Answers to Plaintiffs' Interrogatories</i>	1314
1. Two False Answers	1314
2. Attorney Affirmation	1317
C. <i>The Context</i>	1318
D. <i>Confidential Documents</i>	1320
E. <i>Judge Kirkpatrick's Decision</i>	1321
III. DIFFERENT ROADS TO A SHOWDOWN	1324
A. <i>Department of Justice</i>	1325
1. Federal Rules of Civil Procedure	1326
2. Two Cornerstones of the Executive Privilege Argument	1328
B. <i>Cotton Valley</i>	1335
C. <i>The Reynolds Intersection</i>	1339
1. Secretary of the Air Force	1340
2. Judge Advocate General of the Air Force	1343
IV. THE THIRD CIRCUIT	1346
V. THE SUPREME COURT PROCEEDINGS	1352
A. <i>The Executive's Brief</i>	1352
1. Legal Claim	1352
2. Presentation of Finletter and Harmon's Claims	1356
3. Lawyers Not "Permitted" to "See" Documents	1357
B. <i>The Conference</i>	1359
C. <i>The Opinion</i>	1363
1. "Well Established"	1363
2. Controlling Principles	1366
3. Application	1368
VI. THE FAUSTIAN BARGAIN	1369
A. <i>Vinson's Masks</i>	1371
1. The Substantive Rule	1371
2. The Rule's Application	1372
3. Depositions	1375
4. Remand	1378
5. Purposes	1380
B. <i>Vinson and Truman</i>	1381
C. <i>Reflections</i>	1386
D. <i>Consequences</i>	1389
VII. THE LAST APPEAL	1392
A. <i>Justice Denied</i>	1392
B. <i>Unreasonable Deference</i>	1394

INTRODUCTION

Sixty years ago, the Supreme Court decided *United States v. Reynolds*.¹ That decision attracted very little public attention at the time,² remains largely unexamined today,³ and is critically important in understanding the scope of the contemporary state secrets privilege.⁴

¹ 345 U.S. 1 (1953).

² The Supreme Court's 1953 decision in *Reynolds* attracted very little press attention when it was announced. See LOUIS FISHER, IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE REYNOLDS CASE 120 (2006). As one prominent student of the lawsuit has noted, the ruling "caused barely a ripple in the press." *Id.* The *New York Times* endorsed the outcome in four "short" paragraphs, commenting that "judges were no more entitled to learn real military secrets than any other parties to a lawsuit," even though the *Times* and the judges did not know whether the disputed documents in fact contained any military secrets. *Id.* The *Washington Post* summarized the outcome of the case in a news report that reviewed twelve other decisions and placed the description of the *Reynolds* case second to last. *Id.* The *Philadelphia Inquirer* followed suit, even though the case originated in Philadelphia. *Id.*

Many reasons combined to distract press attention at the time from the Supreme Court's decision, even though the decision announced a startling new state secrets privilege of potentially enormous importance and controversy. First, the actual issue in the case was a rather dry rule of evidence as opposed to a seminal, easily digestible, public policy question such as the scope of protected speech as decided in *Dennis v. United States*, 341 U.S. 494 (1951), the limits on presidential power as defined in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), or the constitutionality of mandatory race segregation in the public schools as announced in *Brown v. Board of Education*, 347 U.S. 483 (1954), which was pending before the Court in the spring of 1953. The state secrets doctrine had rarely been the subject of judicial disputation—including by the Supreme Court—had attracted minimal scholarly interest, and had never cut a public profile attracting the attention of the press or the public. Furthermore, the Supreme Court opinion itself gave the appearance—as misleading as it was—of not disturbing settled law, and that was true even though the Court knew when it announced the new state secrets privilege rules that it did so against a slate left almost unmarked by American judicial opinions. The disagreement among the justices over the resolution of the state secrets privilege in *Reynolds* was also muffled by the fact that the three dissenting justices—Black, Frankfurter, and Jackson—did not write an opinion. And as final as the new rules for the state secrets privilege were, the Supreme Court's decision left unresolved the human interest side of the litigation: the claim by the three widows against the government. Lastly, the potential importance of the *Reynolds* case was overwhelmed by the case involving "convicted atomic spies Julius and Ethel Rosenberg." Brad Snyder, *Taking Great Cases: Lessons from the Rosenberg Case*, 63 VAND. L. REV. 885, 886 (2010). Snyder concludes that the Rosenbergs' conviction and death sentence imposed upon the Rosenbergs "dominated the news and divided the country," *id.* at 886, and was at the time "considered a *Bush v. Gore* moment, a rush to judgment that alienated people who held the Court in high institutional regard," *id.* at 891.

³ I draw a distinction between a reconsideration of the Supreme Court's 1953 decision in *Reynolds* and the contemporary state secrets privilege. The contemporary privilege has received close scrutiny by scholars and commentators; the original 1953 decision in *Reynolds* that announced the framework for the contemporary privilege has not. For two recent and very useful books on the *Reynolds* case, see FISHER, *supra* note 2; and BARRY SIEGEL, CLAIM OF PRIVILEGE: A MYSTERIOUS PLANE CRASH, A LANDMARK SUPREME COURT CASE, AND THE RISE OF STATE SECRETS (2008). Each book provides useful background information and thoughtful analysis of the *Reynolds* case.

⁴ The *Reynolds* decision announced the rules for the contemporary state secrets privilege that federal courts uphold in appropriate cases. During the last thirty-five years, that privilege has gone from a rarely invoked privilege to a frequently invoked, highly controversial, and enormously important one. See, e.g., DAVID COLE & JULES LOBEL, LESS SAFE, LESS FREE: WHY

The *Reynolds* decision announced new guidelines that courts to this day⁵ must follow when they decide whether to sustain an executive⁶ branch claim that certain information is confidential because it is protected by the state secrets privilege.⁷ That privilege, which has been vastly expanded in recent decades and has a determinative impact on a large number of cases,⁸ is highly controversial and has been the subject of substantial analysis by judges,⁹ news commentators¹⁰ and legal

AMERICA IS LOSING THE WAR ON TERROR 42 (2007) (“Perhaps the most troubling invocation of secrecy has been the administration’s invocation of the state secrets privilege to block judicial oversight of some of its most dubious practices.”); SUSAN N. HERMAN, TAKING LIBERTIES: THE WAR ON TERROR AND THE EROSION OF AMERICAN DEMOCRACY 198 (2011) (“Take the state secrets privilege. The Bush and then Obama lawyers have invoked this privilege . . . to keep cases out of court altogether, sometimes without even allowing the court to review whether an asserted national security concern is credible.”); ROBERT M. PALLITO & WILLIAM G. WEAVER, PRESIDENTIAL SECRECY AND THE LAW 86 (2007) (“The state secrets privilege is the most powerful weapon in the presidential arsenal of secrecy . . .”); CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY 169–70 (2008) (“[U]se of the State Secrets Privilege essentially established the president and his department heads as the sole arbiters of which matters could receive judicial review.”).

⁵ See, e.g., *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010); *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007); *Black v. United States*, 62 F.3d 1115 (8th Cir. 1995); *Bareford v. Gen. Dynamics Corp.*, 973 F.2d 1138 (5th Cir. 1992); *Zuckerbraun v. Gen. Dynamics Corp.*, 935 F.2d 544 (2d Cir. 1991); *Ellsberg v. Mitchell*, 709 F.2d 51 (D.C. Cir. 1983).

⁶ In this Article I have generally tried to use the word “executive” or the term “executive branch” as opposed to using the word “government” in referring to the executive branch. I do so because the president and the executive branch as a whole are not the “government.” Of course, it is true that the press and public frequently use the words “government,” “presidency,” and “executive branch” interchangeably. But such usage may result in confusion and uncertainty in considering the responsibilities and duties of the three co-equal branches with regard to such matters as maintaining a system of checks and balances and upholding the rule of law.

⁷ For a summary of the controlling rules set forth in *Reynolds*, see *infra* Part V.C.2.

⁸ The expansion of the state secrets privilege over the last three and a half decades has been so sweeping and intricate that a thorough description and analysis would require a separate Article. The best that can be done in footnotes is to point to mountain peaks. Thus, the so-called “Mosaic theory,” which emphasizes that trivial information that may seem to be of no particular national security significance may in fact be significant when assessment, in the context of other information by an informed person, prompts the protection of seemingly harmless information. See, e.g., *United States v. Marchetti*, 466 F.2d 1309 (4th Cir. 1972). The “unacceptable risk” doctrine holds that a complaint will be dismissed before a responsive pleading is filed because of a state secrets privilege when a judge decides that litigation of the claim will present a “risk” that a state secret may be accidentally and unintentionally disclosed and that a judge decides that the “risk” is “unacceptable.” See, e.g., *Jeppesen Dataplan*, 614 F.3d at 1079, 1083; *El-Masri*, 479 F.3d at 305–06. The state secrets privilege now applies when a party merely seeks from the executive a statement that information already in the public domain is true. A court may sustain the executive’s objection that acknowledging, confirming, or denying, the validity of such information constitutes a state secret. See, e.g., *Bareford*, 973 F.2d 1138; *Fitzgibbon v. CIA*, 911 F.2d 755 (D.C. Cir. 1990). The privilege may result in the dismissal of an action if the unavailability of the evidence due to the privilege hampers a defendant in establishing a valid defense. *Zuckerbraun*, 935 F.2d 544. See generally *infra* Part VI.D. Perhaps in recognition of the expansion and potential abuse of the state secrets privilege, the Obama administration has adopted a policy which grants authority to the Department of Justice to review all claims of executive privilege. See *infra* note 409.

⁹ See, e.g., *Jeppesen Dataplan*, 614 F.3d at 1093 (Hawkins, J., dissenting); *Ellsberg*, 709 F.2d

scholars.¹¹ Nonetheless, with few exceptions,¹² scholars and commentators have not returned to re-examine the *Reynolds* decision, the basis of the modern privilege.

The *Reynolds* decision also helped usher in what I term the Age of Deference, a seventy-year period that commenced with the ending of World War II and continues through today, in which courts exhibit the “utmost deference”¹³ towards the executive in national security cases.¹⁴

at 60 (Edwards, J.); *Halkin v. Helms*, 598 F.2d 1, 12 (D.C. Cir. 1979) (Bazelon, J., dissenting from denial of rehearing en banc).

¹⁰ See, e.g., Holly Wells, Note, *The State Secrets Privilege: Overuse Causing Unintended Consequences*, 50 ARIZ. L. REV. 967 (2008); Adam Liptak, *Obama Administration Weighs in on State Secrets, Raising Concern on the Left*, N.Y. TIMES, Aug. 4, 2009, <http://www.nytimes.com/2009/08/04/us/politics/04bar.html?ref=states>; Charlie Savage, *Justice Dept. to Limit Use of State Secrets Privilege*, N.Y. TIMES, Sept. 23, 2009, http://www.nytimes.com/2009/09/23/us/politics/23secrets.html?_r=1&.

¹¹ The scholarly literature on the privilege is voluminous. See, e.g., Frank Askin, *Secret Justice and the Adversary System*, 18 HASTINGS CONST. L.Q. 745 (1991); Joseph W. Bishop, Jr., *The Executive’s Right of Privacy: An Unresolved Constitutional Question*, 66 YALE L.J. 477 (1957); Carrie Newton Lyons, *The State Secrets Privilege: Expanding Its Scope Through Government Issue*, 11 LEWIS & CLARK L. REV. 99 (2007); James Zagel, *The State Secrets Privilege*, 50 MINN. L. REV. 875 (1966).

¹² For two notable exceptions, see FISHER, *supra* note 3; SIEGEL, *supra* note 3.

¹³ *United States v. Nixon*, 418 U.S. 683, 710 (1974). For two cases decided before *Reynolds* that provided doctrinal support for the Age of Deference, see *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103 (1948); *United States v. Curtiss-Wright Exp. Corp.* 299 U.S. 304 (1936).

¹⁴ A thorough analysis of the Age of Deference is beyond the scope of this Article. But some comments are in order so that the term I use—Age of Deference—is understood. The Age of Deference, in which courts show the utmost respect for executive authority in national security matters, is a direct outgrowth of the establishment and development of the contemporary national security state that emerged after World War II.

In 1947, the United States established what one authority, George C. Herring, termed “the Magna Charta of the national security state.” GEORGE C. HERRING, *FROM COLONY TO SUPERPOWER: U.S. FOREIGN RELATIONS SINCE 1776*, at 614 (2008) (internal quotation marks omitted). This “Magna Charta” consisted of the National Security Act of July 1947 which created an independent Central Intelligence Agency; a National Security Council in the White House to coordinate policy-making; a cabinet-level, civilian secretary of defense responsible for the previously separate army, navy, and air force departments; and institutionalized the Joint Chiefs of Staff. Added to these 1947 initiatives must be a seven-page presidential memorandum signed by President Harry S. Truman on October 24, 1952. This memorandum, which was classified top secret and stamped with a code word that was itself classified, JAMES BAMFORD, *THE PUZZLE PALACE: INSIDE THE NATIONAL SECURITY AGENCY, AMERICA’S MOST SECRET INTELLIGENCE ORGANIZATION* 15 (1983), established the National Security Agency (NSA, or as referred to by some, “No Such Agency”). HERRING, *supra*, at 647. The initial purpose of the NSA was to “listen in on enemy communications and crack codes.” *Id.*

Together these developments put in place a set of national security agencies that form the foundation of the U.S. national security structure. See FREDERICK A.O. SCHWARZ, JR. & AZIZ Z. HUQ, *UNCHECKED AND UNBALANCED: PRESIDENTIAL POWER IN A TIME OF TERROR* 4–5 (2007) (“The cold war and the 1947 National Security Act brought a new institutionalization of intelligence powers. Until the 1940s, the United States, unlike the former Soviet Union and Great Britain, had no permanent secret intelligence services. What previously was ad hoc and informal became bureaucratic, regularized, and effective—a powerful tool concentrated almost exclusively in presidents’ hands. The FBI’s domestic security activities burgeoned. The CIA and the [NSA] were born and rapidly expanded to enormous proportions.”).

The result of the Age of Deference has been the insulation of the executive from meaningful judicial accountability and review, a distortion in the checks and balances governmental scheme, the denial of a judicial remedy to those allegedly harmed by executive branch conduct, and the undermining of the rule of law.¹⁵ Although many legal scholars and political scientists have evaluated the various legal doctrines that comprise the Age of Deference and protect the executive from judicial accountability,¹⁶ very few have re-examined the *Reynolds* case,¹⁷ which is one of the early major pillars of the entire epoch.¹⁸

This Article's reconsideration of *Reynolds* has led to many completely unexpected and surprising conclusions. Although *Reynolds* is a leading case calling for judicial deference to the executive in cases arguably implicating national security, it turns out that the initial impetus behind the executive branch's effort that resulted in the modern state secrets doctrine had little to nothing to do with national security.¹⁹ Rather, the executive branch's litigation strategy that resulted in the *Reynolds* decision had its origins in its efforts during the 1940s to limit the reach of pre-trial discovery procedures authorized by the Federal Rules of Civil Procedure in 1938. In its most ambitious expression, that complex effort sought an extremely broad and essentially absolute

The growth and expansion of the agencies and personnel that constitute the national security structure has been enormous. Sixty years after the foundations of the national security state were established, the *Washington Post* published a lengthy three part series entitled *Top Secret America: A Washington Post Investigation*, which provides a contemporary snapshot of the growth of the national security state. The report concluded that about "1,271 government organizations and 1,931 private companies work on programs related to counterterrorism, homeland security and intelligence in about 10,000 locations across the United States"; approximately 854,000 individuals "hold top-secret security clearances"; since 9/11, thirty-three building complexes for "top-secret intelligence" work have been built or are being built and together they are, in size, the equivalent of "almost three Pentagons or 22 U.S. Capitol buildings." Dana Priest & William M. Arkin, *A Hidden World, Growing Beyond Control*, WASH. POST, July 19, 2010, at A1. Moreover, "[t]he U.S. intelligence budget is vast, publicly announced last year [2009] as \$75 billion, 2½ times the size it was on Sept. 10, 2001." *Id.* These reports are now in book form. See DANA PRIEST & WILLIAM M. ARKIN, *TOP SECRET AMERICA: THE RISE OF THE NEW AMERICAN SECURITY STATE* (2011).

¹⁵ See *infra* Part VI.D.

¹⁶ See, e.g., MATTHEW CRENSON & BENJAMIN GINSBERG, *PRESIDENTIAL POWER UNCHECKED AND UNBALANCED* (2007); HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* (1990); SAVAGE, *supra* note 4; ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* (1973); SCHWARZ & HUQ, *supra* note 14; David Rudenstine, *Breaking the Tradition: The Case for the 640 Detainees in Guantanamo*, in *GUANTANAMO BAY AND THE JUDICIAL-MORAL TREATMENT OF THE OTHER 15* (Clark Butler ed., 2007).

¹⁷ See *supra* note 3.

¹⁸ As is acknowledged and accepted, Congress has also improperly deferred to the executive branch in matters pertaining to national security. See generally, CRENSON & GINSBERG, *supra* note 16; SCHWARZ & HUQ, *supra* note 14; STEPHEN R. WEISMAN, *A CULTURE OF DEFERENCE: CONGRESS'S FAILURE OF LEADERSHIP IN FOREIGN POLICY* (1995). But see JAMES M. LINDSAY, *CONGRESS AND THE POLITICS OF U.S. FOREIGN POLICY* (1994).

¹⁹ See *infra* Part III.A–B.

privilege that would have provided the executive branch with a breathtakingly broad shield against discovery efforts to secure information from the government.²⁰ Although the executive's sweeping claim for a privilege was not initially termed "executive privilege," that was the term the executive eventually used in its legal briefs filed with the Supreme Court by 1950.²¹ Thus, although *Reynolds* announced significant rules guiding courts in cases that, the executive claimed, implicated national security, the initial impetus for the executive's strategy in that case had no connection to the nation's security.

Moreover, the fact that the executive branch ended up using the *Reynolds* case—a case that arose out of a 1948 crash of a B-29 plane that killed four civilian engineers in addition to five servicemen and that had little to nothing to do with national security—as a vehicle for pressing its request for a sweeping executive privilege turned out to be a complete happenstance. For its part, the Air Force needed to keep certain highly embarrassing documents confidential that were in dispute in the *Reynolds* case,²² and as for the Department of Justice it was urgently in need of a case to use to press its executive privilege claim, a claim it had previously unsuccessfully pressed in the courts.²³ As a result, the interests of the Air Force and the Department of Justice unexpectedly came together in the *Reynolds* case, and the accidental nature of this intersection goes a long way towards explaining the mysteries surrounding *Reynolds*, such as why a routine tort case became a seminal national security declaration; why the executive branch delayed so long before asserting the executive privilege in the *Reynolds* litigation, and then engaged in the manipulation and misrepresentation of the evidence once it did assert the privilege; why, as is now known, there was in fact no information in the disputed documents that were at the heart of the *Reynolds* litigation that would injure national security if disclosed; and why the Supreme Court's opinion in *Reynolds* was riddled with deceit and pretense.

It also turns out that a reconsideration of the *Reynolds* case is a history of a complicated and entangled set of events involving the Air

²⁰ See Brief for the Petitioner, *United States v. Cotton Valley Operators Comm.*, 339 U.S. 972 (1950) (No. 490), 1950 WL 78566 [hereinafter *Cotton Valley Brief*]. Harvard Law Professor Paul A. Freund wrote the foreword for the *Harvard Law Review's* review of the 1973 Supreme Court term, in which he stated that the earliest usage of the phrase "executive privilege" that he could discover was in the executive's brief in the *Reynolds* case. Paul A. Freund, *Forward: On Presidential Privilege*, 88 HARV. L. REV. 13, 18 n.29 (1973). The executive's brief in *Cotton Valley*, however, makes use of the phrase three years earlier. *Cotton Valley Brief, supra*, at 19–20, 1950 WL 78566, at *19–20; see also *infra* notes 306–317. And, as will be discussed in this Article, the executive's brief in *Reynolds*, including the use of the term "executive privilege," drew extensively from the executive's brief in *Cotton Valley*.

²¹ See *Cotton Valley Brief, supra* note 20, at 18–19.

²² See *infra* Part I.E.

²³ See *infra* Part III.C.

Force, Department of Justice lawyers, and the Supreme Court, aimed at, among other things, shielding the Air Force from substantial public embarrassment.²⁴ The Air Force's effort to protect itself began immediately after the plane crash that gave rise to the *Reynolds* case, when the Air Force conducted a limited investigation into the causes of the crash.²⁵ The Air Force effort to protect itself from public humiliation and criticism continued when the Air Force kept confidential a second report reviewing the causes of the crash, submitted false responses to a routine set of interrogatories submitted to the Air Force by the plaintiffs' lawyer, and deceived a senior Radio Corporation of America (RCA) executive about the causes of the plane crash.²⁶ Thereafter in the litigation, senior Air Force officials submitted two affidavits to the federal court that contained misleading and deceptive statements²⁷ in the hope of securing a ruling that protected the confidentiality of the investigation-related documents.

The Air Force's effort to protect itself from public embarrassment soon swept within its orbit Department of Justice lawyers. From the available evidence, it seems that the Department of Justice lawyers shielded themselves from discovering information that would have prevented them from asserting claims that the Air Force was determined to present to the courts in the hope of protecting its reputation and public standing. This complicity first occurred in the district court²⁸ and then repeated itself throughout the appeal process.²⁹

But this effort to conceal the truth about the plane crash involved more than the executive branch. Eventually, the opinion in the *Reynolds* case, written by Chief Justice Fred M. Vinson, was yet one more major step taken to protect the Air Force from public criticism. Thus, although the Supreme Court in *Reynolds* set out rules that appear to constitute a blending of competing claims involving national security, individual justice, and the maintenance of a governmental system of checks and balances, the opinion invited executive branch caprice by granting the executive a de facto absolute right to control the disclosure of information. Moreover, the Justices on the Court who reversed the judgment of the lower courts in favor of the widows had reason to doubt, at the very time they decided the case, that the disputed Air Force documents contained any information harmful to the national security.³⁰ Furthermore, although the opinion suggested that it would be possible for the widows to establish the cause of the crash without

²⁴ See *infra* Parts III, V, VI.

²⁵ See *infra* Part I.C–F.

²⁶ See *infra* Part I.D–F.

²⁷ See *infra* Part III.C.

²⁸ See *infra* Part II.B.2.

²⁹ See *infra* Part V.A.3.

³⁰ See *infra* Part VI.A.2.a.

relying upon the evidence that the Air Force insisted should be privileged, there was no reasonable basis for such a representation.³¹ In the end, this Article maintains that although the outcome in *Reynolds* was probably in accord with Chief Justice Vinson's willingness to curtail, if not eliminate, meaningful judicial review in cases implicating national security, it seems implausible that Vinson would have written the particular opinion he did in *Reynolds* unless he had received information about the case from President Harry Truman.

But the reasons warranting the reconsideration of the *Reynolds* case are even more complex. During the last seventy years the Supreme Court has, in one case after another, crafted legal doctrines that insulate executive conduct from meaningful judicial review in cases in which the executive asserts that national security interests are implicated.³² The overall consequence of these doctrinal developments has been that the Court has too often failed to provide a judicial remedy to individuals arguably wronged by the government; to strengthen a system of checks and balances by holding the executive accountable for its actions, even though such judicial accountability deters executive abuse of power and contributes to making executive conduct transparent; and ultimately to uphold the rule of law. Because the *Reynolds* case is one of the bedrocks of the Age of Deference, reconsidering *Reynolds* may help foster a more complete, complex, and long-overdue rethinking of all the doctrines that compose this time period.

The Supreme Court decision in *Reynolds* constituted a serious error. That decision provided a doctrinal basis for legal developments that have emboldened the executive at the expense of the courts and denied judicial remedies to individuals, thus undermining the rule of law. Yet the high court pretended in *Reynolds* that it was not making any of these problematic changes, which in turn only undermines the public trust in the Court which is the essence of its legitimacy.

Summary

To create a context so that the conduct of the Air Force in the *Reynolds* litigation can be understood, Part I of this Article, entitled "Not Safe for Flight," sets forth the general design features and devastating problems that beset the B-29 bomber from its initial testing. It reviews the substandard condition of the crashed bomber, Bomber #866, that gave rise to the *Reynolds* case, outlines the initial Air Force investigation into the crash, and describes a letter written by a senior RCA Executive Vice President Frank M. Folsom, seeking more

³¹ See *infra* Part VI.A.3.

³² See *infra* Part VI.D.

information about the crash that killed RCA engineers. This Part also reviews the second Air Force investigation into the crash which concluded among other things that Bomber #866 was so impaired that it was not fit for flight, and concludes by summarizing the Air Force's response to Folsom's letter.

Part II, entitled "A Lawsuit," describes the initial developments in the *Reynolds* litigation,³³ which were presided over by United States District Judge William H. Kirkpatrick of the Eastern District of Pennsylvania, and contributed to converting a routine tort action into a seminal national security case. This Part reviews the Air Force's responses to the plaintiffs' ordinary interrogatories, which contained two false statements, and discusses the Air Force's refusal to disclose to the plaintiffs the Air Force's investigative report into the plane crash and the statements of the three surviving servicemen. It was that refusal that ultimately culminated in the assertion by the Air Force that the documents were protected from disclosure because of executive privilege.

Part III is entitled "Different Roads to a Showdown." It reviews how the entirely different interests of the Air Force and Department of Justice unexpectedly intersected in the *Reynolds* case in late July and early August of 1950 and how that intersection led to the Supreme Court decision in *Reynolds* in 1953. Part III begins by canvassing the efforts by the Department of Justice during the 1940s to craft legal defenses to the discovery demands made on the government pursuant to the 1938 Federal Rules of Civil Procedure. It focuses on the Justice Department's utilization of a British House of Lords decision,³⁴ which granted the crown an absolute executive privilege, to support an argument for a comparable legal doctrine in the United States, and it examines a law review Article written by Herman Wolkinson,³⁵ a Justice Department lawyer, which asserted that the Congress and the federal courts had consistently accepted that the executive had a constitutionally based executive privilege that was absolute. By 1950, the Justice Department had woven together the House of Lords decision and the Wolkinson Article into a legal position that advanced a sweeping claim for executive privilege, and then presented that claim to the Supreme Court, first in 1950 in *United States v. Cotton Valley Operators Committee*,³⁶ and then again in 1953 in the *Reynolds* case.

³³ *Brauner v. United States*, 10 F.R.D. 468 (E.D. Pa. 1950), *aff'd sub nom. Reynolds v. United States*, 192 F.2d 987 (3d Cir. 1951), *rev'd*, 345 U.S. 1 (1953).

³⁴ *Duncan v. Cammell, Laird & Co.*, [1942] A.C. 624 (H.L.) (appeal taken from Eng.).

³⁵ Herman Wolkinson, *Demands of Congressional Committees for Executive Papers*, 10 FED. B.J. 103 (1949).

³⁶ See *infra* Part III.B.

Part IV, entitled “The Third Circuit,” summarizes that court’s opinion written by Judge Albert B. Maris in the *Reynolds* appeal that affirmed District Judge Kirkpatrick’s ruling requiring the Air Force to submit the disputed documents to the district judge for an ex parte, in camera inspection to determine if the documents satisfied the legal requirements of a privilege. The Third Circuit opinion takes on unusual importance in the reconsideration of *Reynolds* because the three dissenting Supreme Court Justices—Associate Justices Black, Frankfurter, and Jackson—stated that they dissented essentially for the reason set forth in Judge Maris’s opinion.

Part V is entitled “The Supreme Court Proceedings.” This Part describes the brief submitted by the executive in its appeal to the Supreme Court in *Reynolds*, summarizes the discussion among the Justices at their weekly conference, and reviews Chief Justice Vinson’s majority opinion.

Part VI is entitled “The Faustian Bargain.” Part VI argues that although the Supreme Court’s decision in *Reynolds* seems to blend a concern for national security with an effort to provide a remedy to three widows, to check potential abusive executive authority, and to uphold the rule of law, the decision created a de facto absolute state secrets privilege that has resulted in a broad contemporary state secrets privilege which is almost always fatal to a plaintiff’s effort to secure relief. This Part maintains that Vinson’s seemingly Solomonic opinion masked the many considerations that formed the underpinnings of the opinion, and that those considerations constituted a betrayal by the court of its responsibility to uphold the rule of law, to provide a remedy to an injured party asserting a legal right, to fulfill its role in a scheme of government dependent upon checks and balances, and to set forth a candid statement of the reasons for its judgment. Thus, the Court’s decision in *Reynolds* constituted a Faustian bargain in which it put aside its constitutional responsibilities to avoid confrontations with the executive. This Part also contends that *Reynolds* is one of the pillars of the Age of Deference,³⁷ which expresses a juristic frame of mind that has placed the Court—quite ironically—in the middle of controversy which nibbles away at the underpinnings of its own legitimacy.

Part VII is entitled “One More Appeal.” This Part focuses on the effort during the years 2003–2006 by the descendants of the RCA engineers killed in the 1948 crash to reopen the 1953 judgment. They claimed that because the now declassified confidential Air Force documents in dispute in *Reynolds* contained no information relating to national security, the judgment in the case should be vacated because of fraud.³⁸ This Part argues that the defeat of the family members was the

³⁷ See *infra* Part VI.D.

³⁸ Independent Action for Relief from Judgment to Remedy Fraud on the Court at 2–3,

result of broad judicial deference towards the executive emblematic of the Age of Deference and not a consequence of the state secrets privilege or the doctrinal rules favoring the finality of judgments. Thus, in retrospect, the *Reynolds* litigation forms two bookends defining the Age of Deference—a 1953 decision that helped launch it and a 2006 decision that symbolizes its maturity.

I. NOT SAFE FOR FLIGHT

How did a lawsuit following a plane crash become the basis of a seminal Supreme Court national security decision? How did Air Force and Department of Justice officials end up misleading and deceiving the courts? Why did the Supreme Court protect the Air Force from public embarrassment? The answers to these questions are complex, and if the *Reynolds* case is to be understood, the factors that led to a host of other events must be isolated and analyzed. The first of such events involve the development of the B-29 bomber.

A. *Always Engine Fires*

The commencement of war in Europe in 1939 and the possibility of a Nazi conquest of Britain persuaded United States military authorities of the imperative need to develop a long-range bomber that might be capable of flying round-trip from the east coast of the United States to European targets.³⁹ When the Army—at the time the Air Force was part of the Army—sought a builder for a new bomber that had demanding specifications, Boeing had a leg up on its competitors because it had been working on the design of a long-range bomber since the early 1930s, and on September 6, 1940, the Army awarded a contract to Boeing for the construction of what became popularly known as the B-29 bomber—the Superfortress.⁴⁰ Although the B-29 was not used in the

Herring v. United States, No. 03-CV-5500-LDD (E.D. Pa. Sept. 10, 2004), 2005 U.S. S. Ct. Briefs LEXIS 2430, at *104, *105.

³⁹ B-29 Superfortress, Boeing, FIGHTER-PLANES.COM, <http://www.fighter-planes.com/info/b29.htm> (last visited Apr. 5, 2012).

⁴⁰ *Id.*; see also B-29 Device Ends Oxygen Mask Use, N.Y. TIMES, June 22, 1944, at 11 (reporting that “Boeing Aircraft produced the world’s first pressurized cabin plane in 1937,” a requirement for the B-29 development); B.K. Thorne, “Bugs” in B-29’s Date to War Tests; Power Plant Always Was Problem, N.Y. TIMES, Nov. 19, 1949, at 2 (“First conceived by Boeing engineers in 1936 as the plane that would inevitably replace the B-17.”); B-29 Superfortress, BOEING, <http://www.boeing.com/history/boeing/b29.html> (last visited Apr. 5, 2012) [hereinafter BOEING] (“Boeing submitted a prototype for the B-29 long-range heavy bomber to the army in 1939, before the United States entered World War II.”); Stephen Sherman, Boeing B-29 Superfortress, ACEPILOTS.COM, <http://acepilots.com/planes/b29.html> (last visited Apr. 5, 2012).

European theatre,⁴¹ the bomber was a major weapon in the war against Japan and was the plane selected to drop atomic bombs on Hiroshima and Nagasaki in August 1945.⁴²

The B-29 was a giant airplane, nearly twice as heavy as the then-heaviest bomber.⁴³ This Superfortress⁴⁴ was 99 feet long,⁴⁵ had a wing span of 141 feet and 3 inches,⁴⁶ was 29 feet and 7 inches off the ground at its highest point,⁴⁷ with a gross weight of 105,500 pounds,⁴⁸ had a maximum speed of 365 miles per hour,⁴⁹ could fly over 31,000 feet above the earth,⁵⁰ and could climb 900 feet per minute,⁵¹ and had a combat range of 5830 miles.⁵² The aircraft was powered by four 2200 horsepower Wright R-3350-23 radial engines⁵³ driving 16-foot, 7-inch four-bladed propellers.⁵⁴

In addition to being huge, the B-29 was one of the most sophisticated bombers in its time.⁵⁵ It featured such innovations as a pressurized cabin which allowed a twelve-person crew to work without heated flying suits, heavy boots, thick gloves, helmets, or oxygen masks;⁵⁶ “a central fire-control system”;⁵⁷ “four remotely controlled gun turrets mounting a total of twelve fifty-caliber machine guns”;⁵⁸ and a

⁴¹ *Weapons of Mass Destruction: B-29 Superfortress*, GLOBAL SECURITY, <http://www.globalsecurity.org/wmd/systems/b-29.htm> (last visited Apr. 5, 2012); see also Foster Hailey, *Superfortress Is Largest and Swiftest Bomber in the World; It Carries Heaviest Load*, N.Y. TIMES, June 16, 1944, at 4.

⁴² BOEING, *supra* note 40. It was a B-29 that dropped an atomic bomb on Hiroshima on August 6, 1945, and another B-29 that dropped the second atomic bomb on Nagasaki three days later. *Id.*

⁴³ *B-29 Superfortress*, Boeing, *supra* note 39.

⁴⁴ The B-29 was nicknamed “Superfortress.”

⁴⁵ BOEING, *supra* note 40.

⁴⁶ *Id.*

⁴⁷ *Boeing B-29 Superfortress Strategic Heavy Bomber*, MILITARY FACTORY, http://www.militaryfactory.com/aircraft/detail.asp?aircraft_id=82 (last visited Feb. 22, 2013); *B-29 Flight Procedures and Combat Crew Functioning*, ZENO’S WARBIRD VIDEOS, <http://www.zenoswarbirdvideos.com/B-29.html> (last visited Feb. 22, 2013).

⁴⁸ BOEING, *supra* note 40.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Nathan Twining, *General Twining’s History of the B-29*, <http://flgrube1.tripod.com/id26.html> (last visited Feb. 15, 2013).

⁵² BOEING, *supra* note 40.

⁵³ *Id.*

⁵⁴ Dep’t of the Air Force, *U.S. Air Force Fact Sheet: Boeing B-29*, NAT’L MUSEUM OF THE AIR FORCE (Feb. 4, 2011), <http://www.nationalmuseum.af.mil/factsheets/factsheet.asp?id=2527>.

⁵⁵ See 2 MARCELLE SIZE KNAACK, *POST-WORLD WAR II BOMBERS, 1945–1973*, at 482 (1988).

⁵⁶ GEOFFREY PERRET, *WINGED VICTORY: THE ARMY AIR FORCES IN WORLD WAR II* 448 (1993); see also *B-29 Device Ends Oxygen Mask Use*, *supra* note 40, at 11 (“Pressurized cabins—air-conditioned compartments in which superchargers maintain near-normal air pressure—make it possible for crews of the new B-29 Superfortresses to operate without oxygen masks at altitudes of 40,000 feet and higher, the War Department revealed today.”).

⁵⁷ *B-29 Superfortress*, ALLEXPerts.COM (on file with author).

⁵⁸ PERRET, *supra* note 56, at 448.

“twenty-millimeter high-velocity, long range cannon in the tail.”⁵⁹ It was “crammed with state-of-the-art electrical and electronic systems”⁶⁰ that permitted it to “navigate over vast expanses, under conditions of radio blackout and overcast skies, when celestial navigation was impossible.”⁶¹

The actual manufacturing of the B-29 was an immense and complex task involving a Boeing plant in Renton, Washington, and Wichita, Kansas, a Bell plant in Marietta, Georgia, a Martin plant in Omaha, Nebraska, and thousands of subcontractors.⁶² The complex design and manufacturing of the B-29 was made only more complicated by the military demand that Boeing begin the manufacturing of the B-29 within a few years of receiving the contract.⁶³

From the beginning, the B-29 was plagued with serious problems.⁶⁴ That was at least partially true because of the sheer sophistication and complexity of the design and because of the speed with which a developmental design became a final design and the basis for manufacturing.⁶⁵ More specifically, it was also true because the plane’s engine—the 2200 horsepower Wright R-3350, which had two compactly arranged rows of eighteen radial cylinders—gave rise to serious maintenance problems and at times catastrophic failures.⁶⁶ In order to

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ WILBUR H. MORRISON, *POINT OF NO RETURN: THE STORY OF THE TWENTIETH AIR FORCE* 18 (1979).

⁶² BOEING, *supra* note 40.

⁶³ See PERRET, *supra* note 56, at 448 (describing the pressure on Boeing to have B-29s ready to deploy by early 1944); see also KNAACK, *supra* note 55, at 481 (“The first experimental B-29 (Serial No. 41-002) made its initial flight on 21 September 1942; the second XB-29 (Serial No. 41-003), on 30 December.”); SIEGEL, *supra* note 3, at 15 (describing the rushed nature of testing B-29 prototypes to meet production demands from the Air Forces).

⁶⁴ See *B-29 Superfortress, Boeing*, *supra* note 39; see also KNAACK, *supra* note 55, at 482 (“Another special—and for a while greatly troublesome—feature of the B-29 was the brand new, but fire-prone, 18-cylinder Wright R-3350-23 engine.”).

⁶⁵ See generally KNAACK, *supra* note 55, at 484 (“The cumulative effect of the B-29’s many new features caused more than the normal quota of ‘bugs’ attendant to the production of a new plane. This was compounded by several factors. First, the B-29 was urgently needed. Secondly, troubles with the R-3350 engine hampered testing to the point that all flight operations were suspended until September 1943, even though production models of the already greatly modified B-29 kept on rolling off the line.” (footnote omitted)); see also *B-29 Superfortress, Boeing*, *supra* note 39 (“Because of [the B-29’s] highly advanced design, challenging requirements, and immense pressure for production, development was deeply troubled.”). Further, the development and manufacturing of the B-29 may have been further complicated by “defective parts” furnished for “use in Army and Navy planes by the Wright Aeronautical Corporation.” *Say Faulty Parts Went into Planes: Truman Committee Declares Army and Navy Craft Got “Defective” Items*, N.Y. TIMES, May 20, 1943, at 17; see also *Plane Defects Laid to a Wright Plant; Government Sues: Report of Truman Committee Accuses Factory in Ohio of Making Defective Engines*, N.Y. TIMES, July 11, 1943, at 1; *Truman Disputed by Curtiss-Wright*, N.Y. TIMES, July 11, 1943, at 24.

⁶⁶ See generally KNAACK, *supra* note 55, at 484. Knaack offers one indication of the troubles created by the engine: “By mid-1943, 2,000 engineering changes had been made to the R-3350 engine, first tested in early 1937. Approximately 500 of these changes required tooling

achieve an optimal weight-to-horsepower ratio, the crank-cases were made of light-weight but strong magnesium which was highly inflammable and made the engines a fire hazard.⁶⁷ The hazard was increased because the two rows of cylinders restricted the flow of cooling air, causing overheating and engine fires.⁶⁸ At that point, a fire not contained in the forward part of the engine would spread to the back of the engine, and an accessory housing manufactured of magnesium alloy would then often catch fire, producing such an intense heat that it burned through the firewall to the main wing span in no more than 90 seconds, resulting in catastrophic failure of the wing.⁶⁹

The propensity of the B-29 engine to catch fire came to public attention on February 18, 1943 when perhaps the nation's most celebrated test pilot, Edmund Turney Allen, died in the test flight of a B-29.⁷⁰ Allen was held in such high regard as a test pilot that insurance companies would refuse to cover test flights unless he was the pilot.⁷¹ On the 18th, Allen tested a #2 XB-29 that had completed only thirty-one flights, together totaling thirty-four hours and twenty-seven minutes.⁷² He took off at 12:09 PM, and eight minutes later, while climbing

modifications." *Id.* at 484 n.12; *see also* B-29 Superfortress, Boeing, *supra* note 39.

⁶⁷ SEGEL, *supra* note 3, at 15.

⁶⁸ *Id.*; *see also* WILBUR H. MORRISON, BIRDS FROM HELL: HISTORY OF THE B-29 4 (2001) ("Designed with two rows of 18 cylinders to develop 2,200 horsepower for take-off, [the R-3350 engines] had revealed an unpleasant characteristic. They were so compact, with front and rear rows of cylinders, that there was an insufficient flow of air around the cylinders to properly cool them. Several B-29s had been lost due to uncontrollable engine fires.").

⁶⁹ MORRISON, *supra* note 68, at 4-5. A *New York Times* report from November 1949, described the dynamic that produced frequent devastating engine fires as follows:

One "bug" in early B-29's that went to eastern theatres of war was that the throttle setting for cruising was "full-rich," usually used only for take-off and landing. "Full-rich" fuel mixture is much the same as pouring raw gasoline into the cylinders to burn. Great power is obtained from such a mixture but the engines run very hot. If the throttle setting is held for any length of time at "full-rich" the danger of fire is considerable.

Thorne, *supra* note 40, at 2; *see also* MORRISON, *supra* note 68, at 4-5 ("The most intense portion of an engine fire was caused by the magnesium accessory housing because this material burns at an extremely hot temperature. Once a fire started, if the extinguishers failed to contain it in the forward section of the engine, it was impossible to stop. After the housing ignited, the fire usually burned through the engine's firewall in to the wing, causing it to break off. From the time the housing caught fire, a crew had one-and-a-half minutes to bail out.").

⁷⁰ *See, e.g., Army & Navy: Test Pilot No. 1*, TIME, Mar. 1, 1943, available at <http://www.time.com/time/magazine/article/0,9171,932958-1,00.html>; *see also* B.K. Thorne, *supra* note 69, at 2 ("The famous test pilot Edmund T. Allen and thirteen other persons were killed on Feb. 18, 1943, when one of the original B-29's with at least one engine afire, crashed into a packing house in Seattle."); *see also* KNAACK, *supra* note 55, at 481-82; CURTIS E. LEMAY & BILL YENNE, SUPERFORTRESS: THE STORY OF THE B-29 AND AMERICAN AIR POWER 60-64 (1988).

⁷¹ *See Army & Navy: Test Pilot No. 1*, *supra* note 70.

⁷² Bob Robbins, *Eddie Allen and the B-29*, in THE GLOBAL TWENTIETH 34-35 (Chester Marshall et al. eds., 1988).

through 5000 feet, a fire was reported in the number one engine.⁷³ Allen reacted by cutting the mixture and fuel to engine number one, feathering the propeller, closing the cowl flaps, and discharging a fire extinguisher.⁷⁴ Because the fire appeared to be extinguished, Allen elected to follow a normal landing.⁷⁵ But apparently the fire broke out again, causing Allen to radio in that he was “coming in with a wing on fire” and prompting a crew member to state: “Allen better get this thing down in a hurry. The wing spar is burning badly.”⁷⁶ Allen’s plane never made it to the runway. The crash killed all eleven crew members and nineteen workers in the nearby Frye meat-packing plant.⁷⁷ Given the subsequent history of the B-29 bomber, it is evident that the story of Allen’s fatal test flight in a B-29 is emblematic of the B-29.⁷⁸

The B-29 problems stemmed from demanding specifications, a rushed design, the fast-paced manufacturing, and the abbreviated testing period before the plane was rushed into operations. As problems announced themselves, “fixes” were tried, and some were more successful than others.⁷⁹ But B-29 engine fires persisted despite the

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*; see also KNAACK, *supra* note 55, at 482 (referring to the crash that killed Edmund T. Allen, the encyclopedia states: “The accident, caused by fire which spread throughout the plane, was not attributed to any mechanical failure. Leakage of gasoline and a backfire were the likely factors.”).

⁷⁷ See KNAACK, *supra* note 55, at 482.

⁷⁸ See, e.g., *17 Die as Bomber Burns in Take-Off*, N.Y. TIMES, Aug. 21, 1948, at 26 (“[T]he plane was about to take off when one port engine caught fire. The pilot was forced to feather his propellers and the plane lost speed. It had barely left the ground. Just as it passed the edge of the runway it banked to the left, the left wing hit the ground and the plane turned over and burst into flames.”); *Army Crash Kills 11 in New Mexico*, N.Y. TIMES, Jan. 28, 1947, at 3 (“[O]ne of the engines caught fire before the huge craft cleared the field.”); *B-29 Falls in West; 15 Leap, 14 Safe*, N.Y. TIMES, Aug. 31, 1949, at 1 (“Fifteen airmen parachuted to safety when a B-29 Superfortress crashed five miles southeast of Wellpinit, Wash. One man was missing. Spokane Air Force officials announced the entire crew of fifteen bailed out after the bomber’s number four engine burst into flames.”); *B-29 Pacific Crash Kills 2; Six Hunted*, N.Y. TIMES, Oct. 11, 1945, at 2 (“The B-29 took off from Okinawa on Oct. 7. According to a radio message received at headquarters of the United States Strategic Air Forces at Guam, engine trouble later developed and two engines caught fire.”); *Parachute Burned Open*, N.Y. TIMES, Apr. 2, 1945, at 4 (reporting that “Harold G. Vovra . . . was in a Superfortress . . . when an engine caught fire. The B-29 lurched violently, his back was broken and he was tossed out.”); *Ten of B-29’s Crew Rescued from Sea*, N.Y. TIMES, May 16, 1945, at 3 (“The B-29 . . . had started to turn back . . . when the right outboard engine started to shoot hot metal Less than thirty seconds later the plane exploded ‘Fire shot up, lighting the whole sky for miles around. There was a terrific explosion, then it was quiet.’”); *U.S. Grounds B-29s as Another Crash Kills 5 in Florida*, N.Y. TIMES, Nov. 19, 1949, at 1 [hereinafter *U.S. Grounds B-29s*]; *Seeking Lost B-29, Another Crashes*, N.Y. TIMES, Nov. 19, 1949, at 2 (“A B-29 off to hunt for another B-29 missing in the Atlantic crashed into the mud of Tampa Bay today, killing five of the nine-man crew The big plane in today’s crash was five minutes off the ground and barely 1,000 feet up when one of the motors developed trouble. Smoke poured out, then flames.”).

⁷⁹ One of the “fixes” was set out in “Technical Orders 01-20EJ-177 and 01-20EJ-179, dated 1 May 1947 These Technical Orders provide[d] for changes in the exhaust manifold

“fixes” and eventually resulted in the development of heat shields designed to prevent excessive heat which were, as of May 1, 1947, (seventeen months before the crash that resulted in the *Reynolds* case) required for every engine of every B-29.⁸⁰

B. Bomber #866

The particular B-29 bomber that crashed over Waycross, Georgia, on October 6, 1948, Bomber #866, had a history of problems that impaired its safety.⁸¹ A full sixteen months before the crash, a maintenance report dated June 19, 1947, stated that the plane was out of compliance with a technical order requiring heat shields designed to deter engine fires from spreading.⁸² The report read: “TO 01-20EJ-177 partially c/w. Exhaust manifold installed. Shields not installed,”⁸³ which meant that the technical order requiring heat shields to prevent engine fires was only partially complied with.⁸⁴ Five days later, Bomber #866 went air borne without the heat shields and was forced, a mere twenty minutes after take-off, to return to Wright Field in Ohio because of a malfunction.⁸⁵ At that point the plane was designated unfit for flight because of trouble in all four engines.⁸⁶ Nonetheless, the next day the plane departed for Boca Raton, Florida, where it then required approximately six weeks of maintenance repairs before the plane was considered safe again.⁸⁷

assemblies for the purpose of eliminating a definite fire hazard.” Independent Action for Relief from Judgment to Remedy Fraud on the Court, Exhibit J, at 103, 110, *Herring v. United States*, No. 03-cv-05500 (E.D. Pa. 2004) ECF No.1, *aff’d*, 424 F.3d 384 (3d Cir. 2005), *cert. denied*, 547 U.S. 1123 (2006), 2005 U.S. S. Ct. Briefs LEXIS 2430, at *198, *205-06 (providing JOHN W. PERSONS, REPORT OF SPECIAL INVESTIGATION OF AIRCRAFT ACCIDENT INVOLVING TB-29-100XX NO. 45-21866 (1950), or the Persons Report, as an exhibit appended to the complaint). As it turned out B-29 bomber #866 was not in compliance with these two technical orders. *Id.*

⁸⁰ See *id.* at 110, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *205-06. (noting that May 1, 1947 was the dates the requirements took effect).

⁸¹ *Id.* at 115, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *212-13.

⁸² SIEGEL, *supra* note 3, at 17-18.

⁸³ *Id.* at 17.

⁸⁴ *Id.* at 17-18.

⁸⁵ *Id.* at 18.

⁸⁶ *Id.*

⁸⁷ *Id.* In addition to engine problems, Bomber #866 had such other persistent problems such as fuel leaks and vibration in the tail section that for about one half the time during the six months prior to the crash the plane had been out of commission, and not safe for flight for more than fourteen consecutive days at a time. *Id.* at 34. Indeed, just five days before plane #866 exploded mid-air, it was “listed as being on ‘red-cross’—grounded, unflyable.” *Id.* Moreover, the Air Force’s investigatory report into the crash of Bomber #866 confirmed that the bomber “required more than the normal amount of maintenance,” in that the “aircraft was in commission 48.7% of the time since 1 April 1948, as compared to the Air Force average of 57% of B-29 aircraft in commission for a similar 6-month period.” Independent Action for Relief from Judgment to Remedy Fraud on the Court, *supra* note 79, Exhibit J, at 103, 115, 2005 U.S.

On the day of the crash, Bomber #866 was testing what the Supreme Court termed “secret electronic equipment”⁸⁸ that the Air Force was developing with the assistance of RCA and the Franklin Institute of Technology.⁸⁹ The purpose of the project, which was termed project “Banshee,” was, according to RCA Executive Vice President Frank Folsom, the development of a “pilotless aircraft guidance system”⁹⁰ that would permit the flying via remote control of a pilotless plane across great distances to drop bombs on a target.⁹¹ Although the government took the position during the *Reynolds* litigation that the very idea of the early drone system was itself a secret,⁹² during the years just prior to the crash there had been press reports on the development of this weapon.⁹³

The day Bomber #866 crashed, it left the Robins Field runway at 1:28 PM carrying eight Air Force crew members, five civilian electronic experts, and secret military electronic equipment.⁹⁴ The plane climbed without incident until an altitude of about 18,500 feet was attained,⁹⁵ at

S. Ct. Briefs LEXIS 2430, at *212–13 (Persons Report). Thus, Bomber #866 had a track record that made it stand out as a plane that had above-average mechanical problems even by comparison to other B-29 planes that had well known systemic problems.

⁸⁸ *United States v. Reynolds*, 345 U.S. 1, 3 (1953).

⁸⁹ Letter from Frank M. Folsom, Executive Vice President, RCA, to Hoyt S. Vandenberg, Commanding Gen., U.S. Air Force (Nov. 22, 1948) (on file with author) [hereinafter Folsom Letter].

⁹⁰ *Id.*

⁹¹ See Anthony Leviero, *Robot-Piloted Plane Makes Safe Crossing of Atlantic*, N.Y. TIMES, Sept. 23, 1947, at 1; *Army Tells Secret of Its Robot Pilot*, N.Y. TIMES, Sept. 21, 1943, at 25.

⁹² See Independent Action for Relief from Judgment to Remedy Fraud on the Court, *supra* note 79, Exhibit C, at 28, 30, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *129, *131 (Claim of Privilege by the Secretary of the Airforce (Finletter Statement), *Reynolds v. United States*, Civil Action No. 10142) (objecting to the production of the crash investigation report, in part, on the grounds that the aircraft and its personnel “were engaged in a confidential mission of the Air Force,” and that the plane “carried confidential equipment on board”).

⁹³ See “*Drone*” *Plane Grounded*, N.Y. TIMES, Jan. 14, 1947, at 11; see also Leviero, *supra* note 91, at 1 (“A Douglas C-45 Skymaster with a mechanical brain landed without human aid near London today after a robot directed hop from Newfoundland. The revolutionary flight across the Atlantic, effected by the push of the button, was hailed by Air Force leaders as a feat with vast new possibilities for war and peace.”). As early as 1943, the New York Times reported in a lead paragraph: “Details of an electronically controlled automatic pilot, the existence of which was not known heretofore outside of military circles, and which is regarded as ‘one of America’s best-kept military secrets,’ were disclosed yesterday with Army approval.” *Army Tells Secret of Its Robot Plane*, *supra* note 41, at 25.

⁹⁴ SIEGEL, *supra* note 3, at 36. According to Frank M. Folsom, Executive Vice President of RCA (which directly employed two of the three civilian engineers killed in the crash, and which indirectly employed the third engineer in that he was employed by the Franklin Institute, a RCA subcontractor), RCA had been under contract since 1946 with the Air Force to construct “several development models of a pilotless aircraft guidance system called Banshee.” This experimental equipment was installed in B-29 aircraft and first tested in the spring of 1947 at Boca Raton, Florida, before being transferred to the Warner Robbins Field in Macon, Georgia. Folsom Letter, *supra* note 89.

⁹⁵ Independent Action for Relief from Judgment to Remedy Fraud on the Court, *supra* note 79, Exhibit J, at 103, 132, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *232 (testimony of Herbert W.

which point the manifold pressure on number one engine “dropped to 20 inches [of mercury].”⁹⁶ The efforts of the plane’s engineer to restore the manifold pressure failed, and before the “engine was in a full feathered position,”⁹⁷ a fire broke out in engine one.⁹⁸ The fire extinguishers “helped only momentarily”⁹⁹ before the fire “engulf[ed] the entire engine and the wing area immediately to the rear of No.1 engine.”¹⁰⁰ The fire did not spread to the other three engines.¹⁰¹

In his attempt to feather engine number one, the pilot “inadvertently hit the feather switch on No. 4 engine,”¹⁰² and although the co-pilot tried to un-feather engine number four,¹⁰³ the propeller blades for engine four were still feathered when it was examined after the crash.¹⁰⁴ With two engines out, the pilot opened the bomb bay doors and according to the co-pilot and the engineer the plane “went into a spin to the left immediately after the doors were opened,”¹⁰⁵ and the centrifugal force caused by the spinning “greatly restricted” the movement of the plane’s personnel who had been alerted to abandon the aircraft.¹⁰⁶ The plane disintegrated during its spinning,¹⁰⁷ and “[s]everal witnesses on the ground reported hearing a definite explosion when the B-29 was at what they estimated to be 15,000 feet and they further reported that the left wing came off at the same time.”¹⁰⁸

There were only four survivors.¹⁰⁹ The left scanner, Sergeant Walter J. Peny, and a civilian engineer, Eugene Meckler, safely jumped from the rear of the compartment through the bomb bay, and copilot Captain Moore, and engineer, Sergeant Earl E. Murrhee, escaped

Moore, Jr., Captain, U.S. Air Force).

⁹⁶ Independent Action for Relief from Judgment to Remedy Fraud on the Court, *supra* note 79, Exhibit J, at 103, 110, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *206 (Persons Report).

⁹⁷ *Id.* at 111, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *207. An engine is “feathered” when a propeller’s rotation is stopped and the propeller blades are parallel to the wind. LAURA HILLENBRAND, UNBROKEN: A WORLD WAR II STORY OF SURVIVAL, RESILIENCE, AND REDEMPTION 117 (2010).

⁹⁸ Independent Action for Relief from Judgment to Remedy Fraud on the Court, *supra* note 79, Exhibit J, at 103, 111, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *207 (Persons Report).

⁹⁹ *Id.* at 111, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *207.

¹⁰⁰ *Id.* at 111, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *207.

¹⁰¹ *Id.* at 112, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *208.

¹⁰² *Id.* at 111, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *207.

¹⁰³ *Id.* at 133, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *232 (testimony of Herbert W. Moore, Jr., Captain, U.S. Air Force).

¹⁰⁴ *Id.* at 112, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *208 (Persons Report).

¹⁰⁵ *Id.* at 111, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *207.

¹⁰⁶ *Id.* at 112, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *208.

¹⁰⁷ *Id.* at 115, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *212.

¹⁰⁸ *Id.* at 111, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *207–08.

¹⁰⁹ *Id.* at 127, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *225 (Memorandum from Murl Estes, Lieutenant Colonel, Deputy Chief, Flying Safety Division, U.S. Air Force, to Commanding General, Strategic Air Command (Sept. 15, 1950) (regarding Summary of B-29 Aircraft Accident)).

through the forward compartment via the nose wheel hatch.¹¹⁰ Three others—Technical Sergeant Melvin T. Walker, Lieutenant Lawrence N. Pence, Jr., and A. Palya—were found free of the plane but “[a]pparently all three persons left the aircraft too late to successfully utilize their parachutes.”¹¹¹

The day following the crash, The Waycross Journal-Herald ran an eight-column banner headline across its front page: “NINE KILLED AS B-29 EXPLODES OVER CITY.”¹¹² The report’s opening paragraph read: “Two fires in one engine and failure of another preceded a ‘thunder clap’ blast that ripped apart a B-29 Superfortress bomber over Waycross.”¹¹³ The next paragraph stated that the “craft exploded at an altitude of nearly twenty thousand feet,” and two paragraphs later the report stated that the “plane was on a special mission testing secret electronic equipment, scheduled to land ‘somewhere in Florida.’”¹¹⁴ A public relations officer at the air base “told reporters that the bomber was on a special research mission to test secret electronic equipment,”¹¹⁵ and one historian of the crash writes that the newspaper reports published within days of the crash “spoke openly about the plane’s secret equipment and the civilians on board,” who were employed by either the RCA in Camden, New Jersey, or the Franklin Institute of Technology in Philadelphia, Pennsylvania, and who were hired “to assist Air Force Personnel with the development and testing of the electronic equipment.”¹¹⁶

C. First Investigation

The Air Force conducted two investigations of the crash of Bomber #866. The first was designed to be completely ineffective in identifying the cause of the crash, and the second, forced upon the Air Force by a corporate executive, did explicate the causes of the crash but was promptly classified and kept secret.

The first Air Force investigation into the crash was commenced within days of the incident. It consisted of Air Force interviews of the three surviving servicemen and an investigation conducted by a five-

¹¹⁰ *Id.* at 112, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *209 (Persons Report).

¹¹¹ *Id.* at 113, 2005 U.S. S. Ct. Briefs LEXIS 2430, at 209.

¹¹² *NINE KILLED AS B-29 EXPLODES OVER CITY: Four Men Leap to Safety; Plane on Special Mission*, WAYCROSS J.-HERALD, Oct. 7, 1948, at 1. For a similar story covering the crash, see *Survivors Describe Plane Wreck Over Waycross Costing 9 Lives*, ATLANTA J., Oct. 7, 1948, at 4.

¹¹³ *NINE KILLED AS B-29 EXPLODES OVER CITY*, *supra* note 112, at 1.

¹¹⁴ *Id.*

¹¹⁵ FISHER, *supra* note 2, at 1–2.

¹¹⁶ Independent Action for Relief from Judgment to Remedy Fraud on the Court, ¶ 9, at 5, *Herring v. United States*, No. Civ.A.03-CV-5500-LDD, 2004 WL 2040272 (Sept. 10, 2004).

person panel. The interviews of the servicemen were conducted by Major Robert J.D. Johnson from the inspector general's office at Langley Air Force Base in Virginia on October 11, 1948.¹¹⁷ He interviewed Captain Herbert W. Moore, the plane's copilot,¹¹⁸ Technical Sergeant

¹¹⁷ See Independent Action for Relief from Judgment to Remedy Fraud on the Court, *supra* note 79, Exhibit J, at 103, 129, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *227 (testimony of Herbert W. Moore, Jr., Captain, U.S. Air Force); *id.* at 139, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *239 (testimony of Earl W. Murrhee, Technical Sergeant, U.S. Air Force); *id.* at 150, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *250–51 (testimony of Walter J. Peny, Staff Sergeant, U.S. Air Force).

¹¹⁸ Captain Herbert W. Moore, the plane's copilot, was assigned to the 3150th Electronics Squadron, which was intimately involved with the testing of the Banshee secret electronic equipment. *See id.*, at 129, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *228 (testimony of Herbert W. Moore, Jr., Captain, U.S. Air Force). Johnson asked Moore thirty-two questions about what he knew about the flight and when he knew it. *Id.* at 129–38, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *229–39. Moore testified that the flight was initially scheduled for 8:00 AM on October 6, but that a faulty gasket in engine number four delayed the flight until the afternoon. *Id.* at 131, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *229. The Captain stated that he did not know if he had previously flown with the crew, and although he conceded that the 3150th Electronics Squadron's policy required "established crews," the squadron was unable to "keep to that because of shortage of primarily officer personnel." *Id.* at 130, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *228–29. Moore also stated that he did not attend any briefing of the crew or passengers regarding emergency procedures, even though such briefings were required by Air Forces policies. *Id.* at 131, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *229. Moore described the take-off as "normal" and, except for the fact that engines one, two and four were "running a little hot" and that the manifold pressure fell to forty inches during the climb, there were no reports of "trouble or malfunction of the engines until we reached about 18,500 or 19,000 feet." *Id.* at 131–32, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *230–31. At that point, the manifold pressure in engine one was twenty-three inches, and after climbing to 20,000 feet and efforts to increase the manifold pressure failed, Captain Erwin said he would feather engine one, but instead of feathering engine one, Captain Erwin accidentally pushed the switch to feather engine number four. *Id.* at 132–33, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *232. Moore testified that he almost immediately pressed the switch to un-feather engine four. *Id.* at 133, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *232. But given that the engine was feathered when inspected after the crash, *see id.* at 112, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *208 (Persons Report), Moore's effort to correct to un-feather engine four was ineffective. During this series of events, Moore stated that Captain Erwin "advised everybody to have their chutes on." *Id.* at 132, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *231 (testimony of Herbert W. Moore, Jr., Captain, U.S. Air Force). Moore then stated that Captain Erwin "put the plane in a descending attitude," "ordered the cabin pressure released," and directed the "left scanner to keep an eye on that engine and watch for a possible outbreak of fire." *Id.* at 133, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *233. Moore testified that the scanner immediately reported smoke coming from engine number one, and after a failed effort to extinguish the fire failed, the fire spread "rapidly." *Id.* at 133, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *233. Moore stated that "[s]omebody then said to open the hatch leading to the bomb bay," and after some delay the hatch was opened. *Id.* at 133, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *233–34. At the point Captain Erwin asked "what's wrong with number two [engine]," and, as Captain Moore stated, "[i]t must have been at this time that the airplane was thrown into the spin." *Id.* at 134, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *234. Moore stated that he "pulled" himself "to the nose-wheel escape hatch" and after he "kicked" a person lying face-up in the well "on through," he "didn't hesitate and went on through after the person that I had pushed out," and he did that even though Moore stated that he never heard Captain Erwin give an "order to abandon the aircraft." *Id.* at 134, 136, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *234–35, *237. As Moore stated with reference to his parachuting from the plane: "I just didn't see what else could be done except to make for it." *Id.* at 137, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *237.

Earl W. Murrhee, the flight engineer,¹¹⁹ and Staff Sergeant Walter J. Peny, the left scanner.¹²⁰ Each witness took an oath and was advised of his rights under the 24th Article of War.¹²¹

Johnson's examination of the three servicemen shed very little light on the causes of the crash. Therefore, Johnson did not question Moore,

¹¹⁹ See *id.* at 139–49, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *239–50 (testimony of Earl W. Murrhee, Technical Sergeant, U.S. Air Force). Murrhee had about five hundred hours flying time on a B-29, see *id.* at 140, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *240, or about five times the flying time of copilot Moore, who estimated his own B-29 flying time at one hundred hours at the time of the crash, see *id.* at 129, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *228 (testimony of Herbert W. Moore, Jr., Captain, U.S. Air Force). Murrhee stated that the morning flight on October 6 was canceled because the civilian engineers did not arrive at the field, that the Air Force personnel did not receive a briefing, as far as he knew, but that the Air Force crew members were “well-informed” about emergency procedures. *Id.* at 140–41, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *240–41 (testimony of Earl W. Murrhee, Technical Sergeant, U.S. Air Force). He also stated that he had “nothing to do” with briefing the civilian engineers, but that he thought at least two of the engineers—Reynolds and Payla—had been briefed in the past because they had been assigned to “our squadron all the time.” *Id.* at 141, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *241. Murrhee stated that no mechanical problems were noticed until the plane reached about 20,000 feet, when the manifold pressure in engine number one dropped and he was unable to restore it. *Id.* at 142, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *242. Captain Erwin feathered engine number one—Murrhee stated that he was unaware that Captain Erwin feathered engine number four inadvertently—and as that was occurring, a fire began in engine number one, which he said he saw. *Id.* at 143, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *243–44. Captain Erwin ordered everyone to “stand by to abandon ship,” and within a short moment, the bomb bay doors opened, the plane was thrown “violently to the right,” and someone—he did not know who—gave the order to abandon ship. *Id.* at 143, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *244. At that moment, Murrhee stated that he was thrown into the hatch, and that later Captain Moore told him that he, Captain Moore, kicked him, Murrhee, out of the hatch and he parachuted safely. *Id.* at 143, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *244. Murrhee also testified that while he was in the air the plane exploded. *Id.* at 143, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *244.

¹²⁰ See *id.* at 150–54, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *250–55 (testimony of Walter J. Peny, Staff Sergeant, U.S. Air Force). Peny had flown about two hundred hours on a B-29 and had previously flown with copilot Moore, but not with Captain Erwin. *Id.* at 150–51, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *251. Peny stated that he had not been briefed about emergency procedures before the flight and that he was not aware of the civilians being briefed. *Id.* at 151, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *251–52. He did state that he had heard the civilian engineer who safely parachuted state that “he didn’t even know how to get out of a B-29.” *Id.* at 151, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *252. Peny testified that the fire in engine number one followed the loss of engine power. He said that the fire extinguishers put the fire out for “five or six seconds,” and then, the fire “broke out completely over number one engine.” *Id.* at 152, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *253. At that point Captain Erwin notified the crew to put on their parachutes and to prepare to bail out, but Peny stated that he never heard an order to abandon the plane. *Id.* at 152–53, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *253–54. At that moment, the bomb bay doors opened, the plane engineer reported that engine number two was losing power, and “the whole wing was enveloped in a flame and the ship went into a spin.” *Id.* at 152, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *253. Peny unfastened his buckle, lunged for the escape hatch to the bomb bay, and then “blacked out momentarily.” *Id.* at 152, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *253. He said “the next thing [he] remember[ed] [was] going through the hatch,” pulling the rip cord, having his arm caught in the chute line, and landing. *Id.* at 152–53, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *254. As he was gliding down, Peny said that he heard a “puff in the skies,” and saw “[a] piece of metal” fly by his parachute. *Id.* at 153, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *254.

¹²¹ Articles of War of 1806 art. 24, 2 Stat. 359, 362 (repealed 1956).

Murrhee, and Peny about the cause of the fire in engine number one or its spread to the wing. He did not inquire into the plane's spinning and subsequent explosion and crash.¹²² He did not inquire into whether the plane's engines had the heat shields intended to retard the possibility of engine fires.¹²³ Apart from the pilot error that resulted in the inadvertent feathering of engine number four, Johnson did not ask about the timing of the opening of the bomb bay doors and the failure of the pilot to quickly take the plane to a lower altitude which might have given all the passengers more time to escape.¹²⁴ Nor did Johnson ask the three surviving servicemen as to why they did not take any steps to assist the civilians' escape.¹²⁵ In the course of the examinations, not one of the three servicemen discussed or mentioned the secret electronic equipment or any other matter that might conceivably constitute a military secret.

Within days of the questioning of the three surviving servicemen, a five-man investigatory team based at the Warner Robins air base interviewed witnesses on the ground, surveyed the damage to the plane, noted where the bodies were found, and collected reports concerning the plane's maintenance and flight plan.¹²⁶ But the team did not "so much investigate the accident as chronicle it,"¹²⁷ and its report failed to state that the civilian engineers were not briefed on emergency procedures, to explain why the plane went into a spin, to point out that the plane lacked heat shields and was thus out of compliance with a technical order, and failed to speculate about the cause of the fire.¹²⁸

The Air Force's initial, sharply curtailed inquiry into the crash was ineffective.¹²⁹ Indeed, from all of the evidence, it seems that the Air Force initially had had no interest in finding out the real causes of the crash or learning any information about the crash that would embarrass the Air Force, undermine its public standing, stir up any opposition to its various programs that required congressional approval and funding, or cause the private corporations retained by the Air Force as consultants to lose any trust or confidence in the safety conditions of

¹²² See Independent Action for Relief from Judgment to Remedy Fraud on the Court, *supra* note 79, Exhibit J, at 103, 129–38, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *239–49 (testimony of Herbert W. Moore, Jr., Captain, U.S. Air Force); *id.* 150–54, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *250–55 (testimony of Walter J. Peny, Staff Sergeant, U.S. Air Force).

¹²³ See *supra* note 122.

¹²⁴ See *id.*

¹²⁵ See *id.*

¹²⁶ SIEGEL, *supra* note 3, at 62.

¹²⁷ *Id.* Because I do not have a copy of this first investigatory report, I rely upon Siegel's description of the report.

¹²⁸ *Id.* at 63.

¹²⁹ The limited nature of the initial Air Force inquiry is apparent when it is compared to the Air Force's second investigation. See *infra* Part I.E.

Air Force experiments.¹³⁰ In short, the Air Force's first reaction to the crash was to cover up the facts and circumstances surrounding the crash so as to avoid any public embarrassment or humiliation that might result from a searching investigation.

D. *Frank M. Folsom's Letter*

The Air Force's attempted cover-up of its own negligence and malfeasance would have constituted the last word on the crash of Bomber #866 but for a letter dated November 22, 1948, written by Frank M. Folsom, RCA's Executive Vice President, to General Hoyt S. Vandenberg, Commanding General of the United States Air Force.¹³¹ Folsom was no ordinary high-ranking business executive in a corporation doing business with the Defense Department. According to one reporter, Folsom was "exceptionally influential and well connected," he "moved across party lines" to build working relations with important Democrats and Republicans, and had "many close friends" in business, government and the military.¹³² In fact, Folsom's connections included President Truman with whom he had one private, "OFF THE RECORD" meeting,¹³³ and to whom he sent many gifts such as a "booklet of Prayers and Poems," a "fine notebook," and music "recordings," all acknowledged in letters to Folsom signed by the President.¹³⁴ Because two of the civilian engineers killed in the crash of Bomber #866 were employees of RCA, and a third was an employee of RCA's subcontractor, the Franklin Institute of Technology, Folsom wanted to know why the bomber crashed.¹³⁵

Folsom, who had had some experience serving in the higher ranks of the armed services, having been a chief procurement officer for the Navy during World War II,¹³⁶ informed Vandenberg that his information about the crash was not "authoritative information from the Air Force regarding the cause of the accident," but was based only

¹³⁰ For a discussion of the pressures prompting the Air Force not only to delimit its investigation in the crash of Bomber #866, but to submit later in time two false responses to plaintiffs' interrogatories, see *infra* Part II.C.

¹³¹ See Folsom Letter, *supra* note 89.

¹³² SIEGEL, *supra* note 3, at 67.

¹³³ The meeting was on August 25, 1950, at 11:50 AM. Daily Presidential Appointments, Friday, August 25, 1950, HARRY S. TRUMAN LIBRARY & MUSEUM, <http://www.trumanlibrary.org/calendar/main.php?currYear=1950&currMonth=8&currDay=25> (last visited Mar. 6, 2013).

¹³⁴ Letters from Harry S. Truman, President of the United States, to Frank M. Folsom, Executive Vice President, RCA, (on file in President's Personal File, Box 563 with the President Harry S. Truman Library).

¹³⁵ See Folsom Letter, *supra* note 89, at 4 (requesting a copy of the official Air Force investigation report).

¹³⁶ SIEGEL, *supra* note 3, at 68.

on “informal information and from statements of one survivor.”¹³⁷ Nonetheless, Folsom’s letter makes it evident that he was exceptionally well-informed about the safety conditions of Bomber #866, Air Force policies, the crew members who flew #866 on October 6, and specific events leading up to the engine fire and the explosion.¹³⁸ Thus, Folsom wrote: “[I]t appears . . . that one of the engines caught fire, followed shortly by a loss of power in a second engine. At about the same time the plane went into a spin or tight spiral, and the resulting centrifugal force prevented escape for some time.”¹³⁹ Folsom charged that “[t]he civilian engineers had received no preflight briefing in emergency bailout procedures and therefore probably did not make the best use of the opportunities available to them.”¹⁴⁰

Folsom was also well informed about the dismal maintenance record of Bomber #866. Thus, Folsom did not mince his words. He wrote that “this particular airplane had a long history of unsatisfactory performance,” and that “[d]uring the time the flight test program was being conducted at Boca Raton and at Warner Robins Air Base,” Bomber #866 “was unavailable for flight tests much of the time because of mechanical difficulties.”¹⁴¹ Although Folsom conceded that RCA had “no evidence that the plane was in an unsafe condition on its last flight,” he made it clear that, based on the information he had, “this particular airplane had never, to our knowledge, performed satisfactorily for a period as long as one month.”¹⁴²

With regard to the flight crew aboard Bomber #866 the day of the crash, Folsom accepted that the individual crew members were qualified, but insisted that “these men were not accustomed to flying together and therefore could not be expected to act as a team, particularly in an emergency.”¹⁴³ Indeed, because the crew had not previously flown together, Folsom wrote Vandenberg that “it is probable that there was some confusion among the pilot, copilot, and flight engineer which delayed actions that might have allowed more time for bailing out,” and resulted in more survivors.¹⁴⁴ The probability of “confusion” in the cockpit, he speculated, may have been the reason why the flight crew did not throttle back the engines and put “the plane into a glide,” actions which would have allowed “ample time for more, if not all, of those aboard to bail out.”¹⁴⁵

¹³⁷ Folsom Letter, *supra* note 89, at 1.

¹³⁸ *See id.*

¹³⁹ *Id.* at 1.

¹⁴⁰ *Id.* at 1–2.

¹⁴¹ *Id.* at 2.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

Folsom's letter to Vandenberg listed several changes RCA wanted made if its engineers were to continue to participate "in the future in Air Force flight test programs."¹⁴⁶ Folsom wanted "additional insurance and flight pay" from the Air Force for RCA employees;¹⁴⁷ flight testing conducted in "relatively safe" and "relatively new" aircraft without "a long history of maintenance difficulties";¹⁴⁸ the contractor to have control of the "flight test aircraft" or in the alternative strict adherence by the Air Force to its own regulations;¹⁴⁹ the assignment of only the "highest grade" flight and maintenance crews to experimental flights, as compared to the variable quality of such crews in the past;¹⁵⁰ and the flight crew assigned to an experimental flight should have "flown together long enough to act as a team."¹⁵¹

Folsom did not trust the Air Force to implement the recommendations he set forth in the letter.¹⁵² Therefore, he stated that the RCA engineers would be reassured about the safety of the planes used for experimental testing if the Air Force permitted "a frank and open disclosure of all facts regarding the maintenance and operation of airplanes for experimental projects," that RCA be given the "privilege of having an independent inspector inspect the aircraft from time to time," and that the inspector be permitted to report to RCA "regarding the quality of the maintenance and the operation of the aircraft."¹⁵³ Folsom also requested that the Air Force promptly provide RCA with the Air Force's official investigation report into any crash.¹⁵⁴ Lastly, Folsom informed Vandenberg that the recommendations set forth in his letter represented not only the views of RCA, but the attitude of other consulting corporations which worked on experimental projects with the Air Force, and that pending a satisfactory response from the Air Force to his letter, RCA's "development programs" will be "slowed considerably."¹⁵⁵

E. *Second Air Force Investigation*

Folsom's letter to General Vandenberg was widely circulated among the Air Force's hierarchy and caused the Air Force to reopen the

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 3.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* ("[N]othing arouses fear and suspicion as much as the appearance that some of the information is being withheld.").

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 3-4.

investigation into the crash of Bomber #866.¹⁵⁶ By early December 1948, the Air Force's inspector general, Major General Hugh J. Knerr, ordered a new investigation and assigned the task to the Flying Safety Division, part of the Office of Air Inspector.¹⁵⁷ The completed investigation report was dated January 3, 1949, signed by Colonel John W. Persons, Chief of the Flying Safety Division, distributed within the Air Force on January 6, and marked "Secret."¹⁵⁸

The report stated that the flight's purpose was a "research and development mission" for the purpose of "completing an electronics project."¹⁵⁹ It found that when the plane reached 18,500 feet "the manifold pressure on No.1 engine dropped to about 20 inches," and that the effort to "bring it back by the use of the manual emergency system and by replacing the turbo amplifier was ineffective so the engine was feathered."¹⁶⁰ At that point, the pilot advised the crew to put on the parachutes, and during the feathering of No.1 engine, "a fire broke out that engulfed the aft half of the engine and the flames extended past the left scanner's window."¹⁶¹ Efforts "to extinguish the fire by use of the engine fire extinguishers were to no avail."¹⁶² When the bomb bay doors were opened the plane went into a "spin to the left" which was so violent that only four of the plane's occupants were able to escape.¹⁶³

The report further stated that the crew members had not previously flown together, that the weather was not a factor in causing the accident, that the plane had had fifteen hours flying time since the last "100 hours inspection,"¹⁶⁴ that the civilian passengers and crew were "not briefed prior to take-off on emergency procedures," and that the "Commanding Officer of the 3150th Electronics squadron failed to exercise adequate supervision to insure that his aircraft commanders complied with the briefing requirements for emergency procedures."¹⁶⁵

Even more importantly, the report stated that two technical orders requiring heat shields were "not complied with."¹⁶⁶ These technical orders, numbered 01-20EJ-177 and 01-20EJ-178, specified the "exhaust manifold assemblies for the purpose of eliminating a definite fire hazard."¹⁶⁷

¹⁵⁶ SIEGEL, *supra* note 3, at 72-73.

¹⁵⁷ *Id.* at 73.

¹⁵⁸ See Independent Action for Relief from Judgment to Remedy Fraud on the Court, *supra* note 79, Exhibit J, at 103, 118, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *215 (Persons Report).

¹⁵⁹ *Id.* at 108, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *203.

¹⁶⁰ *Id.* at 108, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *203.

¹⁶¹ *Id.* at 108, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *203.

¹⁶² *Id.* at 108, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *203.

¹⁶³ *Id.* at 108-09, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *203-04.

¹⁶⁴ *Id.* at 110, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *205.

¹⁶⁵ *Id.* at 113, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *210.

¹⁶⁶ *Id.* at 110, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *205.

¹⁶⁷ *Id.* at 110, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *205-06.

The report set forth conclusions in three short sentences that deserve quoting:

- a. The aircraft is not considered to have been safe for flight because of non-compliance with Technical Orders 01-20EJ-177 and 01-20EJ-178.
- b. Fire developed in the No. 1 engine as a result of the failure of the right exhaust collector ring.
- c. AF Regulation 60-5 was violated in that the passengers and crew were not properly briefed.¹⁶⁸

In sum, the *Persons Report* concluded that several factors contributed to the crash—the plane was unsafe because it lacked heat shields as required by technical orders; the lack of heat shields contributed to causing the fire in No. 1 engine; the fire extinguishers did not put out the engine fire and the fire engulfed the wing; the crew had not previously flown together; and the servicemen and the civilian passengers had not been briefed about emergency procedures—and therefore the plane was ultimately “not . . . safe for flight.”¹⁶⁹

In reaching its devastating conclusions regarding the causes of the crash, the *Persons Report* did not discuss the secret electronic equipment that was tested the day of the crash,¹⁷⁰ nor did it include any other information about the design or structure of the B-29 bomber or the details of the flight of #866 that might constitute a military secret.¹⁷¹

One last point requires mentioning: The report stated that “copies of [the] official Air Force accident report [are] not to be sent to civilian agencies.”¹⁷² In other words, the report, which was initiated in response to Frank Folsom’s inquiry, was classified as “Secret,” and it was not to be sent to Folsom and his colleagues who had assigned civilian engineers to fly on B-29 bombers to test secret electronic equipment.

F. *Air Force’s Response to Folsom*

In a letter dated February 17, 1949, roughly six weeks after the date on the *Persons Report*, Major General William F. McKee of the Air Force responded to Frank Folsom’s November letter inquiring into the crash of Bomber #866. McKee’s letter was another step in the Air Force’s effort to minimize and control the potential damage that the crash of Bomber #866 constituted to its reputation and public standing.

¹⁶⁸ *Id.* at 116, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *213–14.

¹⁶⁹ *Id.* at 116, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *213–14.

¹⁷⁰ Independent Action for Relief from Judgment to Remedy Fraud on the Court, *supra* note 79, Exhibit J, at 103, 2005 U.S. S. Ct. Briefs LEXIS 2430, *198.

¹⁷¹ *See id.* at 103, 2005 U.S. S. Ct. Briefs LEXIS 2430, *198.

¹⁷² *Id.* at 125, 2005 U.S. S. Ct. Briefs LEXIS 2430, at 224 (testimony of Lt. Moore).

The two page letter acknowledges that the “official investigation” of the crash was completed and states that this letter is the official reply to Folsom’s “specific questions” and “remarks.”¹⁷³ The letter acknowledges a fire in engine number one and a loss of power in engine number two, but fails to mention that the pilot inadvertently feathered engine number four and that the pilot’s decision to open the bomb bay doors contributed to the plane going into a powerful downward spin, thus pinning the crew and passengers in place making it extremely hard to move toward openings that would allow them to parachute safely. Instead, the letter claims that although the crew had not previously flown together, the “action taken [by the crew] was as prompt as the situation demanded,” and the “factors causing the spin were beyond the control of the crew.”¹⁷⁴ The letter excused the pilot’s failure to order the abandonment of the plane prior to the spinning on the ground that it was not warranted. The letter did acknowledge that the survivors were unable to establish whether the pilot gave an order to abandon the plane once the spinning commenced.¹⁷⁵

The letter fails to acknowledge the technical orders that required modifications in the engines to retard engine fires and the highly important fact that Bomber #866 was not in compliance with these orders. Instead of acknowledging the poor performance history of the bomber and the salient conclusion of the *Persons Report* that Bomber #866 was not safe for flight, the reply to Folsom insisted that the “Air Force is most anxious to conserve property and life and under no condition, except extreme emergency, are aircraft permitted to fly when safety is in question.”¹⁷⁶ The letter declined to make the official investigation report available to Folsom because of the “purpose and nature of the Accident Report.”¹⁷⁷

In closing, McKee appealed to Folsom and the industry not to abandon the Air Force because of the death of the civilian engineers: “The bulk of the Air Force Research and Development program depends upon the cooperation and good will of industry.”¹⁷⁸ And then as if the false statements already made in the letter were inadequate to completely impeach the Air Force’s credibility, the letter closed with two more mendacious statements: “Every possible action will be taken to maintain and foster full mutual confidence and understanding. Your personal interest in this matter is deeply appreciated.”¹⁷⁹

¹⁷³ Letter from William F. McKee, Major Gen., Assistant Vice Chief of Staff, U.S. Air Force, to Frank M. Folsom, Exec. Vice President, RCA (Feb. 17, 1949) (on file with author).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

In retrospect, it is plain that the senior Air Force officials, who misled and deceived the three widows, also misled and deceived RCA, which was merely trying to secure the safety of its engineers in future flights.

II. A LAWSUIT

A. *The Filing*

On June 21, 1949, six months after the completion of the second Air Force investigation into the crash of Bomber #866, Phyllis Brauner, who had two children, joined with Elizabeth Palya, who had three children, in filing a complaint seeking money damages against the government for the plane crash that killed their husbands, William H. Brauner and Albert H. Palya.¹⁸⁰ Three months later, on September 27, Patricia Reynolds, who did not have any children at the time, filed a separate action against the government for the death of her husband, Robert E. Reynolds, who died in the same crash.¹⁸¹ In December, the two actions were consolidated for trial before Chief Judge William H. Kirkpatrick of the District Court for the Eastern District of Pennsylvania in Philadelphia.¹⁸² Charles J. Biddle and Francis Hopkinson of the prominent Philadelphia law firm Drinker Biddle & Reath represented the three widows.¹⁸³ The suit was commenced against the government pursuant to the 1946 Federal Tort Claims Act, which, in addition to waiving the government's sovereign immunity, authorized actions for damages against the government on the same terms and conditions that would exist if the injured parties were suing a private party.¹⁸⁴

In November of 1949, thirteen months after the crash, the plaintiffs submitted interrogatories to the executive branch to answer.¹⁸⁵ There was nothing exceptional about plaintiffs' thirty-one questions, which sought information about the B-29 bomber in general, Bomber #866 in particular, and the events leading up to the crash. The plaintiffs

¹⁸⁰ Independent Action for Relief from Judgment to Remedy Fraud on the Court, *supra* note 38, ¶ 2-3.

¹⁸¹ *Id.* ¶ 1.

¹⁸² *Id.* ¶ 5.

¹⁸³ See *Brauner v. United States*, 10 F.R.D. 468, 469 (E.D. Pa. 1950), *aff'd*, *Reynolds v. United States*, 192 F.2d 987 (3d Cir. 1951), *rev'd*, 345 U.S. 1 (1953).

¹⁸⁴ *Id.*; see also 28 U.S.C. § 1346(b) (2006).

¹⁸⁵ Independent Action for Relief from Judgment to Remedy Fraud on the Court, *supra* note 79, Exhibit K, at 163, 164, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *263, *263 (Interrogatories Propounded by Plaintiffs for Answer Under Rule 33 (*Brauner* Interrogatories), *Brauner v. United States*, Civil Action No. 9793 (1950)); *id.* Exhibit K at 163, 171, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *263, *270 (Answer to Interrogatories Propounded by Plaintiffs for Answer Under Rule 33 (Answer to *Brauner* Interrogatories), *Brauner*, Civil Action No. 9793).

requested that the executive branch make available a variety of documents, including the Air Force's investigative report and the statements made by the surviving servicemen to investigators.¹⁸⁶

In response to the plaintiffs' interrogatories, the executive branch gave what Judge Kirkpatrick termed "a mass of documents" to the plaintiffs.¹⁸⁷ According to the executive branch, that "mass of documents" included: "current flight engineering records"¹⁸⁸ and other "records or logs showing mechanical condition, maintenance of equipment, repairs and/or flight records";¹⁸⁹ "written standard regulations with reference to the operations of army aircraft, and the carrying of civilian personnel therein";¹⁹⁰ the pilot's and the copilot's logs and records;¹⁹¹ documents showing or describing the size and location of escape hatches;¹⁹² a radio log "kept by the control tower at Robins Air Force Base of messages sent to and received by the said TB-29 for take-off instruction";¹⁹³ and pictures taken of the wreckage.¹⁹⁴ In addition to these documents, the government's responses to the interrogatories gave a brief description of the events minutes before the plane's explosion and the crash. Thus, the executive branch reported

¹⁸⁶ *Id.* at 164, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *263 (*Brauner Interrogatories*).

¹⁸⁷ *Brauner*, 10 F.R.D. at 471.

¹⁸⁸ Independent Action for Relief from Judgment to Remedy Fraud on the Court, *supra* note 79, Exhibit K, at 165, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *264 (*Brauner Interrogatories*); *id.* at 171, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *271 (Answer to *Brauner Interrogatories*) (responding to plaintiffs' third interrogatory in the affirmative and attaching the requested documents).

¹⁸⁹ *Id.* at 165, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *264 (*Brauner Interrogatories*); *id.* at 171, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *271 (Answer to *Brauner Interrogatories*) (responding to plaintiffs' fourth interrogatory in the affirmative and attaching the requested documents).

¹⁹⁰ *Id.* at 167, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *268 (*Brauner Interrogatories*); *id.* at 174, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *273 (Answer to *Brauner Interrogatories*) (responding to plaintiffs' nineteenth interrogatory in the affirmative and attaching the requested documents).

¹⁹¹ *Id.* at 168, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *267-68 (*Brauner Interrogatories*); *id.* at 173-74, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *273 (Answer to *Brauner Interrogatories*) (responding to plaintiffs' twentieth and twenty-first interrogatories in the affirmative and attaching the requested documents).

¹⁹² *Id.* at 168, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *268 (*Brauner Interrogatories*); *id.* at 174, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *273 (Answer to *Brauner Interrogatories*) (responding to plaintiffs' twenty-second interrogatory in the affirmative and attaching the requested documents).

¹⁹³ *Id.* at 175, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *274 (Answer to *Brauner Interrogatories*); *id.* at 169, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *269 (*Brauner Interrogatories*) (requesting radio logs). According to the executive branch, the logs that would have contained "enroute messages" were destroyed after a year and were therefore unavailable. *Id.* at 175, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *274 (Answer to *Brauner Interrogatories*).

¹⁹⁴ *Id.* at 175, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *274 (Answer to *Brauner Interrogatories*) (responding to plaintiffs' twenty-ninth interrogatory in the affirmative and attaching the requested pictures); *see also id.* at 169, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *269 (*Brauner Interrogatories*).

that the plane's engine trouble occurred "almost immediately before the crash" at an altitude of about 18,500 feet.¹⁹⁵ It stated that, between 18,500 and 19,000 feet, "manifold pressure dropped to [23 inches] on No. one engine," and "[t]hereafter engine No. one was feathered."¹⁹⁶ It also stated that when the bomb bay doors were opened to facilitate parachuting, the plane "fell into a violent spin,"¹⁹⁷ and that the plane exploded and crashed at 1408 hours about 500 feet above sea level.¹⁹⁸ The plane had an autopilot that was not in use at the time of the accident,¹⁹⁹ and it had functional firefighting equipment on board.²⁰⁰

Although the executive branch gave the plaintiffs a "mass of documents," Judge Kirkpatrick concluded that its responses fell "far short of the full and complete disclosure of facts which the spirit of the rules requires."²⁰¹ But the executive branch's curtailed and limited response to the interrogatories in this case was not exceptional. Indeed, it was entirely consistent with its persistent and recognized failure to respect the purpose and the spirit of the 1938 discovery rules.²⁰²

B. Executive's Answers to Plaintiffs' Interrogatories

1. Two False Answers

The executive branch's answers to plaintiffs' interrogatories certainly fell short of the expectations of the new discovery rules, but failing to comport with the spirit of the new rules was a minor lapse by comparison to the executive branch's more egregious failure. In two of its answers to plaintiffs' questions, the executive branch submitted answers that were unequivocally inconsistent with the *Persons Report* prepared for the Air Force.

¹⁹⁵ *Id.* at 172, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *272 (Answer to *Brauner* Interrogatories) (responding to plaintiffs' seventh and eighth interrogatories regarding engine trouble prior to the crash); *id.* at 166, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *265 (*Brauner* Interrogatories).

¹⁹⁶ *Id.* at 172, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *271 (Answer to *Brauner* Interrogatories).

¹⁹⁷ *Id.* at 172, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *271.

¹⁹⁸ *Id.* at 173, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *272.

¹⁹⁹ *Id.* at 173, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *272; *see also id.* at 166-67, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *266 (*Brauner* Interrogatories) (asking whether the plane was equipped with automatic pilot and, if so, whether it was in use at the time of the crash).

²⁰⁰ *Id.* at 167, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *266 (*Brauner* Interrogatories); *id.* at 173, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *272 (Answer to *Brauner* Interrogatories) (responding to plaintiffs' fourteenth and fifteenth interrogatories).

²⁰¹ *Brauner v. United States*, 10 F.R.D. 468, 471 (E.D. Pa. 1950), *aff'd*, *Reynolds v. United States*, 192 F.2d 987 (3d Cir. 1951), *rev'd*, 345 U.S. 1 (1953).

²⁰² *See infra* notes 256, 259 and accompanying text.

One question submitted by the plaintiffs inquired as to “any engine trouble experienced” by the plane prior to the crash.²⁰³ On this matter, the *Persons Report* stated that during the feathering of engine one “a fire broke out that engulfed the aft half of the engine and the flames extended past the left scanner’s window.”²⁰⁴ The report further stated that attempts to extinguish the fire were to “no avail,”²⁰⁵ and that the fire in the engine eventually “engulf[ed] the entire engine and the wing area immediately to the rear of No. 1 engine.”²⁰⁶ Nonetheless, the executive branch stated in an answer labeled 8(c) that the fire was “extinguished.”²⁰⁷

The second question that elicited an answer inconsistent with the *Persons Report* was the very last of the plaintiffs’ interrogatories. That three-part question inquired as to whether any “modifications” had been prescribed for the engines of the B-29 to “prevent overheating of the engines and/or to reduce the fire hazard in the engines”; when the modifications had been prescribed; and whether the prescribed modifications had been made on the plane that crashed.²⁰⁸ The question most likely referred to the heat shields that had been developed to reduce the frequent B-29 engine fires,²⁰⁹ and, as already noted, the *Persons Report* had concluded that Bomber #866 was not in compliance with the Air Force technical order that required the installation of the heat shields in all B-29 planes.²¹⁰ The executive branch gave a one word

²⁰³ Independent Action for Relief from Judgment to Remedy Fraud on the Court, *supra* note 79, Exhibit K, at 163, 166, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *263, *265 (*Brauner Interrogatories*).

²⁰⁴ Independent Action for Relief from Judgment to Remedy Fraud on the Court, *supra* note 79, Exhibit J, at 103, 120, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *217 (Memorandum for the Chief of Staff, U.S. Air Force).

²⁰⁵ *Id.* at 120, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *217.

²⁰⁶ *Id.* at 111, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *207 (*Persons Report*).

²⁰⁷ Independent Action for Relief from Judgment to Remedy Fraud on the Court, *supra* note 79, Exhibit K, at 172, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *271 (Answer to *Brauner Interrogatories*). The Plaintiffs’ interrogatories contained no 8(c), although 8(b) requested a description, “in detail,” of any engine trouble the plane experienced. *Id.* at 166, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *265 (*Brauner Interrogatories*).

²⁰⁸ *Id.* at 169–70, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *269–70 (*Brauner Interrogatories*).

²⁰⁹ The *New York Times* reported on its front page on November 19, 1949, that General Hoyt S. Vandenberg, the Air Force Chief of Staff, had grounded planes “that have not been modernized mechanically” at least in part because, as General Curtis Le May was quoted in the same report as stating, “[t]he modification and modernization program we have had in progress for some time will now be stepped up because we’ve been having entirely too many engine fires with unmodified engines.” *U.S. Grounds B-29’s*, *supra* note 78, at 1 (internal quotation marks omitted). Because plaintiffs’ interrogatories were filed with the Clerk of the Court at the United States District Court for the Eastern District of Pennsylvania, four days later, on November 23, 1949, there is a possibility that plaintiffs’ lawyers in Reynolds framed their interrogatories based in part on the *New York Times* report. That possibility is strengthened by comparing the language in the *New York Times* report and the language of the specific question. *See id.* at 169–70, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *269–70 (*Brauner Interrogatories*).

²¹⁰ The *Persons Report* made it clear that Bomber #866 was not in compliance with two

response to the plaintiffs three-part question, and that one word was “no.”²¹¹

Because many of the answers to the plaintiffs’ questions tracked the *Persons Report* and the three statements from surviving servicemen, there is no doubt that one or more individuals who prepared the answers were familiar with the contents of those documents and utilized them in preparing the submitted answers. For example, the substance of the government’s answers to questions regarding the overheating of the plane’s engines during the flight,²¹² the plane’s altitude when engine trouble commenced,²¹³ the point in time when the pilot instructed the plane’s personnel to put on their parachutes,²¹⁴ and whether or not the pilot gave an order that the civilian personnel should bail out²¹⁵ tracked

technical orders that required important modifications. Under a heading entitled “Facts,” the report stated: “Technical Orders 01-20EJ-177 and 01-20EJ-178, dated 1 May 1947, were not complied with. These Technical Orders provide for changes in the exhaust manifold assemblies for the purpose of eliminating a definite fire hazard.” Independent Action for Relief from Judgment to Remedy Fraud on the Court, *supra* note 79, Exhibit J, at 103, 110, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *205–06 (Persons Report). In the “Discussion” section of the report, the noncompliance was repeated and linked to the fire in engine one. *Id.* at 114, 2005 U.S. S. Ct. Briefs LEXIS 2430, *211 (“The fire was probably caused, however, by breaks which were found in the right exhaust collector ring. The fire may have been aggravated by non-compliance with Technical Orders 01-20EJ-177 and 01-20EJ-178.”). And then in the section of the report entitled “Conclusions,” the report stated that noncompliance with the technical orders made Bomber #866 unsafe. *Id.* at 116, 2005 U.S. S. Ct. Briefs LEXIS 2430, *213–14 (“The aircraft is not considered to have been safe for flight because of non-compliance with Technical Orders 01-20EJ-177 and 01-20EJ-178.”).

²¹¹ *Id.* at 175, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *274 (Answer to *Brauner* Interrogatories).

²¹² *Compare id.* at 172, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *271 (Answer to *Brauner* Interrogatories) (“At between 18,500 or 19,000 feet manifold [sic] pressure dropped to 23” on No. one engine. . . . Thereafter engine No. one was feathered. Fire broke out which was extinguished.”), with Independent Action for Relief from Judgment to Remedy Fraud on the Court, *supra* note 79, Exhibit J, at 103, 132, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *231 (“[T]here was no further report of trouble or malfunction of the engines until we reached about 18,500 or 19,000 feet. At that time either Captain Erwin or the engineer reported that the manifold pressure on number one had dropped to 23 inches.”) (testimony of Herbert W. Moore, Jr., Captain, U.S. Air Force), and *id.* at 108, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *203 (“Upon reaching approximately 18,500 feet the manifold pressure on No. 1 engine dropped to about 20 inches.”).

²¹³ See *supra* note 212.

²¹⁴ *Compare* Independent Action for Relief from Judgment to Remedy Fraud on the Court, *supra* note 79, Exhibit K, at 163, 172, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *263, *271–72 (Answer to *Brauner* Interrogatories) (“All personnel were instructed by the pilot to put their chutes on immediately after leveling off at 20,000 feet, and prior to the outbreak of the engine fire.”), with Independent Action for Relief from Judgment to Remedy Fraud on the Court, *supra* note 79, Exhibit J, at 103, 132, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *231–32 (“I believe at about this time that Captain Erwin advised everybody to have their chutes on. . . . I can only guess the time lapse between our noticing the trouble with number one engine and the time we reached 20,000 feet.”) (testimony of Herbert W. Moore, Jr., Captain, U.S. Air Force).

²¹⁵ *Compare* Independent Action for Relief from Judgment to Remedy Fraud on the Court, *supra* note 79, Exhibit K, at 163, 173, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *263, *272 (Answer to *Brauner* Interrogatories) (“Testimony does not indicate whether or not order was given.”), with Independent Action for Relief from Judgment to Remedy Fraud on the Court, *supra* note

the information in the disputed documents. Given that the answers to the interrogatories were based in part on the *Persons Report* and the witness statements, it is implausible that the individuals who prepared the two false answers that concerned the engine fire and the heat shields did so in good faith or that the false answers resulted from inadvertence. Indeed, the only plausible explanation of the two false answers is that they were submitted by individuals who knew that the answers were false and who nevertheless intentionally represented the submitted answers to be truthful.

2. Attorney Affirmation

The inclusion of the two false statements in the responses to plaintiffs' interrogatories was facilitated by the fact that the lawyer representing the Air Force did not have access to the *Persons Report* or to the three statements of the surviving servicemen. The person who signed the executive branch's answers to the interrogatories was not an Air Force official but an Assistant United States Attorney, Thomas J. Curtin.²¹⁶ Thus, at the end of the submitted answers, Curtin affirmed under oath that he was an Assistant United States Attorney for the Eastern District of Pennsylvania; that he had "read the foregoing Answer to Interrogatories; and that answers set forth therein [were] true and correct to the best of his knowledge, being based upon information furnished the deponent by the Department of the Air Force."²¹⁷ In other words, Curtin affirmed that in answering the interrogatories he did not read the *Persons Report* or the three witness statements, but instead relied—as he stated—in answering the interrogatories upon one or more unidentified Air Force officials for information.

Curtin's affirmation of the truth, based on information provided by unidentified others, permitted Curtin to submit statements to the court that were substantively false without himself actually being responsible for the falsity and without those within the Air Force who knew the truth having to sign a document indicating that they believed that the answers submitted to be in fact true.

79, Exhibit J, at 103, 143, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *244 ("At that time Captain Erwin ordered everyone to stand by to abandon ship. . . . Captain Erwin or Captain Moore, not positive, but one of them said to abandon ship.") (testimony of Earl W. Murrhee, Technical Sergeant, U.S. Air Force), *id.* at C153, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *254 ("I never received [the order to abandon the aircraft], sir.") (testimony of Walter J. Peny, Staff Sergeant, U.S. Air Force), *and id.* at C136, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *237 ("I had been off interphone since going back to the rear and did not hear him give the word to abandon the aircraft.") (testimony of Herbert W. Moore, Jr., Captain, U.S. Air Force).

²¹⁶ Independent Action for Relief from Judgment to Remedy Fraud on the Court, *supra* note 79, Exhibit K, at 163, 171, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *263, *270.

²¹⁷ *Id.* at 176, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *275 (emphasis added).

C. *The Context*

Why did the Air Force deliberately submit two false answers to the interrogatories? Certainly, the two answers—first, that the fire in engine number one was extinguished when it was not, and second, that Bomber #866 was not out of compliance when, in fact, Bomber #866 lacked heat shields which were required by two outstanding Air Force technical orders intended to guard against engine fires—were unrelated to national security. As reviewed above, B-29 engine fires were common and commonly reported, and conceding that Bomber #866 lacked required heat shields would not have revealed the design or functionality of the heat shield.²¹⁸ But if national security or flying safety did not prompt the submission of false responses, what did? The context in which the Air Force submitted its responses suggests answers.

On November 18, 1949, just weeks before the Air Force prepared its answers to plaintiffs' interrogatories, General Hoyt S. Vandenberg, the Air Force Chief of Staff, "ordered [the] grounding of all its B-29 bombers that have not been modernized mechanically or have been carrying 'maximum operating stress.'"²¹⁹ Vandenberg's order followed by "only a few hours" the "latest B-29 crash . . . at Tampa [Florida]" which killed five men and injured four others as the plane was, ironically, taking off "to join the search for another B-29 still lost after it reported it was landing on the sea off Bermuda."²²⁰ The same New York Times front page report announcing Vandenberg's order grounding the B-29s also reported that just a few days before "eighteen men lost their lives when two B-29s on a training flight collided near Stockton, Calif[ornia]."²²¹ The report further detailed eleven B-29 crashes in which at least ninety-one men were killed during the sixteen-month period commencing on August 26, 1948 and ending on November 14, 1949.²²² Although the crashes had various causes, Lieutenant General Curtis E. LeMay, "head of the Strategic Air Command," was quoted in the report as emphasizing "engine fires" as a serious problem related to the crashes.²²³ "The modification and modernization program we have had in progress for some time will not be stepped up," LeMay stated, "because we've been having entirely too many engine fires with unmodified engines."²²⁴

²¹⁸ See *supra* Part I.A-B.

²¹⁹ U.S. *Grounds B-29s*, *supra* note 78, at 1.

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.* at 2.

²²³ See *id.* at 1-2.

²²⁴ *Id.* at 1.

Within the context of so many B-29 crashes during the previous sixteen months and the grounding of the B-29s in November 1949, the disclosure of embarrassing factors concerning the crash of Bomber #866 over Waycross, Georgia the previous year could have been a sensitive matter because of at least three considerations. First, when Bomber #866 crashed it had been out of compliance with technical orders requiring engine modifications specifically designed to minimize the risk of engine fires. Moreover, the Air Force's own investigation into the cause of the crash had concluded that Bomber #866 was unfit for flight. Thus, the Air Force may well have considered that the disclosure of this information would have been tantamount to throwing gasoline on a hot fire that was already threatening the Air Force's reputation and standing.

Second, the crash of Bomber #866 had an unusual if not a unique feature to it by comparison to the other B-29 crashes in that the crash killed civilian engineers, as opposed to servicemen, who assume the risk of injury or death and have little choice but to follow orders. But those considerations do not apply to private companies consulting on the development of military equipment. Frank Folsom emphasized that very important point to General Vandenberg in his November 22, 1948 letter to the General. "This accident," Folsom wrote, "has firmly impressed upon our engineering staff the danger of flying in military aircraft and it appears that certain steps will be necessary if we are to participate adequately in the future in Air Force flight test programs."²²⁵ Furthermore, Folsom made it clear to General Vandenberg that the killing of the civilian engineers had sent shock waves through other firms employing electrical engineers engaged in military projects. Thus, Folsom wrote: "Since the crash of 6 October 1948, representatives of several other companies have informed us that their electronic engineers who would normally participate in flight tests have been very reluctant to undertake flights in military aircraft."²²⁶ The threatened rebellion within the ranks of consulting civilian engineers whose work required them to fly on military planes presented a threat not only to the Air Force's reputation and public standing but also to its capacity to advance future research projects.

Third, the Air Force had only become separate and independent from the Army in 1947, and was, as a result, struggling to establish itself on equal footing with the Army and Navy in terms of such considerations as public standing, an Air Force Academy, congressional budgetary allocations, and the development of weapons. But as the Air Force sought to establish a sound footing for itself, the Navy sought to undermine the new branch of the armed services because the Navy

²²⁵ Folsom Letter, *supra* note 89, at 2.

²²⁶ *Id.* at 3.

experienced the emergence of the Air Force as a competitive force that not only threatened its congressional budgetary support but even held out the possibility that the Air Force would one day come to absorb under its command the Navy's air force capacity. Indeed, the "rivalry" between the Navy and the Air Force resulted in such "a running publicity battle" which was played out in the national press, that in early 1949 the Secretary of Defense tried to stop the incessant leaked reports by consolidating the public information sections of each of the military services.²²⁷

D. Confidential Documents

The Air Force's decision to include two false statements in its answers to plaintiffs' interrogatories gave rise to a new imperative. Unless the Air Force was willing to get caught lying to the widows, the Air Force was now required to withhold the *Persons Report* from the plaintiffs, the judge, and RCA. Thus, when the plaintiffs requested the report, the Air Force denied the request.²²⁸

The executive branch defended its refusal to disclose the investigatory report on the ground that the document was "not within the scope of an interrogatory filed pursuant to Rule 33" of the Federal Rules of Civil Procedure.²²⁹ The meaning of this claim is unclear. The report and the witness statements do not offer any explanation as to why they were not within the scope of discovery or why they differed from the "mass" of other documents the executive branch did turn over to the plaintiffs.

²²⁷ Walter H. Waggoner, *Armed Forces News Unified to Stop "Leaks" and Rivalry*, N.Y. TIMES, Mar. 18, 1949, at 1.

²²⁸ Although it is uncertain, it would seem that the executive branch's decision not to disclose the three witness statements was entirely dependent on the imperative to keep the *Persons Report* confidential. As reviewed above, the witness statements were taken as part of the Air Force's initial curtailed investigation; the questions asked of the witnesses were limited; and the statements themselves contained no information concerning the heat shields, the technical orders requiring the installation of heat shields on B-29 bombers, or the fact that Bomber #866 was not in compliance with those technical orders. The witness statements did disclose that the crew members had not previously flown together and that the civilian engineers were not instructed about emergency procedures, but those embarrassing failures would not have held a candle to the incriminating statements in the *Persons Report* that Bomber #866 was out of compliance with heat shield orders and that the plane was "not . . . safe for flight." Thus, it seems highly plausible that the Air Force officials who made the decision not to disclose the witness statements decided that it would be more defensible to maintain that the entire investigation into the crash was confidential and to refuse to disclose to the plaintiffs any of the investigatory documents than it would be to disclose the witness statements and hold back the *Persons Report*.

²²⁹ Independent Action for Relief from Judgment to Remedy Fraud on the Court, *supra* note 79, Exhibit K, at 163, 171, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *263, *270 (Answer to *Brauner Interrogatories*).

More importantly, in refusing to turn the documents over to the plaintiffs, the executive branch did not claim that the documents were privileged—it did not even use that word. Nor did it claim that the documents contained military secrets, pertained to confidential foreign affairs, implicated intelligence methods or sources, or affected flying safety. In other words, weeks before the government first used the word “privilege” in its legal papers, months before it invoked concerns about national security and flying safety as bases for keeping the disputed documents confidential, the executive branch refused to disclose the disputed documents because of a vague legal claim that did not invoke the words “privilege,” “state secrets,” “military secrets,” “national defense,” “diplomatic relations,” “intelligence methods, sources, and operations,” or anything comparable.

E. Judge Kirkpatrick’s Decision

In response to the government’s failure to turn over the investigation report and the witness statements, the plaintiffs made a motion requesting that Judge Kirkpatrick compel the government to produce the documents.²³⁰ The government opposed the motion for two reasons: it claimed that the plaintiffs had failed to show “good cause” warranting the production of the documents, and it claimed for the first time that the disputed documents were “privileged,”²³¹ but the privilege it asserted at this time was unrelated to national security.²³²

When the discovery dispute was presented to Chief Judge Kirkpatrick,²³³ the judge was unaware of the Air Force’s initial, curtailed October investigation, Frank Folsom’s November letter, Persons’ subsequent January investigation and report, the Air Force’s decision not to share the *Persons Report* with Folsom and the other engineering firms, or the two lies contained in the executive branch’s answers to plaintiffs’ interrogatories. All he knew was that the executive branch had refused to hand over to the plaintiffs two documents it conceded it had and that plaintiffs claimed they needed to prepare for trial. Moreover,

²³⁰ *Brauner v. United States*, 10 F.R.D. 468, 469 (E.D. Pa. 1950), *aff’d*, *Reynolds v. United States*, 192 F.2d 987 (3d Cir. 1951), *rev’d*, 345 U.S. 1 (1953).

²³¹ *Id.* at 469–70.

²³² *See id.* at 471–72; *see also infra* text accompanying notes 250–253.

²³³ Chief Judge Kirkpatrick was no inexperienced judge by the time he granted the plaintiffs motion to compel the production of the documents and denied the government’s motion to quash. Indeed, the Chief Judge had joined the Army Judge Advocate’s Corps during World War I, served one term in the House of Representatives from 1921–1923, was nominated by President Calvin Coolidge to the district court judgeship in 1927, and served as Chief Judge from 1948–1958. FISHER, *supra* note 3, at 29. The judge’s broad experience on the bench and his experience with discovery disputes involving the government came through in his opinion and gave the impression of an intelligent judge who was confident, skeptical, and savvy.

until now the reasons publicly offered by the executive branch for refusing to turn over the disputed documents gave no hint of the events just mentioned, nor did they portend that this discovery dispute had the potential to turn into a seminal dispute in which the Supreme Court would announce new rules to guide the application of the state secrets privilege.

In ruling for the plaintiffs, Judge Kirkpatrick devoted the longer portion of his June 30, 1950, opinion to whether the plaintiffs had “good cause”²³⁴ for the production of the documents. This was an important issue in which the Third Circuit had, in another case, recently reversed Judge Kirkpatrick’s decision that a party seeking discovery against the government had shown “good cause.”²³⁵ Judge Kirkpatrick began by emphasizing that a trial judge has “wide” discretion in deciding what constitutes “good cause” because each case “presents its own particular problems and any attempt to establish rigid rules would seriously impair the flexibility and efficiency of the federal discovery procedure.”²³⁶ That stated, Kirkpatrick went on to respond to the claim that the plaintiffs had failed to establish “good cause.” The executive branch “suggested” that plaintiffs had failed to establish “good cause” because they had failed to take the depositions of the three surviving servicemen, and stated that the Air Force “might” bring the witnesses to Philadelphia so that plaintiffs could depose them or pay the expenses of the plaintiffs’ attorney to travel to Florida where the witnesses were based.²³⁷ The judge concluded from these statements that he did not understand “that any binding commitment to that effect had been made,” and stated that he lacked the authority to order the same.²³⁸

But, importantly, Judge Kirkpatrick did not leave the matter at that. The judge assumed that the plaintiffs could take the deposition of the witnesses and then addressed the question of whether the depositions would be an adequate substitute for the disputed documents. The “disclosure of the contents of their written statements is necessary to enable the plaintiffs to properly prepare their cases for trial,”²³⁹ he wrote, because “the plaintiffs must have accurate and precise firsthand information as to every relevant fact, if they are to conduct their examination of witnesses properly and to get at the truth in preparing for trial. This only the statements can give them.”²⁴⁰ Emphasizing that he was “not suggesting that the witnesses on deposition would not

²³⁴ FED. R. CIV. P. 34 (1948) (repealed 1970).

²³⁵ See *Alltmont v. United States*, 177 F.2d 971 (3d Cir. 1949).

²³⁶ *Brauner*, 10 F.R.D. at 470.

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.* at 471.

answer the questions asked them truthfully,”²⁴¹ Judge Kirkpatrick stated the obvious: “[T]he accident happened more than 18 months ago and what the crew would remember now might well differ in important matters from what they told their officers when the event was fresh in their minds.”²⁴²

The executive branch also argued that the plaintiffs could not demonstrate “good cause” because it had provided the plaintiffs with answers to their interrogatories and with a substantial number of documents.²⁴³ Judge Kirkpatrick did not think that these claims dissipated the “good cause” the plaintiffs had in fact established warranting the disclosure of the documents.²⁴⁴ The Air Force responses to the interrogatories, the judge remarked, “are far short of the full and complete disclosure of facts which the spirit of the rules requires.”²⁴⁵ As an example of an inadequate answer to an important question the judge pointed to the interrogatory that asked the Air Force to “[d]escribe in detail the trouble experienced.”²⁴⁶ Judge Kirkpatrick then recited the government’s answer: “‘At between 18,500 or 19,000 feet manifold pressure dropped to 23 inches on No. one engine.’ Obviously,” the judge concluded, “the defendant, with the report and findings of its official investigation in its possession, knows more about the accident than this.”²⁴⁷

When the judge addressed the Air Force’s refusal to disclose the investigative report, his reasons for compelling disclosure were convincing:

The plaintiffs have no knowledge of why the accident happened. So far as such knowledge is obtainable, the defendant has it. When the airplane crashed, it was wrecked and much of the evidence of what occurred was destroyed. Only persons with long experience in investigating airplane disasters could hope to get at the real cause of the accident under such circumstances. The Air Force appointed a board of investigators immediately after the accident and examined the surviving witnesses while their recollections were fresh. With their statements as a starting point the board was able to make an extensive investigation of the accident. These statements and the report of the board’s investigation undoubtedly contain facts, information and clues which it might be extremely difficult, if not

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.* at 469–71.

²⁴⁴ *Id.* at 470–71.

²⁴⁵ *Id.* at 471.

²⁴⁶ Independent Action for Relief from Judgment to Remedy Fraud on the Court, *supra* note 79, Exhibit K, at 163, 166, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *265 (*Brauner* Interrogatories); see also *Brauner*, 10 F.R.D. at 471 (internal quotation marks omitted).

²⁴⁷ *Brauner*, 10 F.R.D. at 471.

impossible, for the plaintiffs with their lack of technical resources to obtain merely by taking the depositions of the survivors.²⁴⁸

In short, Judge Kirkpatrick concluded that because there was no substitute for the investigatory report, plaintiffs were entitled to it and the defendants should turn it over to them.²⁴⁹

In addition to the “good cause” claim, the executive branch also claimed that the material in dispute was privileged. But, as Judge Kirkpatrick made plain, no claim was made “that this is a case involving the well-recognized common-law privilege protecting state secrets or facts which might seriously harm the Government in its diplomatic relations, military operations or measures for national security.”²⁵⁰ Instead, Judge Kirkpatrick wrote that the executive branch sought to protect the documents under a general statute aimed at assuring the preservation of proper government files, which the judge found not pertinent to a discovery dispute in an action brought pursuant to the Federal Tort Claims statute.²⁵¹ Alternatively, Judge Kirkpatrick noted that the government sought the judicial creation of “a new kind of privilege” which protected the proceedings of boards of investigation of the armed services “in order to allow the free and unhampered self-criticism within the service necessary to obtain maximum efficiency, fix responsibility and maintain proper discipline.”²⁵² Judge Kirkpatrick rejected the invitation to fashion a new privilege stating that he “could find no recognition in the law of the existence of such a privilege.”²⁵³ Thus, between the commencement of the *Reynolds* litigation in the fall of 1949, and June 30, 1950, when Judge Kirkpatrick issued his decision, there is no evidence that anyone in the Air Force or the executive branch viewed the litigation as implicating or touching upon national security considerations in the slightest.

III. DIFFERENT ROADS TO A SHOWDOWN

When the *Reynolds* case was filed in 1949 as a simple tort action following an airplane crash, there was nothing about it that suggested

²⁴⁸ *Id.* at 470–71.

²⁴⁹ Plaintiffs’ attorney Charles J. Biddle succinctly set forth his views on the issue of “good cause” in a letter to a New York lawyer, Theodore Matter, dated June 26, 1950: “We concede that the rules require a showing of good cause but take the position that such cause exists where the essential information is in the hands of the Government and cannot be obtained elsewhere. If there was ever a case in which such compulsory disclosure was necessary it would seem to be this one.” Letter from Charles J. Biddle to Theodore Matter (June 26, 1950) (on file with author).

²⁵⁰ *Brauner*, 10 F.R.D. at 471–72.

²⁵¹ *Id.* at 471.

²⁵² *Id.* at 472.

²⁵³ *Id.*

that it would turn into a groundbreaking national security case that would ultimately grant the government a breathtakingly broad privilege that is subject to serious abuse and is today extremely controversial. In January of 1950, when the Air Force objected to the disclosure of the *Persons Report* and the three witness statements, there was still no hint that the discovery dispute implicated national security concerns or that the case would result in a major national security decision. And in June of 1950, when Judge Kirkpatrick specifically stated that the government “does not here contend that this is a case involving the well-recognized common-law privilege protecting state secrets or facts which might seriously harm the Government in its diplomatic relations, military operations or measures for national security,”²⁵⁴ and directed the government to turn the disputed documents over to the plaintiffs, it again seemed that the *Reynolds* case would pass into the night as just another damage action following a horrible accident. And yet within two months, the Secretary of the Air Force and Judge Advocate General had submitted a statement to Judge Kirkpatrick that gave the impression that disclosure of the disputed documents would reveal secrets about the military electronic equipment that was being tested in the B-29 that crashed.²⁵⁵ How and why did this turnabout in the Air Force’s position occur? And why did the Air Force not give the court the impression that this discovery dispute implicated national security until August of 1950, more than a year after the initial complaint in the case was filed?

The answers to these questions are complicated. But from the evidence available it appears that the Department of Justice and the Air Force joined together in an unexpected and unforeseen way and converted a mundane tort action into a seminal Supreme Court decision for reasons unrelated to national security. Understanding how and why the Air Force and the Department of Justice pushed the Supreme Court in the *Reynolds* case into announcing what has become the controversial state secrets privilege is important if the conduct of the executive branch as well as the Supreme Court in this case is to be understood. And understanding the conduct of the executive, as well as of the high court, in this case is important because of what it reveals about the capacities of the executive to abuse its power by using it, and the judiciary to abuse its authority by not using it.

A. *Department of Justice*

The Justice Department’s drive to establish a broad executive privilege is rooted in discovery provisions embodied in the 1937 reform

²⁵⁴ *Id.* at 471–72.

²⁵⁵ See *infra* Part III.C.

of civil procedure. It also incorporated into its effort both a British House of Lords decision and a law review Article authored by a Justice Department attorney.

1. Federal Rules of Civil Procedure

As unanticipated as it may be, a major part of the impetus behind the government's assertion of privilege in the *Reynolds* case is rooted in the modern reform of procedures for civil actions in federal courts and the adoption of the Federal Rules of Civil Procedure in 1938. Those rules, and most particularly the discovery rules, were intended, as is well known, "to abolish trial by ambush, to banish the old fixed principle of keeping an opponent in the dark and the sporting theory of justice."²⁵⁶ As a consequence of the new discovery rules, parties submitted to the federal government discovery requests in the form of interrogatories, depositions, and the production of documents.²⁵⁷ These discovery requests gave rise to an important new set of legal questions focused on the extent to which the federal government was subject to discovery under the new rules and what, if any, restrictions or privileges were available to the government that might not be available to a private party.

In the wake of the new rules, the government strenuously resisted discovery requests. Indeed, government resistance to discovery became such a pattern that two scholars, Raoul Berger and Abe Krash, observed in 1950: "No one has more eagerly resorted to the discovery machinery than the Government; no one has been more grudging in making it reciprocally available."²⁵⁸ A similar conclusion was echoed by District Judge Leon R. Yankwich after years of observing the government's conduct in discovery disputes in anti-trust cases:

In all these cases, particularly those seeking injunctive relief, the Government expects the utmost cooperation of the defendants or even *prospective defendants* in placing their files and records, ranging over periods of years, at the disposal of its agents. When objection is encountered, the widest use is made of the process of the courts. A justified criticism of the Government is, however, that *it is not so generous in reciprocating*. Thus, the government stands on the liberal rules which allow them to plead the facts generally and resists *at all stages, every attempt to compel them*, through bills of particulars, to

²⁵⁶ Raoul Berger & Abe Krash, *Government Immunity from Discovery*, 59 YALE L.J. 1451, 1451 (1950) (internal quotation marks omitted).

²⁵⁷ See James A. Pike & John W. Willis, *Federal Discovery in Operation*, 7 U. CHI. L. REV. 297 (1939); see also, e.g., *Brauner v. United States*, 10 F.R.D. 468 (E.D. Pa. 1950), *aff'd*, *Reynolds v. United States*, 192 F.2d 987 (3d Cir. 1951), *rev'd*, 345 U.S. 1 (1953).

²⁵⁸ Berger & Krash, *supra* note 256, at 1451.

supply data which would give the defendants a definite idea of the line of attack which they may expect at the trial.²⁵⁹

The government vigorously opposed discovery requests on several grounds. Because Rule 34 of the Federal Rules of Civil Procedure at that time required that a party seeking an order compelling production of documents establish “good cause” for such production,²⁶⁰ the government routinely asserted that the moving party seeking production had failed to demonstrate “good cause” as required explicitly by the rules.²⁶¹ The government also relied heavily on the “housekeeping statute,” adopted in 1789, that provided: “The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it.”²⁶² Although the wording of this statute seems to do no more than authorize the head of a department to take some steps to organize the administration of a department, the government tried to stretch the statute from being understood as nothing more than “a provision for routine administration by agency heads in handling their internal housekeeping” to be “a grant of independent authority, in accordance with and as part of the fabric of the constitutional plan of separation of powers,” which the government asserted “stems directly from the original organic acts establishing the executive departments” and is “thus one of the cornerstones of the executive branch.”²⁶³

As the government pressed these claims—one based on the new rules and one based on a 1789 statute—in the courts throughout the 1940s, it failed to secure from the Supreme Court a broad ruling offering it the protection from discovery it sought. Thus, two law review comments, one at the beginning part of the decade and one at the end, striking a similar note, seem to have captured the legal uncertainty at the time. One commentator observed in a 1942 law review Article:

[T]he existing law is at one or the other of two equally undesirable extremes. Either . . . the Government is ensconced behind an impregnable wall of immunity and privilege, or . . . it stands upon the same level as the ordinary private litigant except as to matters involving affairs of state. The ideal is probably somewhere between the two.²⁶⁴

²⁵⁹ Leon R. Yankwich, *Observations on Anti-Trust Procedures*, 10 F.R.D. 165, 168 (1951).

²⁶⁰ See *United States v. Reynolds*, 345 U.S. 1, 3 n.3 (1953).

²⁶¹ See Pike & Willis, *supra* note 257, at 306; see also, e.g., Brauner, 10 F.R.D. 468.

²⁶² 1 Stat. 28, 49, 65, 69 (1789) (codified as amended at 5 U.S.C. § 301 (2006)); see also *Reynolds*, 345 U.S. at 4 n.4.

²⁶³ See *Cotton Valley Brief*, *supra* note 20, at *35.

²⁶⁴ John D. O'Reilly, Jr., *Discovery Against the United States: A New Aspect of Sovereign*

Seven years later, another student of the subject reached a similar conclusion:

The pattern of the cases indicates that it would be incorrect to conclude either that data in the control of executive departments or administrative agencies is generally privileged from production, or to conclude that it is generally not so privileged. Generalizations based on either alternative would not form adequate bases for predicting the results of particular cases.²⁶⁵

2. Two Cornerstones of the Executive Privilege Argument

Two legal developments during the 1940s gave rise to what eventually became a sweeping claim that the Justice Department termed, perhaps for the first time in 1950, “executive privilege.”²⁶⁶ One was a 1942 decision by the British House of Lords; the other, a 1949 law review Article written by a Justice Department attorney. The House of Lords decision requires careful review because the Justice Department relied upon it in its briefs in the *Reynolds* case, and because Chief Justice Vinson in his *Reynolds* opinion not only cited and discussed the House of Lords decision but substantially relied upon it as a guide for fashioning the doctrinal rules in *Reynolds*. The law review Article deserves discussion because Air Force Secretary Finletter’s statement submitted to Judge Kirkpatrick relied upon it, and because the Justice Department shaped its claims regarding United States law and practice in *Reynolds* based largely on the law review Article.

a. House of Lords

In 1942, the British House of Lords decided *Duncan v. Cammell, Laird & Co.*, a damage action resulting from what appears to have been the accidental sinking of a submarine during a submergence test that killed ninety-nine men.²⁶⁷ During the course of the litigation, the

Immunity?, 21 N.C. L. REV. 1, 13 (1942).

²⁶⁵ William V. Sanford, *Evidentiary Privileges Against the Production of Data Within the Control of Executive Departments*, 3 VAND. L. REV. 73, 81 (1949).

²⁶⁶ See *Cotton Valley Brief*, *supra* note 20, at 30.

²⁶⁷ *Duncan v. Cammell, Laird & Co.*, [1942] A.C. 624 (H.L.) 625–26 (appeal taken from Eng.). In deciding *Duncan*, the court distinguished a dispute between private parties in which the Admiralty had a direct interest, as in the *Duncan* case, from two other situations. In one, “the Crown (which for this purpose must be taken to include a government department, or a minister of the Crown in his official capacity) is a party to a suit,” and in such a suit, the Crown “cannot be required to give discovery of documents at all. No special ground of objection is needed.” *Id.* at 632. In the other, the court distinguished the *Duncan* case from a criminal action “where an individual’s life or liberty may be at stake.” *Id.* at 633–34. Thus, although the ruling in *Duncan* was limited in the United Kingdom to civil cases between private parties in

plaintiffs sought design documents from the defendant company, which built the submarine under contract with the Admiralty.²⁶⁸ The First Lord Admiralty opposed disclosure on the ground that “it would be injurious to the public interest that any of the said documents should be disclosed to any person.”²⁶⁹

In deciding *Duncan*, the House of Lords set out three basic questions: Does the Crown have the right to keep certain documents confidential on the grounds that disclosure would be contrary to the public interest?²⁷⁰ If so, what is the proper form in which objection should be made? And lastly, when the Crown objects to disclosure, “should it be treated by the court as conclusive, or are there circumstances in which the judge should himself look at the documents before ruling as to their production?”²⁷¹

The House of Lords quickly decided on the basis of past practices that in theory the Crown had the right to keep information confidential in the name of the “public interest”:

The principle to be applied in every case is that documents otherwise relevant and liable to production must not be produced if the public interest requires that they should be withheld. This test may be found to be satisfied either (a) by having regard to the contents of the particular document or (b) by the fact that the document belongs to a class which, on grounds of public interest, must as a class be withheld from production.²⁷²

Later in its opinion, the House of Lords amplified on this important but brief statement by offering a further description of the documents that are properly kept confidential. It stated that documents may be withheld if they would be “injurious to national defence, or to good diplomatic relations, or where the practice of keeping a class of documents secret is necessary for the proper functioning of the public service.”²⁷³

But the House of Lords added a strong word of caution which further amplified what documents may be properly kept confidential. It would not be “out of place,” the Court stated, “to indicate the sort of

which the Crown was not a party or in which the Crown had intervened to protect the confidentiality of documents subject to a discovery dispute, the Department of Justice used the decision during the 1940s as one of its key building blocks in civil cases in arguing for a broad, unqualified, and absolute privilege against discovery whether the government was or was not a party.

²⁶⁸ *Id.* at 626.

²⁶⁹ *Id.* at 626–27.

²⁷⁰ *Id.* at 633.

²⁷¹ *Id.* at 636–37 (posing the latter two questions).

²⁷² *Id.* at 636.

²⁷³ *Id.* at 642.

grounds which would not afford to the minister adequate justification for objecting to production.”²⁷⁴ And then the Court stated:

It is not a sufficient ground that the documents are “State documents” or “official” or are marked “confidential.” It would not be a good ground that, if they were produced, the consequences might involve the department or the government in parliamentary discussion or in public criticism, or might necessitate the attendance as witnesses or otherwise of officials who have pressing duties elsewhere. Neither would it be a good ground that production might tend to expose a want of efficiency in the administration or tend to lay the department open to claims for compensation. In a word, it is not enough that the minister of the department does not want to have the documents produced.²⁷⁵

In endorsing a privilege for certain documents, the House of Lords explained why a privilege was warranted. The Court asserted:

[T]he public interest is also the interest of every subject of the realm, and while, in these exceptional cases, the private citizen may seem to be denied what is to his immediate advantage, he, like the rest of us, would suffer if the needs of protecting the interests of the country as a whole were not ranked as a prior obligation.²⁷⁶

The second question the Court addressed was the form of the objection interposed by the Crown. The Court’s requirements were straightforward:

The essential matter is that the decision to object should be taken by the minister who is the political head of the department, and that he should have seen and considered the contents of the documents and himself have formed the view that on grounds of public interest they ought not to be produced, either because of their actual contents or because of the class of documents, e.g., departmental minutes, to which they belong.²⁷⁷

The Court made it clear that if the matter arose before the commencement of a trial the submission of an affidavit by the minister would be sufficient, and that if the matter arose once a trial commenced that a minister might, when circumstances required, be required to personally attend and testify.²⁷⁸

The third question—whether a judge should treat an objection from a minister as “conclusive”—was the most perplexing and important. The Court concluded that it should: “[A]n objection validly

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 643.

²⁷⁷ *Id.* at 638.

²⁷⁸ *Id.*

taken to production, on the ground that this would be injurious to the public interest, is conclusive. . . .”²⁷⁹ There is much in the opinion to construe this seemingly straightforward claim to mean that a Court will uphold a minister’s objection if the minister’s affidavit complies with the requirements set forth in the opinion. For example, the Court noted that a judge might well be unable to know after reviewing a document in private why a minister objects to its being made public, thus requiring an inquiry into the objection. Such an inquiry might compromise the required secrecy or, the court speculated, that “the same reasons which induced the department to say that the report itself ought not to be produced might be thought to preclude the department from giving the explanation required.”²⁸⁰ Lastly, although the party seeking discovery in the *Duncan* case had argued that “it is obviously better for the litigant that there should be discussions behind his back *ex parte* than that the bare word of the Crown officials should automatically prevail,”²⁸¹ the Court concluded that a hearing at which a judge had private communications with one party violates what the Court stated was “a first principle of justice that the judge should have no dealings on the matter in hand with one litigant save in the presence of and to the equal knowledge of the other.”²⁸²

Nonetheless, there are two aspects of the opinion that at least raise a question as to whether the Court really meant that a minister’s objection that satisfied the requirements of an affidavit should be conclusive on a court or whether a court might in some limited circumstances actually review the documents. The first is the inclusion of the phrase “validly taken” in the very sentence in which the Court states that a court should treat a minister’s objection as conclusive.²⁸³ Perhaps the phrase refers to nothing more than an objection that conforms with the requirements for an affidavit set forth in the opinion. But if that is what the Court meant, it could have made that meaning plain by simply stating that an objection supported by an affidavit that satisfies the requirements set forth above is conclusive. Instead, the use of the term “validly taken” suggests that a claim of privilege should be sustained provided that the documents satisfy the substantive requirements for the privilege.

Of course, it is obvious that such a construction undercuts the idea that a Court should treat a minister’s objection as conclusive and, as a result, absent any other cause for doubt as to the Court’s meaning such a

²⁷⁹ *Id.* at 642.

²⁸⁰ *Id.* at 640.

²⁸¹ *Id.* at 628.

²⁸² *Id.* at 640–41.

²⁸³ *Id.* at 642 (“[A]n objection *validly taken* to production, on the ground that this would be embarrassing to the public interest, is conclusive.” (emphasis added)).

construction would be dismissed as simply an oversight in writing the opinion. But there is more, and it is part of the very sentence that asserts that a court should treat a minister's objection as conclusive and the sentences that follow. The court insists that "it is important to remember that the decision ruling out such documents is the decision of the judge," and that "[i]t is the judge who is in control of the trial, not the executive."²⁸⁴ Perhaps these assertions were mere window dressing, meant to be exhortations without consequences and thus without any effect whatsoever on the Court's conclusion that a minister's objection is conclusive. But if that is what the Court meant, it could have improved upon its text to clarify its meaning. Although the Court's language in *Duncan* qualifies the idea that it set forth an absolute rule, the government and the Supreme Court understood *Duncan* to present an absolute and conclusive rule.²⁸⁵

b. Herman Wolkinson

The *Duncan* decision left the Department of Justice with a foreign court opinion that it could use as persuasive authority as it shaped its litigation strategy to defend itself from discovery requests. But the *Duncan* decision did not provide the department with historical background and precedential citations rooted in U.S. law and history that it needed to construct a legal argument that supported the position that the executive branch had a right—more or less equivalent to what the House of Lords gave the Crown in the *Duncan* case—to keep documents and information confidential. That missing link was provided by Herman Wolkinson, an attorney in the Justice Department who wrote a long essay—almost 130 pages in total—entitled, *Demands*

²⁸⁴ *Id.* Chief Justice Vinson quoted this very language from *Duncan* in footnote twenty-one of his opinion. *United States v. Reynolds*, 345 U.S. 1, 8 n.21 (1953).

²⁸⁵ Although this ambiguity exists in the opinion, the Third Circuit understood the *Duncan* opinion to grant the government minister conclusive authority to decide what information and under what circumstances the government would disclose. In distinguishing the rule in *Duncan* from the American rule, the Third Circuit stated: "But we do not regard the case as controlling in any event. For whatever may be true in Great Britain the Government of the United States is one of checks and balances. One of the principal checks is furnished by the independent judiciary which the Constitution established." *United States v. Reynolds*, 192 F.2d 987, 997 (3d Cir. 1951). The executive's brief in the *Reynolds* case characterized the *Duncan* opinion as granting a conclusive and absolute privilege. Thus, in relevant part the brief read:

The House of Lords held that discovery could not be obtained [in the *Duncan* case]. "The principle to be applied in every case is that documents otherwise relevant and liable to production must not be produced if the public interest requires that they should be withheld." And the sole arbiter of when the public interest so requires is the cabinet minister who heads the department to which the documents belong.

Brief for the United States at 38–39, *Reynolds*, 345 U.S. 1 (No. 21), 1952 WL 82378, at *38–39 (citation omitted).

of *Congressional Committees for Executive Papers*, that was published in three parts in the *Federal Bar Journal*, a publication of the Federal Bar Association, between April and October 1949.²⁸⁶

Wolkinson's unqualified conclusion was exactly what the Department of Justice would have written: "[O]ur Presidents have established, by precedent, that they and members of their Cabinet have an undoubted privilege and discretion to keep confidential, in the public interest, papers and information which require secrecy."²⁸⁷ And then to add to his fundamental claim, Wolkinson wrote: "Courts have uniformly held that the President and the heads of departments have an uncontrolled discretion to withhold the information and papers in the public interest, and they will not interfere with the exercise of that discretion."²⁸⁸ In support of his conclusion, Wolkinson reviewed thirteen presidencies claiming that events in each one of those thirteen presidencies supported his conclusion.²⁸⁹ He also reviewed seven circumstances in which he claimed that the courts upheld his conclusion.²⁹⁰ In the middle of Part III of the Article, Wolkinson made reference to the House of Lords decision in *Duncan*, and asserted that the "English view supports the American cases" he referenced in Part II of his Article, "that the executive has complete and sole discretion to withhold papers and information from the courts, in the public interest."²⁹¹

Wolkinson spends little time developing a theory to support his conclusion, but what he does provide by way of theory suggests that his view is primarily normative rather than functional. Thus, Wolkinson has two starting points: One, there are three coequal branches and no one branch controls the other.²⁹² And two, the President has total control over the executive department, and to the extent that he is accountable for his actions, he is accountable to the people, not to Congress or to the courts.²⁹³ From these two primary positions, Wolkinson asserts that the executive branch must have total discretion in deciding what information to disclose, to whom to make the disclosure, and when to make whatever disclosure it decided in its discretion to make.

²⁸⁶ See Herman Wolkinson, *Demands of Congressional Committees for Executive Papers*, 10 FED. B.J. 103 (1949) [hereinafter Wolkinson, *Part I*]; Herman Wolkinson, *Demands of Congressional Committees for Executive Papers: Part II*, 10 FED. B.J. 223 (1949) [hereinafter Wolkinson, *Part II*]; Herman Wolkinson, *Demands of Congressional Committees for Executive Papers: Part III*, 10 FED. B.J. 319 (1949) [hereinafter Wolkinson, *Part III*].

²⁸⁷ Wolkinson, *Part I*, *supra* note 286, at 103.

²⁸⁸ *Id.*

²⁸⁹ *Id.* at 107–46.

²⁹⁰ Wolkinson, *Part II*, *supra* note 286, at 226–36.

²⁹¹ Wolkinson, *Part III*, *supra* note 286, at 334.

²⁹² Wolkinson, *Part I*, *supra* note 286, at 103–04.

²⁹³ *Id.* at 104–06.

As is apparent, Wolkinson's view is not dependent on establishing that the preservation of confidentiality in communications is essential to a functioning administration that may require the giving of candid instructions and the receiving of candid advice, or to maintaining a strong defense, or to the implementation of effective foreign relations. These would surely be subsidiary considerations, but Wolkinson does not rely upon such consequential arguments. Rather he bases his conclusion solely on a normative position that rests on the proposition that restricting executive branch discretion in any way in deciding what information to disclose would subordinate the executive branch to the congress or to the courts in contravention of the first principles underlying the constitutional scheme.²⁹⁴ In promoting this position, Wolkinson dismisses any value from the contravening principles embodied in the checks and balances doctrine that forms one of the primary underpinnings of the constitution.

Wolkinson's historical claims are unreliable,²⁹⁵ but the merits of Wolkinson's historical analysis were beside the point from the Justice Department's perspective. Wolkinson's Article provided the Justice Department with a citation to a legal periodical and to historical and

²⁹⁴ *Id.* at 107.

²⁹⁵ Wolkinson's unqualified conclusion that the executive has an absolute executive privilege to decide for itself what information to disclose, when to disclose, and to whom to disclose is contradicted by the Supreme Court's decision in *United States v. Nixon*, 418 U.S. 683 (1974). Part IV of that unanimous opinion is entitled "The Claim of Privilege," and concludes, in relevant part:

Notwithstanding the deference each branch must accord the others, the 'judicial Power of the United States' vested in the federal courts by Art. III, § 1, of the Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto. Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government. We therefore reaffirm that it is the province and duty of this Court 'to say what the law is' with respect to the claim of privilege presented in this case.

Id. at 705-06 (citations omitted) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). The *Nixon* opinion then further states:

However, neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances. The President's need for complete candor and objectivity from advisers calls for great deference from the courts. However, when the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values arises. Absent a claim of need to protect military, diplomatic, or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is significantly diminished by production of such material for *in camera* inspection with all the protection that a district court will be obliged to provide.

Id. at 706.

legal information—no matter how inaccurate or unreliable the claims might be—to support an argument that the executive branch retained absolute control over what information to disclose to Congress and the courts in discovery disputes. And although Wolkinson does not use the phrase “executive privilege” in setting forth his position, that is the term the Department of Justice used in describing its version of the Wolkinson position in a legal brief it prepared shortly after the Wolkinson Article was published.²⁹⁶

The *Duncan* decision and the Wolkinson Article set the stage for the executive branch’s next strategic step: to secure from the Supreme Court some protection from the discovery rules authorized by the 1938 reform of the civil procedure rules.

B. Cotton Valley

The authority of Congress and the courts to demand information and documents from the executive branch has never been definitively prescribed by the courts, and until the second half of the twentieth century the issue was essentially unaddressed by the Supreme Court. Indeed, apart from the very limited and oblique discussion of the issue in the case of *Totten v. United States* in 1875,²⁹⁷ the nation’s highest court did not issue an opinion that addressed the degree to which the executive branch was immune for one reason or another from congressional or judicial requests for information until the *Reynolds* case in 1953, and then again twenty-one years later in *United States v. Nixon*.²⁹⁸

But before the executive branch succeeded in securing a broad common law state secrets privilege in the 1953 *Reynolds* decision (let alone a constitutionally-based executive privilege in *Nixon* in 1974), it decided to use its appeal in *United States v. Cotton Valley Operators Committee*²⁹⁹ to press the Supreme Court for the much broader privilege—an executive privilege not at all dependent on national security considerations—it had been seeking throughout the 1940s.³⁰⁰ Thus, in the development of the executive branch’s effort to secure from the courts a broadly defined privilege, *Cotton Valley* was much more than a dry run for the *Reynolds* case. *Cotton Valley* indicates that the executive branch had made the judicial creation of a broadly conceived

²⁹⁶ See *Cotton Valley Brief*, *supra* note 20, at 19–20.

²⁹⁷ 92 U.S. 105 (1875).

²⁹⁸ 418 U.S. 683 (1974). Of course, there was discussion of the important issue by Chief Justice Marshall sitting as a District Judge in *United States v. Burr*, 25 F. Cas. 187 (C.C.D. Va. 1807) (No. 14,694).

²⁹⁹ 339 U.S. 940 (1950) (per curiam).

³⁰⁰ See *Cotton Valley Brief*, *supra* note 20.

executive privilege an important priority before it fastened on the *Reynolds* case as a litigation vehicle to advance this claim. From that perspective, the Justice Department's use of the *Reynolds* case to press the high court for a judicially defined privilege must be understood to be simply another step in a series of strategic steps unrelated to national security considerations taken by the Justice Department to push the Supreme Court to define a broad privilege the executive branch could use to protect its documents and information from disclosure.

In *Cotton Valley*, the United States sued Cotton Valley Operators Committee for a violation of the Sherman Anti-Trust Law.³⁰¹ The defendant had made a motion to require the United States to produce for inspection various documents, including reports of the Federal Bureau of Investigation.³⁰² After consulting Attorney General Tom Clark, who became a Justice on the Supreme Court by the time the Court decided *Reynolds* a few years later, the government refused to comply with the order to produce claiming that the Attorney General "himself" had the right to "determine the question of privilege."³⁰³ In response, the trial judge rejected the Attorney General's position on the ground that the grant of such absolute authority to the executive would constitute an "abdication of the Court's duty to decide the matter."³⁰⁴ At that point, the trial judge gave the Justice Department additional time to consider whether to comply with the court order, and when the Justice Department refused to comply, the court dismissed the government-initiated anti-trust action against the company.³⁰⁵

The government appealed to the Supreme Court, and its brief, dated March 29, 1950, was filed while the discovery dispute in *Reynolds* was pending before Judge Kirkpatrick.³⁰⁶ Perhaps for the first time ever, the brief submitted by the Justice Department to the Court sets forth a legal argument it termed "executive privilege."³⁰⁷ In presenting its "executive privilege" argument favoring a broad and unqualified executive privilege, the Justice Department relied extensively on the Wolkinson Article and on the House of Lords opinion in the *Duncan* case.³⁰⁸

In Point II of its brief, the Justice Department emphasized that "there is, at the minimum, a substantial claim of executive privilege

³⁰¹ *United States v. Cotton Valley Operators Comm.*, 75 F. Supp. 1 (W.D. La. 1948), *aff'd*, 339 U.S. 940 (1950) (per curiam).

³⁰² *United States v. Cotton Valley Operators Comm.*, 9 F.R.D. 719, 720 (W.D. La. 1949), *aff'd*, 339 U.S. 940 (1950) (per curiam).

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ *Id.* at 720–21.

³⁰⁶ See *Cotton Valley* Brief, *supra* note 20.

³⁰⁷ *Id.* at 18, 30.

³⁰⁸ *Id.* at 36–37, 44–49.

standing in the way of discovery,” and that this claim of “executive privilege” is “an independent barrier to the production of the documents which the district court ordered.”³⁰⁹ The brief maintained that the concept of executive privilege is constitutionally based because it is “part of the fabric of the constitutional plan of separation of powers.”³¹⁰ The brief also asserted that the executive branch must have the authority to decide for itself whether or not to comply with a request for disclosure, and that that is the case whether it is Congress that is seeking information or particular documents, or the courts.³¹¹ Thus, the brief stated:

The determination of what documents should not be disclosed in the public interest is a determination necessarily within the discretion and distinctive knowledge of the executive branch. It is the executive who day in and day out is responsible for the administration of the laws and for the national security, and who is able to evaluate the importance of the particular piece of information sought in relation to an entire course of government policy or action. To the extent that the public interest is at stake in these circumstances, the public interest necessarily requires that the determination of what is privileged be made by the agency responsible for the national program for the protection of which the privilege is asserted. To divorce discretion from responsibility is in itself a denial of the public interest.³¹²

The brief sought to support its major contentions by claiming that Congress “cannot know the importance of having the doings of the executive department kept secret.”³¹³ It claimed that the final political check on executive branch of this enormous authority was periodic election or impeachment.³¹⁴ Further, the brief asserted that the courts have continuously upheld its legal position: “The courts have repeatedly held that they will not and cannot require the executive to produce such papers when in the opinion of the executive their production is contrary to the public interests.”³¹⁵

By the time the appeal in *Cotton Valley* was presented to the Supreme Court, President Harry Truman had appointed Tom Clark to the high court.³¹⁶ Because of his earlier involvement in the matter,

³⁰⁹ *Id.* at 30–31.

³¹⁰ *Id.* at 35.

³¹¹ *Id.* at 38–39.

³¹² *Id.* at 55–56.

³¹³ *Id.* at 38.

³¹⁴ *Id.*

³¹⁵ *Id.* at 41. Such authority must rest with the executive branch, and that branch will then be held accountable “to the people, and to the House, upon a case of impeachment” if the head of the executive department is “causeless, malicious, willfully wrong, or to the detriment of the public interests.” *Id.* at 38.

³¹⁶ See MIMI CLARK GRONLUND, SUPREME COURT JUSTICE TOM C. CLARK: A LIFE OF

Justice Clark disqualified himself from participating in the adjudication of the case, and because the remaining eight justices divided four-to-four, the lower court judgment became the law of the case and the broad issue of executive privilege that the government was seeking to establish was left unresolved.³¹⁷

At that point, the Justice Department had to identify another case in which it could present its claims for a broadly defined executive privilege. Moreover, the Justice Department had to be hopeful about its prospects on the assumption that four Justices supported their executive privilege claim in the *Cotton Valley* case, and that Tom Clark's appointment to the Court almost certainly meant that a majority of five justices now supported their position.³¹⁸ And to the extent that the

SERVICE 144–46 (2010).

³¹⁷ United States v. Cotton Valley Operators Comm., 339 U.S. 940 (1950) (per curiam).

³¹⁸ Apart from the outcome in *Cotton Valley*, other reasons supported such a surmise. Justice Department attorneys assessing how the justices would vote on the executive privilege claim raised in *Reynolds* would have assumed, based on prior decisions, see, e.g., *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579 (1952); *Dennis v. United States*, 341 U.S. 494 (1951), that Chief Justice Vinson and Justices Reed and Minton would support the Justice Department's claim for a broad executive privilege. In addition, they would have assumed based on Tom Clark's views as Attorney General, especially in the *Cotton Valley* litigation, that Justice Clark would support a broad privilege.

At that point, a government lawyer would have expected that Justice Robert Jackson would provide a sixth vote favoring the privilege. Justice Jackson had been an Attorney General and thus could be counted on to appreciate the delicacy of executive branch decisions and the deeply-felt need of executive branch officials for confidentiality, in general, and for tightly-guarded secrecy, when the nation's security was even possibly at stake. In addition, Jackson had penned one of the most frequently-quoted passages powerfully urging judicial deference to the executive branch when the nation's security was at stake. He wrote:

The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit *in camera* in order to be taken into executive confidences. But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948).

Justice Felix Frankfurter would have been another Justice likely to support the claim of executive privilege. Although the evidence to support the view that was less dramatic than Justice Jackson's powerful passage, Justice Frankfurter had earned a reputation as a Justice who emphasized the importance of judicial deference to the coordinate branches of government, and whose conception of the role of the courts in the governing scheme was a modest one. As one scholar recently concluded: "For nearly two decades, Frankfurter's theory of judicial restraint would become the unofficial constitutional philosophy of the movement that would itself become known as American liberalism." NOAH FELDMAN, *SCORPIONS: THE BATTLES AND*

Justice Department had reason to believe that five members would probably support an executive privilege claim, the Justice Department may also have felt some sense of urgency to identify an appropriate case to present to the high court before the Court's membership unexpectedly changed because of a resignation or a death.³¹⁹

C. *The Reynolds Intersection*

Because of the outcome in *Cotton Valley* and District Judge Kirkpatrick's decision in *Reynolds*, the interests of the Justice Department and the Air Force intersected. The Air Force needed new legal grounds for keeping the disputed documents confidential, and the Justice Department needed a new case it could use to press its claim for executive privilege.³²⁰

TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES 32 (2010); *see also* LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 137 (2000).

The government in *Reynolds* would likely have predicted that Justices Black and Douglas would rule against their position because both had ruled against President Truman in the *Steel Seizure* case they and were the only dissenters in the *Dennis* case. *See Steel Seizure*, 343 U.S. at 582 (Black, J.); *id.* at 629 (Douglas, J., concurring); *Dennis*, 341 U.S. at 579 (Black, J., dissenting); *id.* at 581 (Douglas, J., dissenting). Thus, Justices Black and Douglas might have been expected to require in *Reynolds* that the government nonetheless submit the disputed documents for an in camera inspection because such an inspection would have left the door open for the government to prevail by persuading a judge that the documents in question had to be kept secret in whole or in part.

As it turned out, speculation by government lawyers along the lines suggested above as to how the individual Justices would vote on the asserted claim of privilege contained three errors. Instead of supporting the government's claim for privilege, Justices Jackson and Frankfurter voted against the government and joined Justice Black to form the three dissenters, whereas Justice Douglas supported the government's claim, thus providing the sixth vote in the majority.

³¹⁹ As things turned out, such a concern would have been well placed. Chief Justice Vinson died within six months of the *Reynolds* decision, on September 8, 1953. JAMES E. ST. CLAIR & LINDA C. GUGIN, CHIEF JUSTICE FRED M. VISION OF KENTUCKY: A POLITICAL BIOGRAPHY 336 (2002). Justice Jackson died a little more than one year later, on October 9, 1954. EUGENE C. GERHART, AMERICA'S ADVOCATE: ROBERT H. JACKSON 468 (1958). Justice Minton retired three years after the *Reynolds* decision, Justice Reed retired four years after the decision, and Justice Burton retired five years after the decision. HENRY J. ABRAHAM, JUSTICES & PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT app. d, at 420–27 (1992). Thus, four of the six Justices supporting the *Reynolds* decision were off the Court within five years of the judgment.

³²⁰ From the Justice Department's perspective, the *Reynolds* case presented more compelling facts than did the *Cotton Valley* case. In *Cotton Valley*, the government commenced the litigation, thus presenting the court with the option of forcing the government to choose whether to comply with the disclosure order or to have its Sherman Anti-Trust complaint dismissed. 339 U.S. 940. In *Reynolds*, the government did not drag a private party into court. Instead, private parties dragged the government into court pursuant to the recently adopted Federal Tort Claims Act seeking damages because of a crash of an Air Force plane involved in the testing of secret military electronic equipment. *United States v. Reynolds*, 345 U.S. 1 (1953).

1. Secretary of the Air Force

On or around July 20, 1950, the Attorney General was notified that Judge Kirkpatrick had ordered the Air Force to disclose to the plaintiffs the disputed documents.³²¹ His office in turn probably notified Thomas K. Finletter, who up to that point had been Secretary of the Air Force for about three months,³²² of Judge Kirkpatrick's order, for Finletter almost immediately sent a letter to Judge Kirkpatrick objecting to the disclosure of the "confidential" report because the disclosure of the report would threaten flying safety.³²³ Finletter's letter, which Justice Department lawyers later stated Finletter sent "on his own initiative"³²⁴ and without consultation with the Justice Department, made no mention of military secrets, state secrets, or national security; his claim for confidentiality was based solely on flying safety.³²⁵

³²¹ *Reynolds v. United States*, 192 F.2d 987, 990 (3d Cir. 1951), *rev'd*, 345 U.S. 1 (1953).

³²² Finletter's stepping stone to succeeding Stuart Symington as the Secretary of the Air Force occurred in 1947, when Finletter chaired President Truman's Air Policy Commission, which generated a report entitled "Survival in the Air Age." PRESIDENT'S AIR POLICY COMM'N, SURVIVAL IN THE AIR AGE (1948). The lengthy report concluded that "[w]orld peace and the security of the United States are now the same thing," and that the United States must build a "Military Establishment [which] must be built around the air arm" because "[o]ur military security must be based on air power." *Id.* at 4, 8.

³²³ Finletter's letter stated:

Acting under the authority of Section 161 of the Revised Statutes (5 U.S.C. 22), it has been determined that it would not be in the public interest to furnish this report of investigation as requested by counsel in this case. This report was prepared under regulations which are designed to insure the collection of all pertinent information regarding aircraft accidents in order that all possible measures will be developed for the prevention of accidents and the optimum promotion of flying safety. Because this matter is one of such primary importance to the Air Force, it has been found necessary to restrict the use of aircraft accident reports to the official purpose for which they are intended. Under our regulations, this type of report is not available in courts-martial proceedings or other forms of disciplinary action or in the determination of pecuniary liability.

It is hoped that the extreme importance which the Department of the Air Force places upon the confidential nature of its official aircraft accident reports will be fully appreciated and understood by your Honorable Court.

Reynolds, 192 F.2d at 990 (quoting Letter from Thomas K. Finletter, Sec'y of the Air Force, to the U.S. Dist. Court for the E. Dist. of Penn. (July 24, 1950)). At that very time, the plaintiffs' attorney had the strong impression that the Air Force would not disclose the investigation report. Thus, in a letter dated, July 25, 1950, or one day after the date on the letter Secretary Finletter sent to Judge Kirkpatrick, Charles J. Biddle wrote: "The United States Attorney advises me that the Government flatly refuses to produce the report inasmuch as the Air Force takes the position that these reports are confidential and it is not in the public interest that they should be produced." Letter from Charles J. Biddle to Theodore Mattern (July 25, 1950) (on file with author).

³²⁴ Brief for the United States at 5, *Reynolds*, 345 U.S. 1(1952) (No. 21), 1952 WL 82378, at *5 ("After having been notified of this action, the Secretary of the Air Force, *on his own initiative*, caused a letter to be presented to the District Court." (emphasis added)).

³²⁵ As noted, we now know that the disputed documents did not contain such information, *see supra* Part I.C-E, and since Finletter knew that the documents contained no such

Finletter sent Judge Kirkpatrick a second statement, dated August 9, 1950,³²⁶ which was six pages in length, consisted of nine paragraphs, and was drafted in conjunction with Justice Department lawyers.³²⁷ Finletter offered several grounds to support the claim of confidentiality. First, he claimed that plaintiffs were not entitled to the documents because they had failed to establish “good cause” or a “necessity” for the production of the documents. He buttressed this point by emphasizing that the Air Force had offered to make the three military witnesses available to the plaintiffs for examination.³²⁸

Next, the Secretary claimed that confidentiality was required to advance flying safety. He asserted that the investigative report and the witness statements were “prepared under regulations which are designed to insure the disclosure of all pertinent factors which may have caused, or which may have had a bearing on, the accident in order that every possible safeguard may be developed so precautions may be taken for the prevention of future accidents and for the purpose of promoting the highest degree of flying safety.”³²⁹ He maintained that the statements “are obtained in confidence, and these reports are prepared for intra-departmental use only.”³³⁰ The Secretary stated that the disclosure of the witness statements “would have a deterrent effect upon the much desired objective of encouraging uninhibited statements in future inquiry proceedings instituted primarily in the interest of flying safety.”³³¹

The Secretary next object[ed] to the production” of the report and the witness statements on the ground that the “aircraft in question, together with the personnel on board, were engaged in a confidential mission of the Air Force.”³³² He stated that the plane “carried confidential equipment on board and any disclosure of its mission or

information, that explains why Finletter’s letter to Judge Kirkpatrick made no such claim.

³²⁶ See Independent Action for Relief from Judgment to Remedy Fraud on the Court, *supra* note 79, Exhibit C, at 28, 29, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *129, *129 (Finletter Statement); see also Independent Action for Relief from Judgment to Remedy Fraud on the Court, *supra* note 79, Exhibit D, at 35, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *138 (Affidavit of the Judge Advocate General, United States Air Force (Harmon Statement), *Reynolds v. United States*, Civil Action No. 10142 (1950)). Both of these statements were reproduced as Exhibits C and D, respectively in Petition for Writ of Certiorari, *Herring v. United States*, 424 F.3d 384 (3d Cir. 2005), *cert. denied*, 547 U.S. 1123 (2006) (No. 05-821).

³²⁷ Finletter’s letter recounted in detail the historical claims regarding executive privilege, which the Justice Department had presented in legal papers in the *Cotton Valley* litigation and which had formed an important part of Wolkinson’s law review Article. Independent Action for Relief from Judgment to Remedy Fraud on the Court, *supra* note 79, Exhibit C, at 28, 31–34, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *129, *132–38 (Finletter Statement).

³²⁸ *Id.* at 29, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *129–30.

³²⁹ *Id.* at 30, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *130.

³³⁰ *Id.* at 30, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *131.

³³¹ *Id.* at 30, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *131.

³³² *Id.* at 30, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *131.

information concerning its operation or performance would be prejudicial to this Department and would not be in the public interest.”³³³

Further, Finletter stated it was the “historic position of the executive branch of the Government”³³⁴ that it was “beyond judicial authority”³³⁵ to order the executive branch to disclose confidential documents. In support of this sweeping assertion, the Secretary listed sixteen separate historical incidents beginning with President Washington and ending with President Truman which he maintained supported his claim that “executive files and investigative reports are confidential and privileged.”³³⁶ Following the listing of sixteen historical incidents, and in further support of what the Secretary characterized as the executive’s “historic position,” the Secretary cited a 1941 opinion of Associate Justice Robert Jackson, which he rendered when he was Attorney General, a statute, a handful of military regulations, two Supreme Court opinions, one circuit opinion, ten district court opinions, and four additional opinions of the Attorney General.³³⁷

The Secretary concluded his statement by claiming that he declined to disclose the disputed documents because he considered the “compulsory production of the Reports of Investigation conducted by the Board of Officers” to be “prejudicial to the efficient operation of the Department of the Air Force,” “not in the public interest,” and “inconsistent with national security.”³³⁸

A cursory reading of Finletter’s statement might well cause a reader to conclude that the Secretary claimed that the disputed documents contained information that constituted a military secret and that the disclosure of that information would injure national security. But the Secretary never made that claim; he did not state that the documents in

³³³ *Id.* at 30, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *131.

³³⁴ *Id.* at 31, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *132.

³³⁵ *Id.* at 31, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *132.

³³⁶ *Id.* at 31, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *133.

³³⁷ *Id.* at 33–34, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *135–37. These claims were similar to the claims that the Justice Department pressed in the *Cotton Valley* litigation, and the historical examples offered to support the substantive points were drawn from Wolkinson’s law review Article. Wolkinson, *Part I*, *supra* note 286.

³³⁸ *Id.* at C34. Plaintiffs’ attorney, Charles J. Biddle, thought the idea that the Air Force investigatory report into the cause of the B-29 plane crash contained national security information was “perfect nonsense.” Letter from Charles J. Biddle to Theodore Mattern (July 25, 1950) (on file with author) (“To my mind it is perfect nonsense after all these years when B-29s have had accidents all over the world and have been forced down nearly everywhere, including Russia, to say that a report on what caused this accident is a secret which should not be disclosed.”). Mr. Biddle speculated that the contents of the investigatory report may have been “very unfavorable to the Government’s case.” *Id.* (“The violent objection to producing [the investigatory report] on the part of the Air Force naturally makes one suspicious that it may contain some conclusions very unfavorable to the Government’s case, although the refusal may be merely a matter of policy.”).

question contained information relating to military secrets, foreign affairs, or intelligence matters. Nor did he state that the documents themselves contained any information pertaining to the secret electronic equipment. Finletter's statement gave the impression that he was making these claims, but his precise words stopped short of actually making that claim. Instead, what Finletter did claim was that the courts lacked authority to compel disclosure and that "compulsory production" of the documents would prejudice the Air Force, undermine the public interest, and diminish national security.

A difference between a claim that the disputed documents contained military secrets and that compulsory disclosure threatened national security is a substantial difference. One claim focuses on the content of the documents and the other on the authority of the judiciary to compel disclosure. That is not a difference careful lawyers would overlook, and Finletter was an experienced and successful Wall Street lawyer.³³⁹

Because the lawyers who assisted the Secretary in drafting his statement would have favored making the strongest possible claim that supported the claim of privilege, they surely would have urged the Secretary to include in his affidavit the bolder, more forceful claim—that the disputed documents actually contained military secrets. The fact that Finletter did not include such a claim must have been because the Secretary would not sign such a statement, and the only plausible reason for Finletter not signing such a statement would have been that the claim was false. If Finletter refused to sign a statement that the Justice Department lawyers almost certainly would have sought to have Finletter sign, the lawyers who drafted Finletter's statement must have appreciated its deceptiveness.

2. Judge Advocate General of the Air Force

The August 9th two page affidavit submitted to Judge Kirkpatrick by Reginald C. Harmon, the Air Force's Judge Advocate General,³⁴⁰ focused on two matters.

³³⁹ Finletter began his practice about 1920 with the firm of Cravath, Henderson, Leffingwell & de Gersdorff, a precursor of Cravath, Swaine & Moore. After six years he joined the firm Coudert Brothers, where he was an active partner, except for a three-year period, 1941–1944, when he was a Special Assistant to the Secretary of State, 1926–1950. After serving as Secretary of the Air Force, Finletter returned to Coudert Brothers as a partner, from 1953–1961. *Profile of Thomas K. Finletter*, TRUMAN LIBRARY, <http://trumanlibrary.org/profile/viewpro.php?pid=68> (last visited Aug. 6, 2012).

³⁴⁰ See Independent Action for Relief from Judgment to Remedy Fraud on the Court, *supra* note 79, Exhibit D, at 35, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *138 (Harmon Statement).

The first was to make a specific offer to permit the plaintiffs to depose the three surviving servicemen at a time and place convenient for the plaintiffs and at the government's expense.³⁴¹ This offer was in direct response to Judge Kirkpatrick's June 30th opinion in which he had stated that he did not understand the Air Force to have made "any binding commitment to that effect."³⁴²

Harmon emphasized that the servicemen will be "authorized to testify regarding all matters pertaining to the cause of the accident except as to facts and matters of a classified nature."³⁴³ Also, in response to Judge Kirkpatrick's concern that so much time had passed since the crash that the servicemen's recall of the crash's details would be stale by comparison to the statements they provided within a few days of the crash, Harmon stated that in preparation for examination the servicemen would be permitted to "refresh their memories" by reading the statements they gave regarding the accident as well as "other pertinent and material records."³⁴⁴

In the last two paragraphs of his affidavit, Judge Advocate General Harmon stated a different reason for keeping the disputed documents confidential. He stated that the disclosure of the disputed documents "would have a deterrent effect upon the much desired objective of encouraging uninhibited admissions in future inquiry proceedings instituted primarily in the interest of flying safety,"³⁴⁵ and he claimed that the documents "cannot be furnished without seriously hampering

³⁴¹ *Id.* at 36–37.

³⁴² *Brauner v. United States*, 10 F.R.D. 468, 470 (E.D. Pa. 1950), *aff'd sub nom. Reynolds v. United States*, 192 F.2d 987 (3d Cir. 1951), *rev'd*, 345 U.S. 1 (1953).

³⁴³ See Independent Action for Relief from Judgment to Remedy Fraud on the Court, *supra* note 79, Exhibit D, at 35, 37, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *138, *139 (Harmon Statement).

³⁴⁴ *Id.* at 37, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *139. The litigation strategy advanced by Harmon's affidavit substantially cut the ground out from under any claim of privilege based on any claim that the witness statements could not be disclosed because they contained information that constituted a military secret that would injure the national security. As noted, what Harmon did was to offer the deposition of the three servicemen as a substitute for disclosing the signed statements and to state that the depositions would be the equivalent of the signed statements minus classified information. Since the plaintiffs had no interest in classified information, redacted witness statements and depositions would be—using Harmon's words as a guide—essentially the same, and it made no sense for the Air Force to deny the witness statements when they were willing to offer the equivalent. Indeed, if the Air Force actually meant to make good on its representations and to make the depositions of the servicemen the equivalent to the signed statements, it ran the risk of inadvertent disclosure during the depositions, which would not exist if redacted witness statements were turned over. It is uncertain what reasoning prompted this tactic to offer the depositions instead of redacted witness statements. But one likely consideration stemmed from the Air Force's determination not to disclose the *Persons Report* and the Air Force's concern that disclosure of a redacted witness statement would create powerful pressure to turn over a redacted *Persons Report*.

³⁴⁵ Independent Action for Relief from Judgment to Remedy Fraud on the Court, *supra* note 79, Exhibit D, at 35, 37, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *138, *140.

national security, flying safety, and the development of highly technical and secret military equipment.”³⁴⁶

This statement gives the impression that the documents cannot be “furnished” because the documents themselves contain information that could not be disclosed without hampering “national security, flying safety and the development highly technical and secret military equipment” if disclosed.³⁴⁷ But Harmon did not state that the documents themselves contained information bearing on these subjects. Such a statement would have been easy to write.³⁴⁸

The difference between the statements—asserting that the disputed documents contain substantive information that constitutes a military secret, and that the disputed documents “cannot be furnished” without hampering national security—is not hairsplitting. The former asserts that the content of the document prevents its disclosure; the latter claims that the grant of authority to the judiciary to review the judgment of senior Air Force officers threatens national security.³⁴⁹

Given the similarities between the positions set forth in Finletter’s and Harmon’s statements and the legal position presented by the Department of Justice in the *Cotton Valley* case, it seems that the Justice Department hoped to secure a ruling from Judge Kirkpatrick in the *Reynolds* litigation stating that the courts lacked the authority to compel the Air Force to disclose documents it characterized as confidential.

* * *

On September 21, 1950, Judge Kirkpatrick ordered the Air Force to permit an in camera, ex parte review of the disputed documents to determine whether the documents satisfied the legal standard for a privilege.³⁵⁰ The Air Force refused to comply with the order, and on October 12, 1950, Judge Kirkpatrick made factual findings against the Air Force on the issue of liability.³⁵¹ That ruling in turn left only the question of damages unresolved, and after a hearing on damages, Judge

³⁴⁶ *Id.*

³⁴⁷ *See id.*

³⁴⁸ It might have read as follows: “The documents cannot be furnished without disclosing information contained therein that would injure national security, flying safety, and the development of highly technical and secret military equipment.”

³⁴⁹ Judge Advocate General Harmon’s position was entirely in keeping with the Department of Justice’s position, namely that any review by the judiciary of an executive branch decision about what documents to disclose and when to do so would threaten a variety of important interests, including those itemized by Harmon.

³⁵⁰ *Reynolds v. United States*, 192 F.2d 987, 990–91 (3d Cir. 1951), *rev’d*, 345 U.S. 1 (1953).

³⁵¹ *Id.* at 991.

Kirkpatrick rendered a judgment for the plaintiffs in the amount of \$225,000 on February 27, 1951.³⁵²

IV. THE THIRD CIRCUIT

The Third Circuit Court of Appeals ruled against the executive in its appeal in the *Reynolds* case, and the three Supreme Court Justices, who eventually dissented from Chief Justice Vinson's majority opinion—Associate Justices Black, Frankfurter, and Jackson—and had voted to affirm the Third Circuit's judgment, took the unusual step of stating that they dissented "substantially for the reasons set forth in the opinion of Judge Maris below." Thus, Judge Maris's opinion constitutes a response by the three Supreme Court dissenters to Vinson's majority opinion.

On behalf of a three judge panel, Judge Maris began by reviewing the facts of the case and the lower court proceedings and orders, noting that the plane was engaged in the "experimental testing of secret electronics equipment."³⁵³ The court then turned to the district court's judgment that the plaintiffs had shown the required good cause for the disputed documents. In explaining why it "[could not] say that in reaching his conclusion that good cause ha[d] been shown the district judge erred,"³⁵⁴ the court quoted four lengthy paragraphs from Judge Kirkpatrick's June 1950 district court opinion which set forth the reasons supporting his finding that the plaintiffs had satisfied the good-cause requirement.³⁵⁵ It then added over two hundred of its own words explaining why it thought good cause existed:

Where, as here, the instrumentality involved in an accident was within the exclusive possession and control of the defendant so that it was as a practical matter virtually impossible for the plaintiffs to have made any independent investigation of the cause of the accident, 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. We agree with the district judge that it is not, under the circumstances of these cases, a sufficient answer to say that since the names of the witnesses whose statements were sought had been supplied in answer to the interrogatories, their depositions might

³⁵² Independent Action for Relief from Judgment to Remedy Fraud on the Court, *supra* note 38, ¶ 18, at 7, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *104, *114; *see also* Herring v. United States, No. 03-CV-5500-LDD, 2004 WL 2040272, at *2 (E.D. Pa. Sept. 10, 2004) (noting that the district court made a finding of fact against defendant and awarded plaintiff damages for this amount).

³⁵³ *Reynolds*, 192 F.2d at 989.

³⁵⁴ *Id.* at 991.

³⁵⁵ *Id.*

have been taken by the plaintiffs. Obviously, this is no answer at all to their demand for the production of the investigation report. And under the circumstances here disclosed, as the district judge has cogently pointed out, it may well have been of vital importance to the plaintiffs to have knowledge of the contents of the statements made by the survivors immediately after the crash even though their depositions could also have been taken.³⁵⁶

The court next addressed the executive branch's sweeping executive-privilege claim that it summarized as follows:

The Government's claim of privilege is based primarily on Section 161 of the Revised Statutes. The primary contention is that this section in giving to the Secretary of the Air Force authority to prescribe regulations for the custody and use of the records and papers of his Department necessarily confers upon him full discretionary power in the public interest to refuse to produce any such records for examination and use in a judicial proceeding and that such records thereby become "privileged." The doctrine of separation of powers of the executive and judicial departments of the Government which is embodied in the Constitution is said to place the exercise of this discretionary power by the Secretary wholly beyond judicial review. In passing upon the validity, as applied to these cases, of this contention by the Government that it cannot be compelled to produce any records of the Department of the Air Force which the Secretary of that Department deems it not to be in the public interest to produce, it is necessary to consider the precise setting in which the contention is made.³⁵⁷

Without describing each turn of its analysis here, the court concluded that the Federal Tort Claims Act "divested the United States of its normal sovereign immunity to the extent of making it liable in actions . . . in the same manner as if it were a private individual,"³⁵⁸ and in so doing withdrew the right of the executive departments, at least in tort claims, "to determine without judicial review the extent of the privilege against disclosure of Government documents sought to be produced for use in the litigation."³⁵⁹

The court next turned to the government's broad argument that the witness statements and the investigatory reports were privileged in that they were secured to advance flight safety, and that promising confidentiality to individuals was necessary to that goal and would be defeated if the documents were disclosed to a private party in litigation.³⁶⁰ Here again the court rejected the government's claim, in

³⁵⁶ *Id.* at 992.

³⁵⁷ *Id.* (footnote omitted).

³⁵⁸ *Id.* at 993.

³⁵⁹ *Id.*

³⁶⁰ *See id.* at 993-94.

part based on the reasoning that in passing the Federal Torts Claim Act Congress decided that the “greater public interest involved in seeing that justice is done to persons injured by governmental operations” outweighed the value of confidentiality, at least in government documents related to an accident.³⁶¹

But the court did not rest its response there. It directly confronted the executive branch’s effort to establish an evidentiary privilege based on a general claim of confidentiality by asserting that it constituted a “sweeping privilege” which it judged “contrary to a sound public policy.”³⁶² The court stated that if it endorsed such a privilege it would be “but a small step to assert a privilege against any disclosure of records merely because they might prove embarrassing to government officers.”³⁶³ Indeed, it was at this point in its argument that the court stated that the privilege the government sought had no logical stopping point. It wrote, “it requires no great flight of imagination to realize that if the Government’s contentions in these cases were affirmed the privilege against disclosure might gradually be enlarged by executive determinations until, as is the case in some nations today, it embraced the whole range of governmental activities.”³⁶⁴

But the court was not satisfied with leaving its assessment of the government’s claim for confidentiality even at that point. It continued:

We need to recall in this connection the words of Edward Livingston: “No nation ever yet found any inconvenience from too close an inspection into the conduct of its officers, but many have been brought to ruin, and reduced to slavery, by suffering gradual imposition and abuses, which were imperceptible, only because the means of publicity had not been secured.” And it was Patrick Henry who said that “to cover with the veil of secrecy the common routine of business, is an abomination in the eyes of every intelligent man and every friend to his country.”³⁶⁵

The court then tackled another issue. When the government refused to permit Judge Kirkpatrick to examine the disputed documents in camera, he found against the government pursuant to the rules of civil procedure on the issue of negligence and barred the government from submitting evidence to controvert this finding. In affirming this result, the appeals court referred to the established rule in criminal law which is that it “reveal all evidence within its control which bears upon

³⁶¹ *Id.* at 994–95.

³⁶² *Id.* at 995.

³⁶³ *Id.*

³⁶⁴ *Id.*

³⁶⁵ *Id.* (footnote omitted) (quoting 1 EDWARD LIVINGSTON, THE COMPLETE WORKS 15 (New York, Nat’l Prison Ass’n of the United States 1873); and 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 170 (Jonathan Elliot ed., Washington 1836)).

the charges or let the offense go unpunished,” and concluded that the Federal Tort Claims Act “offers the Government an analogous choice in tort claims cases.”³⁶⁶ Thus, the court concluded that, under the relevant statutes, the government could “recognize the public interest involved in according justice to the private claimant . . . by producing relevant documents,” or it could “give priority to the public interest which it believes to be involved in preserving the documents from disclosure by declining to produce them” knowing that “the facts to which the documents are directed [will be] taken by the court to be established” against it.³⁶⁷ Here, the government had the same choice: It could comply with the court’s order to permit judicial inspection of the documents or it could have relevant factual findings made against it.³⁶⁸

The court addressed the government’s claim of a state secrets privilege in the last three pages of its opinion. The court, quoting from Secretary Finletter’s statement, stated that the Air Force claimed that “the aircraft in question, together with the personnel on board, were engaged in a confidential mission of the Air Force. The plane likewise carried confidential equipment on board and any disclosure of its mission or information concerning its operation or performance would be prejudicial to this Department and would not be in the public interest.”³⁶⁹

By comparison to the government’s other claims of privilege, the court stated that this claim was “of a wholly different character” in that—and here Judge Maris was plainly misled by Secretary Finletter’s statement—Secretary Finletter “asserts in effect that the documents sought to be produced contain state secrets of a military character.”³⁷⁰

³⁶⁶ *Id.*

³⁶⁷ *Id.*

³⁶⁸ The court stated:

We think that the Federal Tort Claims Act offers the Government an analogous choice in tort claims cases. The Government may decide to recognize the public interest involved in according justice to the private claimant who has brought suit against it by producing relevant documents in its possession upon an order of the court under Rule 34. On the other hand the Government may decide to give priority to the public interest which it believes to be involved in preserving the documents from disclosure by declining to produce them upon the order of the court at the cost, if its claim of privilege is overruled, of having the facts to which the documents are directed taken by the court to be established against the United States under Civil Procedure Rule 37(b)(2)(i). This last is the alternative which the Government chose in the cases now before us. The Federal Rules of Civil Procedure offer such a choice to private litigants under similar circumstances and we are satisfied that under the Federal Tort Claims Act the same choice is presented to the Government which, as we have seen, has been placed by Congress in this respect in the position of a private individual defending against a tort action.

Id. at 995–96.

³⁶⁹ *Id.* at 996 (quoting Claim of Privilege by the Secretary of the Air Force at 2, Civil Action No. 10142 (E.D. Pa. 1950)).

³⁷⁰ *Id.*

On the assumption that the disputed documents did indeed contain information that constituted military secrets, Judge Maris then proceeded with his analysis of the remaining issues. The judge quickly conceded that “[s]tate secrets of a diplomatic or military nature have always been privileged from disclosure in any proceeding and unquestionably come within the class of privileged matters referred to in Rule 34.”³⁷¹ But he noted that the district judge “fully recognized” this privilege:

[H]e directed that the documents in question be produced for his personal examination so that he might determine whether all or any part of the documents contain, to use the words of his order, “matters of a confidential nature, discovery of which would violate the Government’s privilege against disclosure of matters involving the national or public interest.”³⁷²

Thus the appellate court concluded the government was “adequately protected . . . from the disclosure of any privileged matter contained in the documents in question.”³⁷³

In response to the government’s claim it was “within the sole province of the Secretary of the Air Force to determine whether any privileged material is contained in the documents and that his determination of this question must be accepted by the district court without any independent consideration of the matter by it,” the Court stated it “cannot accede to this proposition.”³⁷⁴ And then to make certain there was no doubt as to what it thought of the government’s position, how it assessed judicial competence to assess national security matters, and what it considered the judiciary’s role in the governmental structure, the court wrote:

[W]e are satisfied that a claim of privilege against disclosing evidence relevant to the issues in a pending lawsuit 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. Such examination must obviously be ex parte and in camera if the privilege is not to be lost in its assertion. But to hold that the head of an executive department of the Government in a suit to which the United States is a party may conclusively determine the Government’s claim of privilege is to abdicate the judicial function and permit the executive branch of the

³⁷¹ *Id.* at 996 (footnote omitted).

³⁷² *Id.*

³⁷³ *Id.*

³⁷⁴ *Id.* at 996–97.

Government to infringe the independent province of the judiciary as laid down by the Constitution.³⁷⁵

But the government had another turn in its argument and that was the claim that the court should follow the 1942 decision rendered by the British House of Lords.³⁷⁶ The court of appeals flatly rejected the claim: “[W]hatever may be true in Great Britain,” the court maintained, “the Government of the United States is one of checks and balances.”³⁷⁷ And “[o]ne of the principle checks,” it wrote, “is furnished by the independent judiciary which the Constitution established.”³⁷⁸ Neither of the politically accountable branches of government, the court continued, “may constitutionally encroach upon the field which the Constitution has reserved for the judiciary by transferring to itself the power to decide justiciable questions” properly presented to the judiciary.³⁷⁹

The Third Circuit panel had little patience for the argument that “a danger to the public interest”³⁸⁰ existed when a question of privilege was submitted to the judiciary. “The judges of the United States,” the court wrote, “are public officers whose responsibility under the Constitution is just as great as that of the heads of the executive departments.”³⁸¹ Moreover, the court asserted, in cases involving alleged state secrets, “the judges may be depended upon to protect with the greatest of care the public interest in preventing the disclosure of matters which may

³⁷⁵ *Id.* at 997 (footnotes omitted).

³⁷⁶ *Id.*

³⁷⁷ *Id.* A few years before Judge Maris criticized the British rule in *Duncan v. Cammell, Laird & Co.*, [1942] A.C. 624 (H.L.) (appeal taken from Eng.), Judge Clark of the Second Circuit had leveled the following negative evaluation:

The English experience seems not wholly untroubled; compare the earlier case of *Robinson v. State of South Australia* (1931) A.C. 704, and the discussions in 56 *Harv.L.Rev.* 806; 58 *L.Q.Rev.* 1, 31, 232, 243, 436, 462, 59 *Id.* 51; 8 *Camb.L.J.* 328; 58 *Scot.L.Rev.* 102; 60 *Id.* 1, with extensive reliance upon the classic limitations on executive power stated by Wigmore, 8 *Evidence*, 3d Ed. 1940, Secs. 2378a, 2379. Now that the war is over, these scholarly discussions and frequent criticism of some of the grounds taken in the *Duncan* case, *supra* (1942) A.C. 624 (though not of the decision, which clearly involved war secrets), may lead to a reexamination of the important issue.

Bank Line, Ltd. v. United States, 163 F.2d 133, 139 (2d Cir. 1947) (Clark, J., concurring).

³⁷⁸ *Reynolds*, 192 F.2d at 997.

³⁷⁹ *Id.*

³⁸⁰ *Id.*

³⁸¹ *Id.* at 997–98. For an entirely different assessment of Article III judicial competence and responsibilities, see Justice Jackson’s opinion in *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 111 (1948). It is important to note that although Justice Jackson penned the powerful paragraph found on page 111, arguing that the judiciary should defer to the executive in matters affecting national security, he was one of the three dissenters in the *Reynolds* case, which meant that in this case he favored a judge reviewing the disputed documents *ex parte* and *in camera* to decide whether the executive’s claim of privilege should be sustained.

fairly be characterized as privileged.”³⁸² And then with an abbreviated nod to a well-worn claim that judges lack a background in the relevant facts necessary to decide a matter of privilege, the appeals court stated that “those facts also may be presented to the judge in camera.”³⁸³

V. THE SUPREME COURT PROCEEDINGS

A. *The Executive’s Brief*

The only brief filed in the Supreme Court in the *Reynolds* case that requires review for our purposes was the brief filed by the executive.³⁸⁴ That brief did not try to prevail on narrow and limited grounds. Instead, it was based on the premise that the executive would prevail on exceedingly broad grounds. As a result, the executive branch pressed the Court, as it had in *Cotton Valley*, to grant it a sweeping privilege—an absolute privilege—to keep confidential any information the head of an executive department concluded should be kept confidential.

1. Legal Claim

The executive’s ambitious hopes were stated in the executive’s framing of the basic question the case raised: “This case presents the question whether the judiciary can compel executive officials to disclose, in the course of litigation, departmental documents which the officials believed should be withheld in the public interest.”³⁸⁵ Two aspects of the question framed by the lawyers are highly revealing. First, the executive argued that the courts had no authority to review or modify the judgment of an executive branch official who concluded that the “public interest”—and the concept of “public interest” was defined broadly to include an array of interests such as efficiency in administration, confidentiality in communications, as well as more traditional considerations such as the identity of informers, diplomatic relations, and military secrets—required that “departmental documents” should

³⁸² *Reynolds*, 192 F.2d at 997.

³⁸³ *Id.* The plaintiffs’ attorney, Charles J. Biddle, thought so highly of the Third Circuit opinion he considered relying exclusively upon it as his argument as to why the Supreme Court should not grant the executive’s petition for writ of certiorari in the case. Letter from Charles J. Biddle to Theodore Mattern (Mar. 18, 1952) (on file with author).

³⁸⁴ Thus, in this Article no attention is paid to the brief submitted on behalf of the widows or to the oral argument.

³⁸⁵ Brief for the United States at 15, *United States v. Reynolds*, 345 U.S. 1 (1953) (No. 21), 1952 WL 82378, at *15.

remain confidential.³⁸⁶ Second, the government argued that courts should treat a decision by the executive branch as to what information to disclose, to whom to disclose it, and when to disclose it as conclusive and without any review whatsoever by the courts.³⁸⁷ The executive branch labeled this legal claim, which gave it absolute control over what information to disclose, an “executive privilege,” and it maintained that its version of “executive privilege” was mandated by the constitution, federal statutes and federal common law.³⁸⁸

Although the executive did argue that the court could grant it the relief it sought on the basis of a statute, this was a mere rehashing of a position that courts had rejected and its presentation was brief and lacking conviction. At that point the brief shifts its focus to a constitutional claim, namely a claim that the constitution grants the executive an “executive privilege” that is absolute in nature and that permits the executive to make—without any oversight whatsoever by the judiciary—a decision as to whether the public disclosure of certain papers or information is or is not consistent with the “public interest.”³⁸⁹ The executive asserted that its absolute, constitutionally rooted privilege was a complete and total shield protecting it from “Congressional attempts to require production by the executive branch, often of the very type of documents involved in this case,”³⁹⁰ and that it was “well established”³⁹¹ that courts “will not and cannot require the executive to produce such papers when in the opinion of the executive their production is contrary to the public interests.”³⁹²

In developing its argument, the executive relied substantially on Herman Wolkinson’s Article, *Demands of Congressional Committees for Executive Branch Papers*,³⁹³ and on *Duncan v. Cammell, Laird & Co.* Under a heading that asserted that “Considerations of Public Policy Recognized by the Common Law” supported the claim that the Secretary of the Air Force had an absolute right to decide what documents may be publicly disclosed, the brief extensively cited the Crown’s privilege defined by the House of Lords decision in *Duncan* as

³⁸⁶ *Id.* at 36–37.

³⁸⁷ *Id.* at 15–16; *see also id.* at 23–24.

³⁸⁸ *Id.* at 23, 52, 57.

³⁸⁹ *Id.* at 22, 30–31.

³⁹⁰ *Id.* at 22.

³⁹¹ *Id.* at 31.

³⁹² *Id.* at 34.

³⁹³ Wolkinson, *Part III*, *supra* note 286. For example, relying exclusively upon the Wolkinson Article, the brief asserted with regard to congressional demands for information from the executive branch: “From the administration of Washington to the present, Presidents have repeatedly asserted the privilege, and when forced to a showdown, Congress has always yielded and ceased to press its demands.” Brief for the United States at 24 n.8, *Reynolds*, 345 U.S. 1 (No. 21), 1952 WL 82378, at *24 n.8.

a model for its new executive privilege.³⁹⁴ The brief urged the court to place “[g]reat weight” on the *Duncan* case, and it argued that the legal and policy considerations that prompted the *Duncan* decision apply with even greater force to the United States.³⁹⁵ Thus, the brief maintained that “[t]he constitutional and public policy considerations which underlie the result in *Duncan v. Cammell, Laird & Co.*, have . . . even greater significance in the present case than in the English case, because the English constitution does not embody the doctrine of separation of powers and there is no extensive history of executive independence like that we have discussed in the preceding subsection.”³⁹⁶

The government’s legal brief not only argued for a sweeping claim of privilege but it constructed its brief so as to place the courts in a position so that they were forced to decide the case on this ground. It did this in several ways. First, it abandoned a claim that it had emphasized in the Court of Appeals for the Third Circuit and that would have constituted an alternative, independent, and much narrower ground for a decision. That claim was that a decision of the Secretary of the Air Force not to disclose the documents could only be challenged “in a proceeding directed against the Secretary personally,” as opposed to an action against the United States.³⁹⁷ Second, although the brief twice opened the door to the possibility of a narrow ruling that accepted that judges might review documents involved in a discovery dispute in deciding whether they were privileged, each of these two references was fleeting.³⁹⁸ Third, the executive’s legal brief referred to the state secrets privilege only as support for the broad proposition that the Secretary of the Air Force had the constitutional authority to make the final determination as to whether certain documents should or should not be privileged.³⁹⁹ Thus, the brief claimed that there were two common law

³⁹⁴ Brief for the United States at 36–38, *Reynolds*, 345 U.S. 1 (No. 21), 1952 WL 82378, at *36–38.

³⁹⁵ *Id.* at 38.

³⁹⁶ *Id.* at 41–42.

³⁹⁷ *Id.* at 73 n.47.

³⁹⁸ In the first, the brief stated that “courts should not interfere” in executive branch judgments “without, at least, a showing that the executive determination is plainly arbitrary,” and given that “[n]o such reasons exist here” because “the Secretary’s determination was clearly founded on adequate considerations.” *Id.* at 12. The second reference to the possibility of a court reviewing the judgment of the Secretary of the Air Force was contained in Point heading I (C) of the “Argument” section of the brief. That position hypothesized that “Even if a Department Head’s Refusal to Produce Might be Reviewable in other Circumstances, there is no Occasion Here to Review or Disturb the Secretary’s Determination.” *Id.* at 47. After repeating that point once in this four-page subsection of the brief, the balance of this section of the brief was devoted to why the court should treat the secretary’s judgment in this case as conclusive.

³⁹⁹ The brief referred to the state secrets privilege to illustrate the point, as expressed by the brief in a point heading, that the Secretary’s broad authority was “Supported by Considerations

privileges—one was the state secrets privilege and the other was the informer’s privilege—which “support[ed] the Secretary’s power to refuse to produce the documents even for the judge alone.”⁴⁰⁰ At that point the brief offers as support a citation to the Wigmore treatise on evidence, the *Totten* case, and three cases cited in a previous footnote, two of the cases being district court opinions and one being a circuit court opinion.⁴⁰¹ Three pages later, at page 45, the brief made its second and last reference to the state secrets privilege: “Also, to the extent that the report reveals military secrets concerning the structure or

of Public Policy Recognized by the Common Law.” *Id.* at 36.

⁴⁰⁰ *Id.* at 42. A few pages prior, the brief made reference to the state secrets privilege without using the phrase: “Among the categories of public policy recognized in this way by the law [is] . . . the interest in secrecy in matters of foreign policy, security and national defense . . .” *Id.* at 36. In support of that claim, the brief inserted spare footnote number 15, which referred to two district court decisions, one court of appeals decision, and one Supreme Court decision. The note states in full:

Thus, in actions between private parties, Government officials as witnesses have asserted a privilege against disclosure of confidential military matter. The privilege is the Government’s, not the party’s. *Firth Sterling Steel Co. v. Bethlehem Steel Co.*, 199 Fed. 353 (E.D. Pa.); *In re Grove*, 180 Fed. 62 (C.A. 3); *Pollen v. Ford Instr. Co.*, 26 F. Supp. 583 (E.D. N.Y.). Compare *Totten v. United States*, 92 U.S. 105, in which an action on a contract for espionage made with President Lincoln was held not to lie on the ground that such a contract was so confidential that public policy would not permit action to be brought on it.

Id. at 36 n.15.

⁴⁰¹ *Id.* at 42. As if even the executive doubted the validity or substantiality of the state secrets privilege, the brief characterized Wigmore as the “doughtiest opponent of executive privilege,” but then maintained that even he “affirms that there is a common law privilege for matters concerning military or international affairs.” *Id.* at 42 (citing 8 JOHN H. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW §§ 2378–2378a, at 785, 798 (3rd ed. 1940)). Footnote 25 of the brief states in full: “Wigmore *seems*, however, to place in the courts the determination of whether military matters are actually involved.” *Id.* at 42 n.25 (emphasis added) (citing 8 JOHN H. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2379 (3rd ed. 1940)). Wigmore is hardly grudging on the need for a state secrets privilege. Indeed, he firmly acknowledged the existence and necessity of a state secrets privilege: “There must by a privilege for *secrets of State*, *i.e.* matters whose disclosure would endanger [sic] the Nation’s governmental requirements or its relations of friendship and profit with other nations.” 8 JOHN H. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2212a (3d ed. 1940). What Wigmore does do is to claim that the privilege is “improperly invoked” and “loosely applied,” which in turn requires that “a strict definition of its legitimate limits must be made.” *Id.* Not only was Wigmore not ambivalent about the existence of a state secrets privilege, he was unequivocal about the fact that the courts determine whether the information claimed to be privileged is in fact privileged. *Id.* § 2379. Wigmore explained:

[A] court which abdicates its inherent function of determining the facts which the admissibility of evidence depends will furnish to bureaucratic officials too ample opportunities for abusing the privilege. The lawful limits of the privilege are extensible beyond any control if its applicability is left to the determination of the very official whose interest it may be to shield a wrongdoing under the privilege. Both principle and policy demand that the determination of the privilege shall be for the court.

Id.

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."⁴⁰²

In its seventy-four page brief, the executive referred to the state secrets privilege twice, in two separate sentences on two different pages two thirds of the way through the brief and, then, only to claim that a common law evidentiary privilege supported the idea that the executive had the authority to decide for itself what information or documents should or should not be kept confidential.

2. Presentation of Finletter and Harmon's Claims

Given that it is now known that the Investigation Report and the three witness statements did not contain information injurious to the national security even though the Supreme Court stated that "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," the question arises as to whether the executive's brief was the basis for the court's statement that "there was a reasonable danger that the accident investigation report would contain references to the secret electronic equipment."⁴⁰³

The executive's brief referred to the Secretary and the Judge Advocate General's claim of privilege twice. The first time the brief represented that the Secretary had claimed that "disclosure of the Board's reports and the statements would seriously hamper national security and flying safety as well as the development of highly technical military equipment."⁴⁰⁴ That was a misrepresentation. The Secretary did not claim that mere "disclosure" would hamper national security. He claimed that "compulsory disclosure" would hamper national security.⁴⁰⁵ By eliminating the phrase "compulsory disclosure," the brief changed the meaning. The Secretary's statements emphasized judicial compulsion of disclosure and thus highlighted the government's general objection to judges second-guessing the judgment of the heads of executive departments. By eliminating the idea of compulsion, the brief shifts the focus of the Secretary's objection from judicial compulsion of disclosure to the content of the documents ordered disclosed, and thus encourages a perception that the Secretary objected to the disclosure of the documents because of their content.

⁴⁰² Brief for the United States at 45, *Reynolds*, 345 U.S. 1 (No. 21), 1952 WL 82378, at *45.

⁴⁰³ *Reynolds*, 345 U.S. at 10.

⁴⁰⁴ Brief for Petitioner at 2, *Reynolds*, 345 U.S. 1 (No. 21), 1952 WL 82378, at *2.

⁴⁰⁵ Independent Action for Relief from Judgment to Remedy Fraud on the Court, *supra* note 79, Exhibit C, at 28, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *129 (Finletter Statement).

The brief's other characterization of the Secretary's position was even more subtle. As noted, the Secretary's carefully worded statement never claimed that the disputed documents contained information that described the plane's "mission," "operation," or "performance." In contrast, the brief, in referring to the "report of the Accident Investigation Board," stated: "Also, 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."⁴⁰⁶ Although the phrase "to the extent" does not entirely foreclose the possibility that there is no "extent" to which the report reveals such matters, such an understanding would be a distortion. By using the phrase "to the extent" the brief plainly implied a substantive point—the investigation report contained information that constituted military secrets concerning the plane's structure or performance—which the Secretary or the Judge Advocate General did not make.

3. Lawyers Not "Permitted" to "See" Documents

The executive's litigation strategy goes one layer deeper. The Justice Department lawyers stated in their brief filed with the Supreme Court in *Reynolds* that the Secretary of the Air Force did not permit them to review the disputed documents. Thus, the brief stated: "[c]ounsel for the Government in the tort action cannot compel [the Secretary of the Air Force] to do so and, indeed, are not permitted by him to see the documents."⁴⁰⁷ The lawyers stated that the Secretary had not "permitted" them "to see" the disputed documents, which in turn meant that the brief's representations as to the content of the documents were based on statements of the Secretary or the Judge Advocate General.⁴⁰⁸

Under ordinary circumstances, the Secretary of the Air Force might well have, as a practical matter, the last word as to whether the disputed documents would or would not be shared with the Justice Department lawyers presenting the matter to the Supreme Court. But as a theoretical matter the Secretary surely did not have the last word. The Secretary of the Air Force was part of a chain of command that ended with the President as Commander-in-Chief, and the capacity of the Air Force's Secretary to dictate orders to the Justice Department was dependent upon the President. More importantly, as influential as the

⁴⁰⁶ Brief for Petitioner at 45, *Reynolds*, 345 U.S. 1 (No. 21), 1952 WL 82378, at *45.

⁴⁰⁷ *Id.* at 63.

⁴⁰⁸ *Id.*

Air Force may have been because of the new strategic importance of air power, it seems implausible that the Air Force could force, over the objections of the Department of Justice and the White House, a confrontation between the executive branch and the judiciary over such an important legal and policy issue. After all, the authority of the judiciary to review executive branch documents affected every executive department and agency, not just the Air Force.

What seems much more likely is that the lawyers for the Justice Department did not demand access to the documents in dispute because they did not want access.⁴⁰⁹ If the lawyers had secured access to them they would have had actual knowledge that Finletter's and Harmon's statements filed with the court were misleading and deceptive. Such knowledge would have imposed an obligation on them to correct the deceptiveness, and that in turn would have destroyed the national security aura that the lawyers were seeking to fabricate in the *Reynolds* case. And because the Justice Department lawyers had participated in the drafting of at least Finletter's statement, they had some reason to suspect that the disputed documents contained no military secrets, and, thus, not having access to the disputed documents facilitated the Justice Department's presentation of a legal position to the court that it wished to present.

This was the second time in the *Reynolds* litigation that lawyers for the executive branch insulated themselves from knowing the real facts of the case. In the district court the government lawyer submitted responses to plaintiffs' interrogatories based on information provided by the Air Force that contained two lies. And now in the brief filed in the Supreme Court the lawyers characterized the allegations of the Secretary and the Judge Advocate General to encourage the view that the disputed documents contained information damaging to the national security.

⁴⁰⁹ The policy of the Obama administration requiring the submission by executive departments to the Department of Justice of all potential claims of the state secrets privilege indicates that the President has the authority to require executive officers to submit disputed documents to the Justice Department for review. Memorandum from the Office of the Attorney Gen. to Heads of Exec. Dep'ts and Agencies and Heads of Dep't Components (Sept. 23, 2009) (on file with author) (regarding "Policies and Procedures Governing Invocation of the State Secrets Privilege"). I found one file in the Harry S. Truman Library prepared in the fall of 1948, originally classified "CONFIDENTIAL," and declassified in 1961, which supports the position that at that time, President Truman, acting through the Department of Justice, asserted authority over executive agencies and required to disclosure of information and documents to the President via the Justice Department. Memorandum on the "Amerasia Case" from the Office of the Attorney Gen. to President Truman (1948) (on file with the Harry S. Truman Library, White House Central Files).

B. *The Conference*

The nine Justices on the Supreme Court discussed *United States v. Reynolds* at the Court's weekly confidential conference on October 25, 1952, and voted five to four to reverse the Third Circuit's judgment. President Truman's four appointments to the court—Chief Justice Vinson and Associate Justices Clark, Burton, and Minton—joined by Associate Justice Reed, all voted to reverse the lower court, while Associate Justices Black, Frankfurter, Douglas, and Jackson voted to affirm.⁴¹⁰

At the conference, the Chief Justice spoke first. Vinson stated that he disagreed with the circuit court's decision because a rule that permitted a trial judge to review documents the executive branch claimed contained national security information and thus privileged would open the door to counsel claiming that it had a right to review the documents.⁴¹¹ Thus, Vinson asserted, the judiciary cannot review the documents "without taking away" the privilege altogether from the executive branch.⁴¹² In offering this view to his colleagues, Vinson was following closely in the footsteps of the judges in the *Duncan* case decided by the House of Lords. According to Vinson's reasoning, a judge should not examine in camera, ex parte documents the executive branch claims are privileged because such a rule would eventually become a shoehorn that permitted opposing counsel to review the documents, and such a disclosure will destroy the executive branch's privilege.⁴¹³

Justice Douglas's notes of the decisions at the conference suggest that Justice Reed's position was close to Vinson's position of granting the executive branch an absolute privilege that permitted it, and it alone, to decide what information it would disclose, to whom, and when.⁴¹⁴ Justice Reed stated the United States should have a privilege at least equal to that of the commonly recognized spousal privilege, the priest-

⁴¹⁰ Notes on Preliminary Vote for *United States v. Reynolds* (Oct. 25, 1952) (on file with the Library of Congress, Manuscript Division, Justice Robert Jackson, Box 222).

⁴¹¹ See Notes from Justice William O. Douglas on Judicial Conference for *United States v. Reynolds* (No. 21) (Oct. 25, 1952) (on file with the Library of Congress, Manuscript Division, William O. Douglas Papers, Box 223) [hereinafter Douglas Notes (Box 223)].

⁴¹² *Id.*

⁴¹³ Here are the *Duncan* tracks that Vinson followed:

In many cases there is a further reason why the court should not ask to see the documents, for where the Crown is a party to the litigation, this would amount to communicating with one party to the exclusion of the other, and it is a first principle of justice that the judge should have no dealings on the matter in hand with one litigant save in the presence of and to the equal knowledge of the other.

Duncan v. Cammell, Laird & Co., [1942] A.C. 624 (H.L.) 640–41 (appeal taken from Eng.).

⁴¹⁴ Douglas Notes (Box 223), *supra* note 411.

parishioner privilege, and the privilege against self-incrimination.⁴¹⁵ He stated that some high official within the executive branch, such as the “Secretary of War,”⁴¹⁶ should take personal responsibility for the claiming the privilege, but if that were done, Reed thought that the executive branch should have an absolute privilege.

Neither Justice Douglas’s notes nor Justice Burton’s notes reveal the views of Justices Minton, Burton, and Clark on whether a judge could in some cases review the arguably privileged documents to determine the appropriateness of the privilege, but given that the *Reynolds* decision did not explicitly grant the executive an unqualified, absolute privilege, one or more of these three Justices must have insisted on a privilege that was slightly less absolute than the privilege Vinson and Reed favored.⁴¹⁷

⁴¹⁵ *Id.* Douglas’s notes on what Reed said at the conference state: “US can protect itself against disclosure of secret intelligences—every citizen has privilege of not some information, e.g., incriminating evidence, confidence of wife—confessions to priest etc.,—US should have the same—reverses, provided US Sec of War himself joined in the privilege.” *Id.*

⁴¹⁶ *Id.*

⁴¹⁷ The evidence pertaining to Justice Burton’s position leaves the matter unsettled. Justice Burton wrote on a page of a memorandum prepared by one of his law clerks that the executive departments right to withhold “confidential military and policy dates and under appropriate circumstances other matters affecting public interest is long recognized—both as against congress & courts.” Notes from Justice Harold Burton on Bench Memo Regarding *United States v. Reynolds* (No. 21) (Oct. 19, 1952) (on file with the Library of Congress, Manuscript Division, Harold Burton Papers, Box 227) [hereinafter Burton Notes (Box 227)]. Burton conceded the possibility that the Congress and the executive could waive the privilege in varying degrees, but in his view the Federal Tort Claims Act did not constitute such a waiver. As a result of these two conclusions, Burton noted that he did not have to reach the question as to whether the plaintiffs had established “good cause,” but that if the privilege had been waived he would have decided that good cause was shown. *Id.* Douglas’s notes provide that Burton said at the conference that he believed the lower court judgment had violated the executive branch’s privilege. Douglas Notes (Box 223), *supra* note 411. As a result of Burton’s willingness to find “good cause” under some circumstances, it is possible that Burton is a Justice who prevented Vinson and Reed from announcing in *Reynolds* that the executive branch had an absolute common law executive privilege at least in disputes involving national security information.

The evidence pertaining to Justice Clark is no more definitive than the evidence pertaining to Justice Burton. Because Tom Clark had been Attorney General when the executive branch filed its brief in the Supreme Court in the *Cotton Valley* case, in which the government sought an absolute executive privilege similar to that defined in the *Duncan* case, there is some reason to think that Clark agreed with Vinson that the Court should grant the executive an absolute privilege. Moreover, Douglas’s notes make it plain that Clark favored reversal, but the notes are inconclusive as to Clark’s reasoning, and thus the notes do not indicate whether Clark favored an absolute privilege or not. Douglas Notes (Box 223), *supra* note 411. In contrast to Douglas’s notes on Clark’s comments, Burton’s notes emphasize that Clark thought the trial judge had erred by not requiring the plaintiffs to take the deposition of the three surviving servicemen. Burton Notes, *supra* note 417 (“[Judge Kirkpatrick] did not exhaust the means before him—did not exhaust the depositions of the witnesses.”). And the notes actually repeat the same point again. There is nothing inconsistent between Douglas’s notation and Burton’s. Clark’s meaning is uncertain. On the one hand, Clark’s point may have been that the trial court’s upholding of an executive privilege in this case did not preclude the possibility of plaintiffs’ proving what they needed to prove to prevail, especially given that the government had offered to make the servicemen available for a deposition. If that is what Clark meant, then he might have favored

Because Vinson was in the majority, he had the prerogative to assign the writing of the majority opinion to any of the Justices in the majority. Though it surely is not a rule, it is not unheard of when the Justices who compose a majority are in disagreement over the substance of an opinion for the Justice who assigns the writing of the opinion to assign the writing to the Justice whose vote may be the most conditioned or uncertain.⁴¹⁸ The assumption underlying such an assignment is that the member of the majority whose views are most conditioned or limited will not produce an opinion that causes disaffection by one of the other Justices in that majority, whereas it might be possible that an opinion written by one of the other Justices might cause the most narrowly committed of the five Justices in the majority to vote differently and thus dissolves the majority. By assigning the writing of the opinion to himself, Vinson bucked this “play-it-safe” approach. Perhaps Vinson did that because he knew, based on past experience, that he could draft an opinion that would be acceptable to the four Justices he needed to retain to reverse the lower court judgment.⁴¹⁹ If that is why he assigned the opinion to himself, he succeeded. Indeed, he not only kept intact his majority of five, but he captured Justice Douglas, who wrote the Chief a note after reading the opinion. “I voted the other way but will go along. It’s a nice opinion.”⁴²⁰

the absolute privilege the government sought. On the other hand, the use of the word “exhaust” suggests that Clark held out the possibility that the plaintiffs should have access to the Investigation Report and the written witness statements of the depositions proved inconclusive. If that is what Clark had in mind, then he would have favored a qualified executive privilege.

⁴¹⁸ For example, in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), which overruled *National League of Cities v. Usery*, 426 U.S. 833 (1976), Justice Brennan assigned the writing of the majority opinion to Justice Blackmun, whose vote was necessary to reach a majority. Justice Blackmun had, nine years earlier, voted in the majority in *Usery* and wrote a separate concurrence. Another example would be *Boumediene v. Bush*, 553 U.S. 723 (2008), in which Justice Stevens was the senior judge in the majority, who assigned the writing of the majority to Justice Kennedy. Kennedy has been identified in the press as the most tentative member of the majority. Linda Greenhouse, *Justices to Answer Detainee Rights Question*, N.Y. TIMES, Dec. 6, 2007, at A32.

⁴¹⁹ ST. CLAIR & GUGIN, *supra* note 319, at 179 (“Vinson maintained a tight control over the assignment of opinions by bending himself to the majority. He was in the majority in over 86 percent of the cases. He averaged only nine dissents per term, far less than Stone’s annual average of eighteen.”).

⁴²⁰ Memorandum from William O. Douglas, Assoc. Justice of the U.S. Supreme Court, to Fred M. Vinson, Chief Justice of the U.S. Supreme Court (Mar. 6, 1953) (on file with the University of Kentucky Library, Papers of Fred Vinson, Box 285) (regarding *United States v. Reynolds* draft opinion). It is not known why Justice Douglas changed his mind. Given the available historical record, two explanations are plausible.

First, Douglas may have found Chief Justice Vinson’s opinion persuasive. And that could have been the case, even though it is likely that Justice Douglas understood that Chief Justice Vinson’s opinion granted the executive a de facto absolute privilege that invited abuse of the privilege. Although Douglas had a reputation of favoring individual substance and procedural rights so that the individual was protected from unchecked executive branch authority, Associate Justice Robert Jackson had a more complicated understanding of Douglas, one that suggested that there was a substantial gap between Douglas’s reputation and his actions. Thus,

That switch made the final vote in *Reynolds* six to three.⁴²¹

consider Jackson's understanding of Douglas's conduct in the appeal of Julius and Ethel Rosenberg to the Supreme Court in the spring of 1953, which occurred during the same weeks that Vinson had circulated his draft opinion in *Reynolds* and Douglas decided to switch his position and to support it. In the Rosenberg appeal to the Supreme Court, Jackson concluded, after observing Douglas changed his mind during that contentious and divisive appeal, that Douglas was seeking to manipulate the appeal process so that he could portray himself as a public critic of the lower court proceedings, but to do so without actually causing the high court to vote to review the merits of the appeal and thus without providing the Rosenbergs any procedural or substantive victory. Indeed, Jackson was so suspicious of Justice Douglas's motives that at a May 23, 1953, conference of the justices he called what he characterized as "Douglas's 'bluff.'" Snyder, *supra* note 2, at 905. Jackson was furious after Douglas had informed his colleagues on the Court that he intended to dissent from the denial of certiorari because "Jackson was certain that Douglas had no desire for the Court to hear the Rosenbergs' case." FELDMAN, *supra* note 318, at 390. As Jackson saw it, "Douglas could have made that result far more likely by joining Black and Frankfurter only a few days earlier in voting to have the case heard." *Id.* Since Douglas declined to do that, Jackson reasoned that Douglas's "only possible motive . . . was to grandstand, drawing attention to his own liberal credentials without actually putting the Court in a position to hear the case." *Id.* In short, Jackson thought that Douglas's threatened dissent from a denial of certiorari was no more than a bluff. Thus, Jackson decided that he would call Douglas's bluff at a conference when he said that he was willing to provide the fourth vote to grant certiorari (Frankfurter, Black, Douglas, and Jackson). FELDMAN, *supra* note 318, at 390; Snyder, *supra* note 2, at 905. At that point, Jackson watched as Douglas stated that he would withdraw his threatened dissent and his vote to grant certiorari. FELDMAN, *supra* note 318, at 390. Thus, as Jackson understood the events as they unfolded, Douglas was willing to dissent publicly from the denial of certiorari in the case so long as his vote favoring certiorari would not in fact result in the granting of certiorari, and that Justice Douglas favored such a course of conduct so as to strengthen his reputation as a staunch defender of individual justice. Snyder, *supra* note 2, at 905–06.

Second, it is possible that Douglas switched his vote in the *Reynolds* case because he had an ex parte communication with the very first Secretary of the Air Force, W. Stuart Symington, later a U.S. Senator from Missouri. Justice Douglas and Secretary Symington were active friends beginning at least in the mid-1940s and continuing on from then. Communications between Douglas and Symington document the friendship. See Communications Between William O. Douglas, Assoc. Justice of the Supreme Court & W. Stuart Symington, Secretary of the Air Force (on file with the President Harry S. Truman Library, W. Stuart Symington Papers, Box 4). Furthermore, Symington was the Air Force Secretary when the B-29 crash that killed the civilian engineers and resulted in the *Reynolds* case occurred. He was also the Secretary when Air Force officials submitted false statements in response to plaintiffs' interrogatories and when the Air Force initially submitted papers to the trial judge—Judge Kirkpatrick—in *Reynolds* opposing the plaintiffs request that the Air Force disclose the Persons investigation report and the signed witness statements. Thus, because of the active nature of their friendship, it is conceivable that Douglas and Symington might have discussed the *Reynolds* case sometime between Douglas's initial vote favoring affirmation of the Third Circuit decision and his note to Vinson that he would endorse Vinson's opinion and vote to reverse the Third Circuit. Such a conversation need not have been lengthy or extensive. Indeed, it is possible that all that Symington had to state was something comparable to the following: "The outcome in this case is important to the Air Force," in order for Douglas to reconsider his view of the case and change his vote.

⁴²¹ The three dissenters were Justices Black, Frankfurter, and Jackson. As noted earlier, they stated that they dissented "substantially for the reasons set forth in the opinion of Just Maris below." *United States v. Reynolds*, 345 U.S. 1, 12 (1953).

C. *The Opinion*

In contrast to his lengthy opinions in the *Dennis*⁴²² and *Steel Seizure*⁴²³ cases in which he belabored and detailed the international crises that presented a national security threat, Vinson's majority opinion in *Reynolds* devoted only two, quite limited sentences to the national security challenges confronting the United States at the time. This brief treatment suggests that while the case was decided against the backdrop of the overarching Cold War with the Soviet Union, the land war in Korea, and the dawn of the modern day national security state, national security considerations were peripheral to Vinson's argument in his *Reynolds* opinion.⁴²⁴

1. "Well Established"

Against the context of "vigorous preparation for national defense,"⁴²⁵ Vinson fully understood that the executive sought in the *Reynolds* case a sweeping and absolute executive privilege.⁴²⁶ He characterized the executive's position as follows: "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."⁴²⁷ Although Vinson acknowledged in a footnote that this claim of "executive power to suppress documents" is based most directly on Revised Statutes section 161,⁴²⁸ he also noted the government's claim that section 161 is "only a legislative recognition of an inherent executive power" which is constitutionally "protected" by the doctrine of separation of powers.⁴²⁹ But Vinson then pivoted in his opinion and claimed that it was unnecessary for the Court to pass on this sweeping claim that had "constitutional overtones" since there was a "narrower ground for decision," and it was that narrower ground that became the basis for the opinion and the contemporary state secrets privilege.⁴³⁰

⁴²² *Dennis v. United States*, 341 U.S. 494 (1951).

⁴²³ *Steel Seizure*, 343 U.S. at 667 (Vinson, J., dissenting).

⁴²⁴ In the first reference Vinson noted that "we cannot escape judicial notice that this is a time of vigorous preparation for national defense," and in the second he acknowledged that World War II had "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." *Reynolds*, 345 U.S. at 10.

⁴²⁵ *Id.*

⁴²⁶ *Id.* at 6 n.9.

⁴²⁷ *Id.* at 6.

⁴²⁸ 5 U.S.C. § 22 (1952) (currently codified at 5 U.S.C. § 2006).

⁴²⁹ *Id.* at 6 n.9.

⁴³⁰ *Id.* at 6.

The narrower ground Vinson had in mind was the “privilege against revealing military secrets,”⁴³¹ a privilege Vinson stated the Secretary of the Air Force had invoked when he filed his formal claim of privilege.⁴³² Although Vinson stated that the “privilege against revealing military secrets” was “well established in the law of evidence,”⁴³³ he conceded that judicial experience in the United States with the state secrets privilege “has been limited,” which was certainly accurate and evidenced by the footnote he wrote to support the claim that the privilege was “well established.”⁴³⁴ That footnote contained not one Supreme Court decision that directly involved the state secrets privilege. The only Supreme Court decision referenced in the footnote was *Totten v. United States*, in which the Court dismissed an action on the ground that the case involved a dispute over wages arguably resulting from a secret agreement—which the Court stated must remain secret because the parties had agreed that it would remain secret—between President Lincoln and a self-described Union spy.⁴³⁵ The other cited cases in the footnote were four district court opinions⁴³⁶ and one Second Circuit Court of Appeals decision.⁴³⁷ These five lower court citations were followed by references to two evidence law treatises⁴³⁸ and one law review Article.⁴³⁹

Thus, when Vinson claimed that the state secrets privilege was “well established,” he must have meant that it was assumed that courts had historically respected such a privilege but that the privilege had rarely been asserted in the United States, and that the scope of the privilege, and the terms and conditions upon which it was to be applied, were undefined.⁴⁴⁰ In fact, Vinson’s opinion even suggests a degree of

⁴³¹ *Id.*

⁴³² *Id.* at 4. Although Chief Justice Vinson used the term “military secrets” or “military matters” five times in his opinion and only used the phrase “military and state secrets” once, it is quite clear from the opinion, that Vinson’s narrow ground was the common law rule of evidence commonly termed the “state secrets privilege.”

⁴³³ *Id.* at 6–7. For a discussion of the history of the privilege, see William G. Weaver & Danielle Escontrias, *Origins of the State Secrets Privilege* (Feb. 10, 2008) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1079364.

⁴³⁴ *Reynolds*, 345 U.S. at 6–7.

⁴³⁵ *Id.* at 7 n.11 (citing 92 U.S. 105 (1875)).

⁴³⁶ *Id.* (citing *Cresmer v. United States*, 9 F.R.D. 203 (E.D.N.Y. 1949); *Bank Line, Ltd. v. United States*, 68 F. Supp. 587 (S.D.N.Y. 1946); *Pollen v. Ford Instrument Co.*, 26 F. Supp. 583 (E.D.N.Y. 1939); *Firth Sterling Steel Co. v. Bethlehem Steel Co.*, 199 F. 353 (E.D. Pa. 1912)).

⁴³⁷ *Id.* (citing *Bank Line, Ltd. v. United States*, 163 F.2d 133 (2d Cir. 1947)).

⁴³⁸ *Id.* (citing 8 WIGMORE, *supra* note 401, §§ 2212(a), 2378(g)(5) (3d ed.); 1 GREENLEAF ON EVIDENCE §§ 250–251 (16th ed. 1899)).

⁴³⁹ *Id.* (citing Sanford, *supra* note 265, at 74–75)).

⁴⁴⁰ Vinson thought that the state secrets privilege was well established with regard to only military secrets. Thus, Vinson stated that the Secretary of the Air Force formally lodged a “Claim of Privilege” against what he termed as revealing “military secrets.” *Reynolds*, 345 U.S. at 6. But again, the Court conceded that judicial experience in the United States with regard to the state secrets privilege, a privilege which it characterized as a “military and state secrets”

unease at the idea that the Court's decision in the case was based on an evidentiary privilege with almost no precedential support as evidenced by the fact that Vinson labored to point out that the "existence of the privilege," was "conceded by the "court below," and by the "most outspoken critics of governmental privilege."⁴⁴¹ If the purpose of referring to these authorities was to give legitimacy to the idea of the state secrets privilege, then the effort was weak to say the least since the authorities cited were hardly authoritative. Instead of Vinson actually thinking that the privilege was truly well established, what seems more likely is that Vinson thought that the privilege was of questionable legitimacy in the absence of any statute authorizing it, but that he nonetheless endorsed it and was going to wring what support for its use he could out of the available precedent and scholarly commentary.

In short, the state secrets privilege announced by the Court in *Reynolds* had been rarely invoked and rested on few United States judicial decisions which did not foreshadow the convoluted rules Vinson announced in *Reynolds*. Thus, the *Reynolds* heritage had no relationship with the rules Vinson announced in *Reynolds*, and as it turns out, the rules announced in *Reynolds* have only a slight relationship with the rules of the contemporary state secrets privilege. In other words, *Reynolds* was a departure from the past, and modern courts have departed from *Reynolds*.

privilege, had been "limited." *Id.* at 7. The court continued to repeat many times over its characterization of the military nature of the privilege. Thus, the court stated: "It is . . . apparent that these electronic devices must be kept secret if their full military advantage is to be exploited in the national interests." *Id.* at 10. Or as the court emphasized: "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." *Id.* Or, as yet again: "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 . . ." *Id.* at 10-11.

The majority's emphasis on military secrets protecting weapon development hardly means that it would refrain from applying the privilege to intelligence or diplomatic affairs, but the emphasis on military weapon development secrets does place information merely characterized as confidential or secret because it promotes administrative efficiency in sharp contrast. Further there was certainly not a whisper of a suggestion in the opinion that the privilege may be properly invoked to shield improper or illegal conduct, which the executive branch did do in the late 1970s. *See, e.g.,* *Halkin v. Helms*, 598 F.2d 1, 12 (D.C. Cir. 1979) (Bazelon, J., dissenting from denial of rehearing en banc) ("Unlike *Reynolds*, where the 'state secret' was only coincidental to the plaintiffs' tort suit, and did not preclude litigation of the case, upholding the privilege in this case precludes all judicial scrutiny of the signals intelligence operations of NSA, regardless of the degree to which such activity invades the protections of the Fourth Amendment."). Nor is there any suggestion in the *Reynolds* opinion that the privilege may be invoked before the information that may be privileged is specifically identified or before it is certain that the litigation of a case will in fact force the disclosure of certain information. Although in later decades the circuit courts expanded the privilege to these circumstances, that expansion has no explicit or direct roots in the *Reynolds* opinion. *See supra* note 8.

⁴⁴¹ *Reynolds*, 345 U.S. at 7. The critics were Wigmore, Greenleaf, and Sanford. *See id.* at 7 nn.11 & 13; *supra* note 439.

2. Controlling Principles

Although Vinson conceded that courts in the United States had had almost no experience with the privilege, he also claimed that “the principles which control the application of the privilege emerge quite clearly from the available precedents.”⁴⁴² For Vinson these two claims were not in conflict with each other since the available precedents Vinson referred to were not United States judicial decisions. Instead Vinson relied very heavily on one 1942 House of Lords decision, *Duncan v. Camell, Laird & Co.*,⁴⁴³ which the Justice Department had relied upon in *Cotton Valley* and then again in its legal papers in *Reynolds*.⁴⁴⁴

The first two rules Vinson offered to guide the exercise of the privilege were straightforward. Vinson stated that the privilege belonged solely to the government; it must be asserted by the government, and it cannot be claimed or waived by a private party.⁴⁴⁵ The privilege must be formally claimed by the head of a department which controls the information in question, and the claim of privilege may only be asserted by the department head “after actual personal consideration.”⁴⁴⁶

It was the third guiding rule that Vinson stated presented any “real difficulty.”⁴⁴⁷ The problem was who should decide whether the material in dispute was or was not privileged. Vinson first insisted that it must be the courts that have final authority in deciding whether the material in dispute is privileged. “The court itself,” Vinson wrote, “must determine whether the circumstances are appropriate for the claim of privilege,”⁴⁴⁸ and whether the exercise of such authority is necessary to avoid abuse of the privilege, or what Vinson termed executive “caprice.”⁴⁴⁹ At the same time that judges must determine for themselves whether the circumstances warrant a privilege and must guard against executive caprice, Vinson stated that they must “do so without forcing a disclosure of the very thing the privilege is designed to protect.”⁴⁵⁰

⁴⁴² *Id.* at 7.

⁴⁴³ *Id.* at 7 n.15 (citing *Duncan v. Cammell, Laird & Co.*, [1942] A.C. 624 (H.L.) (appeal taken from Eng.)).

⁴⁴⁴ See *supra* Part III.A.2.

⁴⁴⁵ *Reynolds*, 345 U.S. at 7.

⁴⁴⁶ *Id.* at 7–8.

⁴⁴⁷ *Id.* at 8.

⁴⁴⁸ *Id.*

⁴⁴⁹ *Id.* at 10.

⁴⁵⁰ *Id.* at 8. In reaching this result, Vinson equated the state secrets privilege with the privilege against self-incrimination. He asserted that submitting to a judge for review documents allegedly containing military secrets would destroy the state secrets privilege, just as an intrusive examination of an individual would destroy the privilege against self-incrimination. *Id.* At its most superficial level, this reference to the self-incrimination privilege relied upon by the majority to support its conclusion that courts should not insist upon

Given the tension between these considerations Vinson stated that a “formula of compromise must be applied.”⁴⁵¹ Thus, he insisted a court may not “automatically require a complete disclosure to the judge,” even to a judge “alone, in chambers,” before the claim of privilege “will be accepted in any case,” if it is “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.”⁴⁵² When such circumstances exist, circumstances that permit a court to conclude that compulsion does in fact pose a “reasonable danger” to national security, Vinson concluded that the “occasion for the privilege” is not only “appropriate,” but a court “should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence.”⁴⁵³

In setting forth this guideline, Vinson did not explicate the term “reasonable danger,” thus leaving the magnitude of the required danger that warrants a privilege undetermined. Nor did he address the question of whether there was a minimum probability that the dangerous harm will in fact be inflicted if there were disclosure to uphold a privilege, or explore the degree to which the danger might be imminent or remote in order to sustain the privilege. Vinson also did not explain why the disclosure of the information to a judge “alone, in chambers” in any way jeopardized the security of the information.

In addressing the question of how intrusive a judge should be in probing whether a judge should sustain the executive’s assertion of privilege, Vinson stated that when a plaintiff makes a “strong showing of necessity” for the material in dispute, a court should not accept a claim of privilege “lightly.”⁴⁵⁴ “[B]ut,” he continued, “even the most

reviewing disputed documents may seem plausible. It would make no sense to force a person claiming the constitutional right against self-incrimination to publicly disclose the incriminating information as a prerequisite for asserting the right. Thus, the majority in *Reynolds* reasoned, it behooves a court to force the executive as a prerequisite for asserting a state secrets privilege to divulge the very information it asserts should not be divulged. But this position makes no sense when the disclosure is to the judge alone, in chambers. An ex parte, in camera disclosure to a judge is not a public disclosure and does not prejudice the executive branch invoking a privilege. The lower court judgment did not require the government to make a disclosure to the public or to the opposing party. The lower court recognized that there was a distinction between information that was properly privileged and information that was not and was merely seeking to monitor the boundary by inspecting the documents in the privacy of chambers.

⁴⁵¹ *Id.* at 9.

⁴⁵² *Id.* at 10.

⁴⁵³ *Id.* The Vinson majority assumed that the judge could make a reliable judgment regarding the likelihood that certain documents contained privileged material from all of the circumstances of the case. That, of course, was not true, even in the *Reynolds* case. See *supra* Parts I.E, III.C, VI.A.2.

⁴⁵⁴ *Id.* at 11.

compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake,” and “[a] *fortiori*, where necessity is dubious, a formal claim of privilege . . . will have to prevail.”⁴⁵⁵ In other words, if a judge concludes from the circumstances of a case that a “reasonable danger” exists that the documents contain military secrets, a judge must sustain the privilege without personally reviewing the documents no matter how essential, important, or necessary they might be to plaintiffs. The privilege was absolute and the practical consequences of Vinson’s rules had the effect of protecting the executive’s assertion of privilege from judicial review.⁴⁵⁶

3. Application

Applying these considerations to the *Reynolds* case, the court quickly decided that its first two principles were satisfied: a formal claim of privilege submitted by the Secretary of the Air Force had been submitted after actual personal consideration of the documents in dispute. It was the third issue—whether the Air Force must submit the investigation reports and the witness statements to the judge for an *ex parte* in camera review—to which Vinson devoted most of his opinion. Based on the legal standard set forth by the majority, that third issue depended on the response to the following question: Whether a judge could conclude 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.”

In answering these inquiries, Vinson stated that “[t]here is nothing to suggest that the electronic equipment, in this case, had any causal connection with the accident,” and that “[t]herefore, it should be possible for [the widow respondents] to adduce the essential facts as to causation without resort to material touching upon military secrets.”⁴⁵⁷ At that point Vinson focused on the Air Force’s offer to permit the plaintiffs to take the deposition of the three surviving servicemen, and assumed that because the depositions might disclose the cause of the crash or lead to non-privileged evidence that might disclose the cause of

⁴⁵⁵ *Id.*

⁴⁵⁶ At least Vinson and Reed told their colleagues in the conference in the case that they favored an outright absolute privilege. See *supra* notes 411–416 and accompanying text. That view lacked a majority, but the formulation of the standard in *Reynolds* more or less gave Vinson and Reed the result they preferred while permitting the courts to appear judicious by insisting that judges would remain in charge of evidentiary rulings and guard against executive caprice. Chief Justice Vinson almost certainly took these factors from the House of Lords decision in the *Duncan* case and in fact tracked the language of *Duncan*. *Reynolds*, 345 U.S. at 8 & nn.19–22.

⁴⁵⁷ *Reynolds*, 345 U.S. at 11.

the crash, the plaintiffs had presented a “dubious showing of necessity” for gaining access to the disputed documents.⁴⁵⁸ Having concluded that the plaintiffs had presented a dubious necessity for access to the documents, Vinson then concluded that the lower courts had erred in requiring the Air Force to submit the disputed documents to the trial judge for an in camera inspection, especially since 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.”⁴⁵⁹

The Supreme Court reversed the Third Circuit’s decision and remanded the action to permit the plaintiffs to carry through with the Air Force’s offer to permit the plaintiffs to take the depositions of the three surviving Air Force crew members.⁴⁶⁰

The decision left the widows little choice but to take the deposition of the servicemen.⁴⁶¹ Although no transcript of the deposition survives,⁴⁶² it is implausible to think that the servicemen made statements during the deposition that shed any more light on the cause of the crash than their written statements, and since those statements contain no definitive information on mechanical cause of the crash, the depositions were inconclusive if not useless in helping the plaintiffs prove their case. At that point while the parties prepared for trial, they reached an out-court-settlement in the amount of \$170,000, which the trial judge approved.⁴⁶³

VI. THE FAUSTIAN BARGAIN

The Supreme Court’s decision in *Reynolds* gives the appearance of a judicious compromise rejecting the executive branch’s request for a sweeping constitutionally based executive privilege but granting the executive a limited privilege that skillfully accommodated competing delicate considerations by defusing a confrontation between the executive branch and the judiciary, protecting the national security,

⁴⁵⁸ *Id.*

⁴⁵⁹ *Id.* at 10.

⁴⁶⁰ *Id.* at 11–12.

⁴⁶¹ *Id.* at 11.

⁴⁶² Interview with Wilson M. Brown, III, Partner, Drinker, Biddle & Reath LLP. (Apr. 29, 2010) (notes on file with author). Wilson M. Brown, III was one of the lawyers who represented the three widows in the original damage action. See Independent Action for Relief from Judgment to Remedy Fraud on the Court, *supra* note 38, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *104.

⁴⁶³ See *Herring v. United States*, No. Civ.A.03-CV-5500-LDD, 2004 WL 2040272, at *2 (E.D. Pa. Sept. 10, 2004), *aff’d*, 424 F.3d 384 (3d Cir. 2005) (noting that on remand from the Supreme Court’s decision in *Reynolds* the parties settled their claims for seventy-five percent of the district court’s judgment).

holding out the possibility of providing a remedy to injured individuals, guarding against executive branch abuse of an evidentiary privilege, protecting the court's important role in the governmental scheme, and upholding the court's role in advancing the ideals of the rule of law. The Court created this impression by doing several things at once. It denied the executive branch the broad and unqualified absolute privilege it sought—to decide for itself what information it was required to disclose. Simultaneously, it required lower court judges to sustain a government's claim for a state secrets privilege if “from all the circumstances of the case, . . . 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.”⁴⁶⁴ It further insisted that courts “must determine whether the circumstances are appropriate for the claim of privilege”⁴⁶⁵ so that “judicial control over the evidence in a case” is not “abdicated to the caprice of executive officers,”⁴⁶⁶ but it directed that courts must “do so without forcing a disclosure of the very thing the privilege is designed to protect.”⁴⁶⁷ Lastly, it defused the confrontation between the courts and the executive branch by reversing the lower court judgment favoring the plaintiffs while holding out the possibility that the plaintiffs should be able to determine the cause of the crash without relying upon privileged information.⁴⁶⁸

Upon closer scrutiny, however, it is apparent that this blending of competing interests was not as prudent or as judicious as it may seem. Indeed, the Court's ruling masked the opinion's own deceptiveness and disguised the many considerations that formed the underpinnings of the opinion. These considerations were complex and cumulatively constituted a betrayal by the Court of its responsibility to uphold the rule of law, to provide a remedy to an injured party asserting a legal right, to fulfill its role in a scheme of government dependent upon checks and balances, and to set forth a candid statement of the reasons for its judgment. Thus, instead of being a judicious, Solomonic ruling, the Court's decision in *Reynolds* constituted a Faustian bargain.

⁴⁶⁴ *Reynolds*, 345 U.S. at 10.

⁴⁶⁵ *Id.* at 8.

⁴⁶⁶ *Id.* at 9.

⁴⁶⁷ *Id.* at 8.

⁴⁶⁸ *Id.* at 11.

A. *Vinson's Masks*

1. The Substantive Rule

The Court stated in setting forth the rules to guide the application of the state secrets privilege that it was determined to guard against executive branch caprice and to uphold the Court's historic rule in having the final say as to the merits of the government's claim that certain information was protected from disclosure by the state secrets privilege.⁴⁶⁹ Thus, the Court insisted that it was not granting the executive branch the authority it requested to decide for itself—without any judicial oversight of any kind—what information it would and would not disclose. And, as a formal matter, the Court did not grant the executive branch such a privilege.

But what the Court did do by means of the rules it set forth was to grant the executive branch an absolute privilege as a de facto matter. It did that by adopting a substantive standard for the administration of the privilege that permitted the executive branch to shape a case so that a trial judge, who was required to respect the *Reynolds* rules, was prohibited from inspecting documents the executive claimed to be privileged. Thus, the *Reynolds* rules, which required courts to sustain the state secrets privilege when “from all the evidence of the case, . . . 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,”⁴⁷⁰ constituted an open door to the executive to shape the circumstances of every case to satisfy this minimal standard.⁴⁷¹ Thus, in other words, while the rule of *Reynolds* is not always fatal in theory, it is fatal in fact.

The Supreme Court's decision in *Reynolds* eventually unleashed a legal doctrine that resulted in the opposite of what the Court stated it was trying to accomplish.⁴⁷² Instead of guarding against executive branch caprice, the *Reynolds* rules permitted and even encouraged executive branch caprice. Instead of upholding the rule of law by providing parties a forum in which to adjudicate claims, the effect of the

⁴⁶⁹ *Id.* at 9–10 (“Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers.”).

⁴⁷⁰ *Id.* at 10.

⁴⁷¹ See Berger & Krash, *supra* note 256, at 1453 (“The contention that a Government agency may decide for itself what documents it will divulge to the court is tantamount to a claim of blanket immunity from discovery procedure. If the court is not permitted to pass on a claim of privilege, ‘discovery’ against the Government comes to mean that those facts will be disclosed which the Government wishes to disclose.”).

⁴⁷² See, e.g., *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010); *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007); *Farnsworth Cannon, Inc. v. Grimes*, 635 F. 2d 268 (4th Cir. 1980); *Halkin v. Helms*, 598 F.2d 1 (D.C. Cir. 1979).

Reynolds rules is to deny individuals a forum to adjudicate their claims.⁴⁷³ Instead of insisting that the courts not surrender to the executive branch the decision of whether disputed material fits within the ambit of the state secrets privilege, the *Reynolds* majority surrendered it.

The grant to the executive of a de facto absolute privilege was no oversight. The justices were experienced lawyers and many were familiar with the exercise of executive authority and must have appreciated the consequences of their ruling.⁴⁷⁴

2. The Rule's Application

The masquerading of the *Reynolds* legal rules is one matter; Vinson's applications of those rules to the facts of the case is quite another and exceedingly problematic in their own right.

a. No Reasonable Danger

Central to the application of the *Reynolds* rules to the *Reynolds* facts was the majority's conclusion that there was a reasonable danger based on all of the circumstances of the case that the disputed documents contained information that constituted a military secret that should not be disclosed. Vinson's opinion made it seem that the majority was convinced that a reasonable danger existed in *Reynolds*. But a careful reading of Vinson's opinion suggests just the opposite.

For example, after concluding that the disputed documents in this case were privileged,⁴⁷⁵ and after making it clear that the case was being remanded to give the plaintiffs the opportunity to take the deposition of

⁴⁷³ See, e.g., *Jeppesen Dataplan*, 614 F.3d 1070; *El-Masri*, 479 F.3d 296.

⁴⁷⁴ Although the Court almost certainly was aware that the legal standard it announced in *Reynolds* constituted a grant of a de facto absolute privilege to executive branch, it might well have failed to foresee that the executive branch would eventually use the state secrets privilege much more frequently in the future than it had the past. If that was the Court's perspective, it might well have accepted the executive branch's deceptiveness in *Reynolds* as having little or no consequence since the executive would only rarely invoke the privilege. Recent history has proven that judgment naïve. During the last four decades, the executive has utilized the privilege frequently and done so in highly prominent and controversial cases which in turn have underscored not only the de facto conclusive absolute character of the privilege but the fact that the *Reynolds* rules have completely blunted judicial control of the evidence when the privilege is invoked; tolerated, if not encouraged executive caprice, undermined the important judicial role in maintaining checks and balances; denied judicial remedies to individuals claiming injury at the hands of executive officials; and betrayed the judiciary's ultimate responsibility to uphold the rule of law. See *supra* notes 5, at 8–9.

⁴⁷⁵ *Reynolds*, 345 U.S. at 6 ("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 . . .").

the three surviving servicemen, Vinson offered the following two statements as encouragement to the plaintiffs: “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.”⁴⁷⁶ Those were peculiar statements. If the electronic equipment did not cause the accident, and if the investigative report was a report into the causes of the crash, the report seeking to explain the accident might not even mention—let alone describe—the equipment, since the equipment was unrelated to the accident. If the report might not mention the equipment—let alone describe the equipment—because the equipment was unrelated to the accident, how could Vinson conclude that there was a reasonable danger that the report contained information about the equipment that constituted a military secret? That is an important question that arises effortlessly from Vinson’s text that casts considerable doubt on Vinson’s claim that the circumstances of the case gave rise to a reasonable danger.

Further, Vinson concluded that there was a “reasonable danger” in *Reynolds* that the investigatory report contained what he termed as “references to the secret electronic equipment.”⁴⁷⁷ In this case a reference to secret electronic equipment hardly constituted a military secret since the newspapers reporting the crash referred to the secret equipment as did a military public relations officer.⁴⁷⁸ Perhaps Vinson meant by the word reference a description of the equipment that revealed for example its purpose, its design, or its capability. But he did not state that even though he could have stated that point in a few words.⁴⁷⁹ As a result, Vinson’s use of the word reference in this part of the opinion is another indication that the court was suspicious of the claim that the disputed documents qualified for a privilege.

There is another signal in the opinion that the Court was doubtful that *Reynolds*’s factual record satisfied *Reynolds*’s legal standard. In addition to using the phrase “references to the secret electronic equipment” Vinson also wrote that the disputed documents contained information “touching upon military matters.” Both Finletter’s and Harmon’s statements created the impression—misleading as it turns out—that the disputed documents contained military secrets but neither statement actually made that claim. Vinson’s specific choice of words—that the disputed documents might contain information “touching

⁴⁷⁶ *Id.* at 11.

⁴⁷⁷ *Id.* at 10 (emphasis added).

⁴⁷⁸ See *supra* notes 112–114 and accompanying text.

⁴⁷⁹ For example, Vinson could have written: “There was a reasonable danger that the accident investigation report would contain references to the secret electronic equipment *which would reveal the equipment’s purpose, design, or capability.*”

upon” military secrets—signaled that Vinson was alert to Finletter’s and Harmon’s limited claims and thus was not claiming that the disputed documents actually contained information that amounted to a military secret.⁴⁸⁰ The idea that the disputed documents contained information touching upon military matters is quite different from the idea that the documents actually contained military secrets. One is ambiguous and uncertain; the other is definite and unequivocal.

There is yet one more indication in the opinion that the majority was doubtful that the record in the case satisfied the reasonable danger test. In its fourth paragraph, the opinion stated that Secretary Finletter had submitted a letter to the district judge that objected to the discovery request on the ground that “it has been determined that it would not be in the public interest to furnish this report.”⁴⁸¹ Because Finletter’s letter was peripheral to the outcome of the case,⁴⁸² Vinson had no warrant to mention it unless he intended to send signals to the Justice Department. First, it is likely that Vinson was signaling that he was aware of the possibility that Finletter’s letter, which was crafted without consultation with the Justice Department lawyers, may have meant that the disputed documents contained absolutely no information implicating national security. Second, Vinson may have been putting the Justice Department on notice that if it forced another “showdown” following the plaintiff’s taking of the servicemen’s depositions over whether a judge could inspect *ex parte* the documents, the executive branch might not prevail because the judge might probe the question of whether a reasonable danger existed more exhaustively and might then conclude that Finletter’s letter to Judge Kirkpatrick—as opposed to his affidavit—altered that assessment.

Vinson misapplied his own legal standard in *Reynolds* to the facts and circumstances in *Reynolds* as he identified them. Apart from merely asserting that the circumstances established a reasonable danger, there was no evidence in *Reynolds* to support the claim. Indeed, the evidence mentioned by Vinson pointed in the other direction.

⁴⁸⁰ *Reynolds*, 345 U.S. at 11. The carefulness and the oddity of Vinson’s choice of words is highlighted by comparing Vinson’s statements with Judge Maris’s Third Circuit opinion, which states that Secretary Finletter “asserts in effect that the documents sought to be produced contain state secrets of a military character.” *Reynolds v. United States*, 192 F.2d 987, 996 (3d Cir. 1951), *rev’d*, 345 U.S. 1 (1953); *see also infra* notes 515–516 and accompanying text. In short, Maris was fooled by Finletter’s deceptiveness; Vinson was not.

⁴⁸¹ *Reynolds*, 345 U.S. at 4 (internal quotation marks omitted).

⁴⁸² *See supra* Part III.C.

b. Redaction

The oddities of Vinson's opinion go deeper. The opinion makes it appear that the Court is doing what it can to protect the widows' right to a remedy while protecting the national security. This is yet one more mask. If the Court accepted that the disputed documents contained information that would injure national security if disclosed, but also concluded that that information was not inextricably intertwined with other information contained in the investigation report, the Court should have ordered the Air Force to excise the sensitive information and make the redacted documents available to the plaintiffs. But Vinson's opinion did not raise or address the question of redacting the disputed documents.⁴⁸³ This was odd since even Vinson stated that at most there was only a possibility that the disputed documents contained "references" "touching upon" the electronic equipment. Thus, there was no hint in Vinson's opinion that the Air Force would confront a difficult problem in isolating sensitive military secrets from the balance of the information and disclosing to the widows the balance of un-redacted portions of the documents.

3. Depositions

The peculiarities of Vinson's opinion are even further compounded by Vinson's other claim that the depositions of the surviving servicemen would be a substitute for the Air Force investigatory report or might result in the discovery of evidence that would be a substitute for the investigative report.

Identifying the cause or causes of the crash required exceptional expert knowledge of the intricacies of this sophisticated plane and it required access to all of the evidence that might shed any light whatsoever on the crash itself. As Judge Kirkpatrick stated in insisting that the Air Force make the Investigation Report available to the plaintiffs, "[o]nly persons with long experience in investigating airplane

⁴⁸³ The lawyer for the plaintiffs was well aware that the Air Force could redact the disputed documents, and he favored such a solution. Thus, in a letter dated July 25, 1950, addressed to another attorney, Theodore Mattern, Charles J. Biddle stated that the plaintiffs had no interest "in any secret devices which may have been on board [the crashed plane] but which had nothing to do with causing the accident. And in any event, the answer, which has been made several times in similar cases, is to let the Court look at the report and if there is anything which should not be made public, the Judge can authorize that it be withheld." Letter from Charles J. Biddle to Theodore Mattern (July 25, 1950) (on file with author). Furthermore, the Air Force was also familiar with the idea of redaction. Thus, the Air Force offered in effect to "redact" the testimony of the servicemen so that they would not testify about classified matters. So, the very idea of eliminating military secrets from a document—or from testimony—was an idea present in the litigation.

disasters could hope to get at the real cause of the accident.”⁴⁸⁴ Furthermore, the plaintiffs did not have access to the plane parts that survived the crash and that were in the Air Force’s custody, and access to those parts was essential to determine the cause of the crash.⁴⁸⁵ As a result, plaintiffs’ request for the *Persons Report*—which had the stamp of authoritativeness because it was the Air Force’s report—was not only a routine request in such litigation but required if the plaintiffs were to know the causes of the crash.⁴⁸⁶

Moreover, the servicemen inside the plane had limited information about the design and construction of the plane and limited information about the events in the plane during the minutes just prior to the crash. Further, they were unschooled in the overall complexity of the plane’s design, inexperienced in investigating plane crashes, and denied access to all of the information an experienced expert in plane crashes would consider relevant before drawing any conclusion as to what may have caused the accident. Thus, the idea that these servicemen would have an

⁴⁸⁴ *Brauner v. United States*, 10 F.R.D. 468, 471 (E.D. Pa. 1950), *aff’d sub nom.*, *Reynolds v. United States*, 192 F.2d 987 (3d Cir. 1951), *rev’d*, 345 U.S. 1 (1953).

⁴⁸⁵ *Id.* at 470–71.

⁴⁸⁶ The lawyer for the plaintiffs in the case, Charles J. Biddle, understood this point precisely. In his letter dated July 25, 1950, to Theodore Mattern, Biddle speculated that the plaintiffs could go to trial without the report and the witness statements “purely on the presumption that since the airplane was entirely under the control of the Government and the accident was something that would not have normally occurred had the plane been properly maintained and handled, therefore the mere happening of the event is sufficient proof of the government’s fault.” Letter from Charles J. Biddle to Theodore Mattern (July 25, 1950) (on file with author). Biddle added that the plaintiffs could “add” the “testimony of Mechler that no instructions were given before the flight with respect to how to get out of the plane in case of emergency,” and based on all of that, Biddle concluded that the plaintiffs would have “a good chance of success.” *Id.* But Biddle stated that “it would be a mistake to go to trial without first exhausting every effort to get the report of the investigation.” *Id.* In a letter to the same New York lawyer and dated June 26, 1950, Biddle addressed the issue of whether plaintiff could conceivably go to trial even if the trial judge denied the motion to compel disclosure on the ground that plaintiffs had failed to demonstrate good cause for compelling disclosure of the investigatory report and the three witness statements as required by the rules for civil procedure. Letter from Charles J. Biddle to Theodore Mattern (June 26, 1950) (on file with author). He wrote:

Even if we should not be successful in obtaining the Air Force report on the cause of the accident, the Georgia law is that where the instrumentality which causes an accident is completely in the control of the defendant and what occurs is something which would not normally occur if the instrumentality involved were properly maintained and operated, the showing of such facts gives rise to the presumption of negligence. Consequently, it should be possible to make out a case even though we are not able to show exactly what it was that caused the accident to take place. I have looked up Georgia law on this and have checked it with Georgia counsel. Nevertheless, I would much prefer before going to trial to be in a position to prove exactly what did cause the accident. For one thing, if it could be shown that the Army was definitely at fault in the way it maintained and operated the plane in question, this would naturally have a substantial effect on the mind of the Judge when it came to fixing the damage.

Id.

informed opinion that was authoritative in any meaningful sense on the causes of the crash was unsupportable and implausible, if not fanciful.

Against these considerations, it is no surprise that Judge Advocate General Harmon, who was the Air Force official who offered that the Air Force would permit the plaintiffs to depose the servicemen, did not claim that the depositions would be an adequate substitute for the investigatory report, establish the cause of the crash, or even lead to evidence that would establish the cause of the crash.⁴⁸⁷ Harmon only made the offer and did not make any representations regarding its utility.⁴⁸⁸

There was another twist to Vinson's remand to permit the plaintiffs to take the depositions. The Judge Advocate General's affidavit stated that the Air Force would permit the witnesses to "refresh their memories by reference to any statements made by them . . . as well as other pertinent and material records that are in the possession of the United States Air Force," and that the Air Force would permit the witnesses to "testify regarding all matters pertaining to the cause of the accident except as to facts and matters of a classified nature."⁴⁸⁹ The Judge Advocate General's representations were supplemented by a statement offered in the executive's brief that the plaintiffs and the court have the "assurance of the Air Force that these witnesses will be fully cooperative and will have complete and detailed knowledge of the events."⁴⁹⁰ In short, the Air Force made the following representations: 1) the three surviving servicemen will testify truthfully at a deposition; 2) their testimony at a deposition will be the equivalent to the statements they made shortly after the crash because the servicemen will have refreshed their recollection; and 3) the Air Force assures that the survivors will testify fully and honestly to all matters except matters that are classified. In short, the Air Force argued that the depositions are the equivalent to the written statements, and thus plaintiffs have no reason to gain access to the written statements.⁴⁹¹

⁴⁸⁷ Independent Action for Relief from Judgment to Remedy Fraud on the Court, *supra* note 79, Exhibit D, at 35, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *138 (Harmon Statement).

⁴⁸⁸ *Id.* at 37, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *139.

⁴⁸⁹ *Id.* at 37, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *139.

⁴⁹⁰ Brief for Petitioner at 71, *United States v. Reynolds*, 345 U.S. 1 (1953) (No. 21), 1952 WL 82378, at *71.

⁴⁹¹ As we now know, the Air Force's representation rang hollow against its past conduct in the litigation. It is now known that the Air Force had lied when it responded to the plaintiff's interrogatory number eight by stating that the engine fire was extinguished and to interrogatory number thirty-one that no modifications for the engines to prevent fires had been prescribed. In addition, recall the government's answer to the reasonable interrogatory number eight that requested a "detailed" statement of the "trouble" experienced by the plane just before the crash. The government's response to a request for a detailed statement was, in full: "At between 18,500 and 19,000 feet manifold pressure dropped to 23 on No. one engine. Thereafter engine No. one was feathered. Fire broke out which was extinguished." Independent Action for Relief from Judgment to Remedy Fraud on the Court, *supra* note 79, Exhibit K, at 163, 172,

As is apparent, the Air Force's position was double edged. The more the Air Force closed the gap between the servicemen's testimony at a deposition and the witnesses' written statements, the more diminished the government's reasons for not providing the plaintiffs with the written statements redacted to excise what it claimed was "classified material."

As is now known and as the senior Air Force officials knew at the time, Vinson's statements that the taking of the depositions might provide non-privileged evidence regarding the cause of the crash were meritless. And it is implausible to think that Vinson thought otherwise. In retrospect it would seem that the only aim of Vinson's statements regarding the depositions was not to provide a really promising avenue of inquiry for the widows but to give the appearance that the Court was doing that.

4. Remand

With the remand to take depositions, the question arose as to whether the trial judge could inspect the disputed documents if the depositions were inconclusive. Following through with one thread of Vinson's reasoning, presumably at some point in the litigation, the plaintiffs' necessity for gaining access to the investigation report would be increased, which might in turn cause a judge, after probing more deeply into whether the circumstances of the case warranted the sustaining of the privilege absent judicial inspection of the documents, to conclude that the circumstances supporting a finding that a reasonable danger for sustaining the privilege did not exist. Such an outcome would at least be a logical extension of Vinson's reasoning. But such a line of thought would encounter a contrary one in Vinson's opinion. At the beginning of the opinion Vinson suggested that the Court had already concluded that a valid claim of privilege existed in the case, which in turn suggested that no degree of necessity warranted the disclosure of the documents.⁴⁹² What Vinson actually wrote was:

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

2005 U.S. S. Ct. Briefs LEXIS 2430, at *263, *271. As Judge Kirkpatrick quipped in understated disbelief: "Obviously, the defendant . . . knows more about the accident than this." *Brauner v. United States*, 10 F.R.D. 468, 471 (E.D. Pa. 1950), *aff'd* *Reynolds v. United States* 192 F.2d 987 (3d Cir. 1951), *rev'd*, 345 U.S. 1 (1953).

⁴⁹² *Reynolds*, 345 U.S. at 6.

judgment below subjected the United States to liability on terms to which Congress did not consent by the Tort Claims Act.⁴⁹³

Vinson's opinion took away with one hand what the logic of his opinion appeared to grant with the other, leaving uncertain whether the Supreme Court was prepared to support a trial judge who had ordered the production of the investigatory report and the three witness statements for judicial inspection.⁴⁹⁴

It is doubtful that this uncertainty was an oversight. There was no basis to assume that depositions would be anything but inconclusive and thus only delay the conclusion of the litigation. That delay in turn would only pressure the parties—especially the widows—either to accept more years of litigation with an uncertain outcome or to try to settle the case, which is what they did. And from all of the evidence, the

⁴⁹³ *Id.*

⁴⁹⁴ Vinson's opinion left the lower courts in the dark about one additional important matter, namely the scope of a trial judge's remedial authority if the executive branch failed to comply with a lawful discovery order following the assertion of a state secrets privilege. Thus, Vinson's opinion left open the slim possibility—but a possibility, nonetheless—that a judge could not decide based on all of the circumstances of a case that a “reasonable danger” existed and that the disclosure of the allegedly privileged documents would be inconsistent with national security, and thus order an in camera, ex parte inspection in chambers. If the executive refused to transmit the documents to the judge, what was the scope of the judge's authority to sanction the executive? Or, if the judge denied the privilege and directed the executive to make the disputed documents available to the opposing party, and the executive refused to comply with the order, what sanction, if any, might the judge impose? When the government refused to make the disputed documents available to District Judge Kirkpatrick to review in camera, the judge found the facts to which the documents pertained—facts pertaining to the government's negligence—as established and barred the government from introducing any evidence to controvert those findings. *Reynolds*, 192 F.2d at 991. In doing so, the trial judge equated a plaintiff's lawsuit for damages against the government pursuant to the Federal Tort Claims Act with the government's decision to criminally prosecute an individual. Because in the criminal context, the government could only invoke an evidentiary privilege at the price of letting the “defendant go free,” the trial judge case concluded that the government could refuse to submit the disputed documents to the court for an in camera inspection, but only at the price of having the pertinent facts found against the government. *Brauner*, 10 F.R.D. 468. The Supreme Court concluded that this “rationale has no application in a civil forum where the Government is not the moving party, but is a defendant only on terms to which it has consented.” *Reynolds*, 345 U.S. at 12. In addition, given that the government, in passing the Federal Tort Claims Act, only consented to comply with discovery compulsion orders for not privileged material, the Court concluded that the government had—at least up until this point—asserted a “valid claim of privilege” regarding the investigation report and the witness statements, and as a result, the lower court order finding the facts about negligence against the government was improper. *Id.* at 6. Vinson set forth one other important guideline: the Federal Tort Claims Act expressly made the Federal Rules of Civil Procedure applicable to suits against the United States, and “Rule 34 compels production only of matters ‘not privileged.’” *Id.* Thus, if material is privileged, it is improper to sanction a party pursuant to Rule 37(b)(2)(i), which authorizes a judge to make findings of fact against a noncompliant party. Presumably then, such a remedy is proper if a judge properly decides that the disputed documents are not privileged. That would at least seem to be the logical conclusion of Vinson's analysis. But Vinson did not explicate his thinking to make clear the remedial powers of a trial judge if and when the executive refused to comply with a lawful order compelling the submission of disputed material to the judge for review.

settlement of the case may have been precisely what Vinson hoped would occur.

5. Purposes

The explanation for these many masks is multi-layered. First, to protect the federal judiciary from high stakes confrontations with the executive in national security cases, Vinson wanted to avoid what he termed a “showdown” between the judiciary and the executive over the authority of the judiciary to inspect the disputed documents in camera and ex parte. This was a showdown that Vinson stated had “constitutional overtones” and his goal was to defuse it.⁴⁹⁵ Hence, he constructed a brand new standard for the application of the state secrets privilege that had no support in prior United States case law and then he sustained its application in the *Reynolds* case even though the court’s opinion contains strong signals that the court itself doubted that the record in *Reynolds* actually satisfied *Reynolds*’s legal rule.

Second, to protect the Court’s reputation and image as upholding the rule of law and assuring judicial checks on executive potential abuse, Vinson wanted the *Reynolds* opinion to make it appear that the Court was upholding its duty to control the evidence and to guard against the executive’s abuse of the privilege in which the executive asserted a state secrets privilege. Thus, Vinson included in his opinion lofty claims but claims that were undermined by the guidelines Vinson set forth for implementing the privilege.

Third, to protect the Court’s image, Vinson wrote the *Reynolds* opinion so it appeared as if the Court was “doing justice” for the three widows by holding out hope that the reversal and the remand in the case would permit the widows to secure non-privileged evidence that allowed them to establish the cause of the accident. But the fact was that the remand to take the depositions placed the widows in a difficult position of either settling the litigation or risking more years of litigation.

Lastly, to increase the possibility that both parties in *Reynolds* were inclined to settle the litigation on remand, Vinson’s opinion left uncertain the authority of the trial judge in the case to inspect the disputed documents if the depositions were inconclusive. The opinion contained some words useful to each side, which created a dynamic in the litigation which motivated each side to settle the case.⁴⁹⁶

⁴⁹⁵ *Reynolds*, 345 U.S. at 6.

⁴⁹⁶ There is some evidence that one of the plaintiffs was worried about how long the litigation was taking almost three years before Vinson’s opinion became public. In a letter dated June 26, 1950, addressed to Theodore Mattern, Charles J. Biddle wrote: “Mrs. Brauner called

In sum, Vinson wanted to defuse the showdown, protect the image and reputation of the Court, and pressure the parties to settle the dispute. And he succeeded.

B. *Vinson and Truman*

Why does one fairly short opinion—eleven pages—give rise to so many questions? Although there is no definitive answer to these questions, it does seem highly improbable that the opinion's perplexities resulted from happenstance or oversight. The opinion's needle work is too intricate to accept that its content was anything but deliberate.

One possible explanation is that Vinson's opinion simply reflected what he thought regarding the relevant legal doctrine. There is some merit to this perspective, and at least part of Vinson's opinion can be so explained. For example, Vinson did tell his colleagues at the conference during which *Reynolds* was discussed that he favored granting the executive an absolute state secrets privilege that more or less tracked the position set forth by the British House of Lords in the *Duncan* case.⁴⁹⁷ That view was consistent with Vinson's deep respect for presidential prerogatives in matters affecting national security and with Vinson's estimation of the dangers and threats the nation confronted during the early 1950s, and thus there is no reason to doubt the sincerity of his position. Given that Vinson was unable to persuade enough of his Supreme Court colleagues to endorse the *Duncan* position, one can understand Vinson's opinion granting the executive a de facto absolute privilege as an extension of those views.

But any effort to explain fully Vinson's opinion in *Reynolds* solely by reference to his general views on executive authority and the role of courts in national security matters fails to explain all of the twists and turns reviewed above in Vinson's opinion and it ignores the obvious. Truman and Vinson were extremely close friends, had profound affection and respect for each other, and discussed all matters of importance to each other with each other. Truman considered Vinson "one of the best men in government."⁴⁹⁸ He appointed him Secretary of the Treasury, Chief Justice of the Supreme Court, and, throughout much of 1951, urged him to run for the 1952 Democratic Party presidential nomination.⁴⁹⁹ Truman considered Vinson part of his inner

me the other day when she was in town and she was naturally anxious to know what happened to her case and in view of the long delay, I can understand perfectly why she should be concerned about it." Letter from Charles J. Biddle to Theodore Mattern (June 26, 1950) (on file with author).

⁴⁹⁷ See *supra* Part V.B.

⁴⁹⁸ DAVID MCCULLOCH, TRUMAN 404 (1992).

⁴⁹⁹ See *id.* at 887 (claiming that Truman tried to persuade Vinson to seek the 1952

circle and such an intimate⁵⁰⁰ that Vinson was “practically ‘family.’”⁵⁰¹ Indeed, “Mrs. Truman and their daughter Margaret called the chief justice ‘poppa Vin.’”⁵⁰²

For his part, Vinson was a Truman loyalist and he considered the President a close personal friend. Vinson was an advisor to the President and he regularly spoke to the President, met with the President, and even accompanied the President on vacations.⁵⁰³ Perhaps even more importantly, Vinson was more than an intimate presidential confidant; he was a strong, active, and unwavering advocate for the President and the executive branch in all cases before the Supreme Court in which President Truman had an interest.⁵⁰⁴ As Chief Justice

Democratic Party nomination for President); CABELL PHILLIPS, *THE TRUMAN PRESIDENCY: THE HISTORY OF A TRIUMPHANT SUCCESSION* 156 (1966) (“In 1951 Truman did his unavailing best to persuade his old friend to accept the Democratic nomination for President.”); *see also* HARRY S. TRUMAN, *MEMOIRS: YEARS OF TRIAL AND HOPE, 1946–1952*, at 489 (1956) (noting that in the spring of 1951, Truman thought “[t]he most logical and qualified candidate” to be the next president was Vinson); Edward T. Folliard, *Vinson Figures Large in the Talk of the Truman Heir*, *WASH. POST*, April 1, 1951, § 11, at 1B; Paul R. Leach, *It Could Be Fred Vinson for Democrats in 1952*, *CHI. DAILY NEWS*, Oct. 27, 1951, at 2.

⁵⁰⁰ Truman considered Vinson a “devoted and undemonstrative patriot” with a “sense of personal and political loyalty seldom found among the top men in Washington.” MCCULLOCH, *supra* note 498, at 507.

⁵⁰¹ ST. CLAIR & GUGIN, *supra* note 319, at 192.

⁵⁰² *Id.*; *see also* David McCullough states in his biography of Truman that Truman “liked games with wild cards, and especially a version of ordinary stud poker that he called ‘Papa Vinson,’ after Fred Vinson, who was a particularly skillful player.” MCCULLOUGH, *supra* note 498, at 511.

⁵⁰³ WILLIAM M. RIGDON, *LOG OF PRESIDENT TRUMAN’S EIGHTH VISIT TO KEY WEST, FLORIDA, MARCH 12–APRIL 10, 1950*, at 42 (1950), *available at* http://www.trumanlibrary.org/calendar/travel_log/key1947/eighthtrip_toc.htm (photograph of President Truman and Chief Justice Vinson as Vinson prepares to return from Florida to Washington); WILLIAM M. RIGDON, *LOG OF PRESIDENT TRUMAN’S TENTH VISIT TO KEY WEST, FLORIDA, NOVEMBER 8–DECEMBER 9, 1951*, at 58 (1951), *available at* http://www.trumanlibrary.org/calendar/travel_log/key1947/tenthtrip_toc.htm (photograph of Chief Justice Vinson and his wife, with the handwritten inscription, “A most pleasant vacation with Chief Justice + Mrs. Vinson.—Harry Truman”).

⁵⁰⁴ In *Truman and the Steel Seizure Case*, Maeva Marcus wrote, in reference to Truman’s four appointments to the Supreme Court (Fred Vinson, Harold Burton, Tom Clark, and Sherman Minton): “It was widely assumed that the four Truman appointees to the Court would support the President. Each was a personal friend of Truman’s. Each had a record of upholding government action whatever the issue, and all often voted the same way.” MAEVA MARCUS, *TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER* 188 (1977). Although Chief Justice Vinson’s close relationship with President Truman raised eyebrows, Vinson was not the only member of that high court to advise a sitting President. In writing about the Warren Court, Professor Lucas A. Powe, Jr., has written:

Supreme Court justices have advised presidents before—Frankfurter and Douglas with Roosevelt jump to mind, as would Vinson’s telling Truman to seize the steel mills because the Court would back him up—but no justice ever went as far as Fortas. According to White House logs, between November 23, 1963, and July 2, 1968, there were 145 face-to-face meetings between Johnson and Fortas. Then there was the red telephone. No justice prior to Fortas had a telephone on his desk with its direct line to the White House.

Vinson's biographers have written: "In fact, on virtually every issue of importance that came before the Supreme Court, Vinson did not fail to serve Truman's interests."⁵⁰⁵

The mere fact that Vinson and Truman were close and personal friends who discussed issues of importance to the President does not establish that Vinson was willing to depart from significant norms of judicial conduct and have a private conversation with Truman about a case in which the Truman administration was a party. Nonetheless, although the evidence is limited, what evidence there is establishes that Vinson was willing to have private conversations with the President or the Attorney General about matters pending before the Court. Indeed, the available evidence establishes that Vinson had such conversations in two cases that dominated the national news.

First, Vinson advised Truman in advance of Truman seizing the steel mills in 1952 that the Supreme Court would uphold presidential seizure.⁵⁰⁶ It turned out that Vinson incorrectly assessed what the Supreme Court would in fact decide in the case.⁵⁰⁷ But there is no doubting the fact that Vinson gave the President advice about a matter

POWE, *supra* note 318, at 470.

⁵⁰⁵ ST. CLAIR & GUGIN, *supra* note 319, at 190; *see also* HENRY J. ABRAHAM, JUSTICES & PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT 8 (3d ed. 1992). In Maeva Marcus's study, the following conclusion is offered: "While serving on the Court, Vinson continued to be an adviser to the President." MARCUS, *supra* note 504, at 189. It was because of the close relationship between Vinson and Truman, and the "inability" of Vinson to "move far enough out Truman's orbit to act independently of the president" that "[s]ome scholars of the Court . . . rated [Vinson] a failure." ST. CLAIR & GUGIN, *supra* note 319, at 189; *see also, e.g.*, ALBERT P. BLAUSTEIN & ROY M. MERSKY, THE FIRST ONE HUNDRED JUSTICES: STATISTICAL STUDIES ON THE SUPREME COURT OF THE UNITED STATES 49 (1978) (referring to Justice Vinson as a failure). *But see* ABRAHAM, *supra*, at 245 ("It is unfair and inaccurate, however, to categorize him as a 'failure' on the bench . . .").

⁵⁰⁶ POWE, *supra* note 318, at 17–18. Vinson's willingness to have a private communication with the executive branch regarding pending cases before the high court was not restricted to the Truman administration. Thus, Vinson met with Attorney General Herbert Brownell and acting Solicitor General Robert L. Stern about the appeal of Julius and Ethel Rosenberg in the spring of 1953. *See* Snyder, *supra* note 2, at 935; *see also infra* note 508.

⁵⁰⁷ *See, e.g.*, POWE, *supra* note 318, at 17–18 ("In those days [the early 1950s], when the Court was filled with former presidential advisers, [Chief Justice Fred] Vinson, cruising the Potomac on the presidential yacht *Sequoia*, agreed with Truman's position and told him that the Court would support him if he seized the mills. Armed with this knowledge, Truman went forward only to be stunned when Vinson's vote count was wrong. Only Reed and Minton joined Vinson in supporting Truman's position."); SCHWARZ & HUQ, *supra* note 14, at 179 (claiming that in seizing the steel mills to avoid the disruption of steel production due to a threatened strike, President Truman "relied on a memo from former Attorney General Clark, who by then was on the Supreme Court [and voted to support the position that the seizure was unconstitutional] and on secret oral assurances from then-Chief Justice Fred Vinson, that the Court would approve his decision. Vinson proved a poor oracle. The Court rejected Truman's claim to inherent wartime power by six votes to three."); *see also* ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 417 (1994) ("Vinson's long, passionate dissent pressed the same advice he had privately given Truman in early April: that the president had the legal power to seize the steel mills as a wartime emergency measure.").

that the Supreme Court eventually decided. Second, in June of 1953, shortly after President Eisenhower became president, Vinson had private communications with the United States Attorney General and the Acting Solicitor General regarding the case of Julius and Ethel Rosenberg who had been convicted of espionage and sentenced to death.⁵⁰⁸

Although there is no specific evidence that Truman and Vinson discussed the *Reynolds* case, if Vinson was willing to depart from judicial norms in cases that commanded national attention, there is no reason to doubt that he had scruples about having private conversations with the President or Attorney General about a case that attracted almost no public attention. That possibility increases given that President Truman had many opportunities to learn of the *Reynolds* case from Air Force Secretaries Symington⁵⁰⁹ or Finletter,⁵¹⁰ or presidential assistant Clark Clifford, or even possibly Frank Folsom of RCA when the President met privately with him,⁵¹¹ and that Truman had innumerable opportunities to discuss *Reynolds* with Chief Justice

⁵⁰⁸ The Supreme Court granted certiorari in the *Reynolds* case and heard oral arguments while Harry Truman was President. The decision itself was made public on March 9, 1953, some weeks after Dwight D. Eisenhower took the presidential oath of office. Moreover, Snyder asserts that Chief Justice Vinson had ex parte communications with the Eisenhower administration while the Rosenbergs' appeal to the Supreme Court was pending. Snyder, *supra* note 2, at 935. Thus, Snyder claims that Vinson met "secretly" at 11:00 PM on June 16, 1953, at his apartment with Acting Solicitor General Robert L. Stern and Attorney General Herbert Brownell to discuss the Rosenberg's appeal to the court; that Vinson met privately from 12:25 PM to 1:10 PM on June 17, with Brownell in Vinson's chambers; and that Vinson told Justice Douglas during a "four-minute meeting on Thursday, June 18 in Vinson's chambers before the Court's conference": "I'm sorry, but the White House has sent word that they have to fry." See *id.* at 917-21 & nn.171-190 (internal quotation marks omitted). Although my focus is on Vinson's ex parte communications with the executive about cases before the Court, there is no reason to assume that Vinson was the only member of the court to have ex parte communications with executive branch officials about pending cases. See, e.g., Carlos M. Vázquez, "Not a Happy Precedent": The Story of Ex parte Quirin, in *FEDERAL COURTS STORIES* 219 (Vicki C. Jackson & Judith Resnik eds., 2010). At a dinner party, Justice Felix Frankfurter discussed the merits of using a military commission to try the eventual defendants in *Ex parte Quirin* with Secretary of Defense Stimson, the chairman of a military commission that would try the defendants. *Id.* at 225. Justice Roberts was told that President Roosevelt told the Attorney General that he would not "hand [the defendants] over to any United States marshal armed with a writ of habeas corpus," *id.* at 227 (internal quotation marks omitted), and Roberts "conveyed" the message "to the rest of the Justices during their first conference on the case. 'That would be a dreadful thing' was the Chief Justice's response." *Id.*

⁵⁰⁹ Daily Presidential Appointments, HARRY S. TRUMAN LIBRARY & MUSEUM, <http://www.trumanlibrary.org/calendar/index.html> (last visited Mar. 6, 2013) (search keyword "Symington" and browse dates listed).

⁵¹⁰ Daily Appointments with President Truman, HARRY S. TRUMAN LIBRARY & MUSEUM, <http://www.trumanlibrary.org/calendar/index.html> (search keyword "Finletter" and browse dates listed).

⁵¹¹ Daily Presidential Appointments, Friday, August 25, 1950, HARRY S. TRUMAN LIBRARY & MUSEUM, <http://www.trumanlibrary.org/calendar/main.php?currYear=1950&currMonth=8&currDay=25> (last visited Mar. 6, 2013) (containing the following entry: "11:50 PM (Mr. Phil Regan) (Mr. Frank Folsom, RCA) OFF THE RECORD").

Vinson, including at the “OFF THE RECORD” meeting the two of them had on November 12, 1952,⁵¹² which was shortly after the oral argument in *Reynolds* and before Vinson’s law clerk, Carl S. Hawkins, completed a draft opinion in *Reynolds*.⁵¹³

Moreover, there is evidence that Vinson and Truman had a private conversation about *Reynolds* in the opinion itself. Consider four instances. A private communication would explain why Vinson stated that the secret electronic equipment did not cause the crash. The *Reynolds* record included only two statements by individuals who would have known whether the secret electronic equipment caused the crash in whole or in part, and they were submitted by Secretary Finletter and Judge Advocate General Harmon. But neither of those statements made any claim regarding the relationship between the secret electronic equipment and the cause of the crash. Nonetheless, Vinson stated that the secret electronic equipment did not cause the crash, a claim central to Vinson’s rationale for a remand. But given that Finletter and Harmon did not make that claim, a private communication between the President and the Chief Justice would explain the basis for Vinson’s views.

A private communication would explain why Vinson was not deceived or misled by Finletter’s or Harmon’s statements into concluding that the disputed documents contained information that would injure national security if disclosed. Those statements had already misled two judges.⁵¹⁴ At the trial, Judge Kirkpatrick⁵¹⁵ thought that Finletter and Harmon had made this claim and as a result had ordered the executive to permit an in camera, ex parte judicial inspection as opposed to directing the executive to clarify the ambiguous claims made in their statements. Circuit Judge Maris also thought that Finletter and Harmon had claimed that the disputed documents contained military

⁵¹² Daily Presidential Appointments, Wednesday, November 12, 1952, HARRY S. TRUMAN LIBRARY & MUSEUM, <http://www.trumanlibrary.org/calendar/main.php?currYear=1952&currMonth=11&currDay=12> (last visited Mar. 6, 2013) (containing the following entry: “4:45 PM (Honorable Fred Vinson, the Chief Justice) OFF THE RECORD”).

⁵¹³ Carl Hawkins, *Draft of United States v. Reynolds Opinion* (Dec. 3, 1952) (unpublished draft) (on file with Margaret I. King, Special Collections Library of the University of Kentucky, Manuscript Collection.).

⁵¹⁴ When the descendants tried to reopen the judgment in the case, they also claimed that the Air Force officials had lied. See Independent Action for Relief from Judgment to Remedy Fraud on the Court, *supra* note 38, at 3, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *104, *107–08.

⁵¹⁵ Judge Kirkpatrick was a careful and thorough judge who was quite capable of parsing sentences. Recall, in his June 1950 opinion he noted that the Air Force had offered to permit the plaintiffs to take the deposition of the surviving servicemen at the convenience of the plaintiffs and at the expense of the Air Force. See *Brauner v. United States*, 10 F.R.D. 468, 470 (E.D. Pa. 1950), *aff’d sub nom. Reynolds v. United States*, 192 F.2d 987 (3d Cir. 1951), *rev’d*, 345 U.S. 1 (1953). But Kirkpatrick also noted that he did not understand by the wording of the offer that the Air Force had in fact made a firm and unequivocal offer by which it would be bound by. See *id.*

secrets: thus, in referring to the claim of privilege in this case, Judge Maris stated that “it asserts in effect that the documents sought to be produced contain state secrets of a military character.”⁵¹⁶ In contrast to what Maris wrote, Vinson made no such claim in his opinion.

Further, if the President told Vinson that the Air Force would not disclose the documents in whole or in part to a judge, that would explain why Vinson did not direct the Air Force to redact the documents to excise military secrets.

Lastly, a private conversation would explain why Vinson’s opinion left a trial judge on remand uncertain whether a judge could order the inspection of the documents if the depositions were inconclusive, an ambiguity that pressured both the executive and the widows to settle the case and to avoid another showdown.⁵¹⁷

C. Reflections

The conduct of senior Air Force officials during this episode was far from admirable. From the commencement of the litigation the Air Force treated the widows who sought relief for their dead husbands not just as legal adversaries but as threats to the Air Force’s reputation and public standing. Thus, the Air Force initially conducted an investigation into the crash designed not to uncover any information that would

⁵¹⁶ *Reynolds*, 192 F.2d at 996. Judge Maris, who, similar to Judge Kirkpatrick, was also a careful judge who read words carefully. Nonetheless, he was taken in by Finletter and Harmon’s deceptiveness. Judge Maris preceded his conclusion that the documents contained military secrets with a quotation from Finletter’s August 9, 1950, statement: “The defendant further objects to the production of this report, together with the statements of witnesses, for the further reason that the aircraft in question, together with the personnel on board, were engaged in a confidential mission of the Air Force. The airplane likewise carried confidential equipment on board and any disclosure of its mission or information concerning its operation or performance would be prejudicial to this Department and would not be in the public interest.” *Id.* at 996 (internal quotation marks omitted). Plainly, Finletter did not claim that the documents contained national security information. But, equally plainly, he hoped to convey that misleading impression. The fact that Judge Maris was taken in by the Secretary’s deceptiveness may be explained by the simple fact that the judge trusted Finletter not to deceive and mislead.

⁵¹⁷ There would have been no reason for Vinson to have shared with one or more of his judicial colleagues information about the *Reynolds* case he had received from the President. Vinson had a close working relationship with other members of the Court who had been appointed by President Truman (Burton, Clark and Minton), as well as with Justice Reed. See FRED RODELL, *NINE MEN: A POLITICAL HISTORY OF THE SUPREME COURT OF THE UNITED STATES FROM 1790 TO 1955*, at 305 (1955) (“Indeed, Vinson’s views were so close to Reed’s on most other matters, not just on civil liberties, that when Vinson at last became king of his Court, Reed, more often than not voting with the Truman-chosen four, became their chief spokesman as well as their ablest—though he had rated about at the bottom of the New Deal Justices.”); see also *id.* at 307 (“To Vinson—as to Reed alone of the Roosevelt Justices—Uncle Sam could almost do no wrong.”). By 1953, Vinson had honed his skill of “bending himself to the majority” and could count on his capacity to write an opinion that a majority of the Justices would support. ST. CLAIR & GUGIN, *supra* note 319, at 179.

embarrass the Air Force, place it in an unfavorable light, or ignite difficulties between the Air Force and Congress or between the Air Force and the private companies upon which the Air Force relied for weapon research and design. The Air Force only conducted a second investigation because an influential RCA official—Frank M. Folsom—wrote the Air Force a scathing letter about the crash, and then the service took steps to assure that no one outside the Air Force had access to it, including Folsom, to whom the Air Force made false statements about what the second investigation concluded.

As disturbing as those developments were, these lapses were merely a preface to the misconduct that followed. Within weeks of the completion of the second investigation that resulted in the *Persons Report*, senior Air Force officials orchestrated a written response to plaintiffs' interrogatories that contained two false statements. Months later, after the interests of the Air Force and the Justice Department lawyers intersected in the *Reynolds* case, senior Air Force officials submitted statements to a federal judge which were misleading and deceptive.

Such appalling conduct was not limited to the Air Force. Justice Department lawyers in the litigation became part of a process aimed at shielding the Air Force from public criticism. One lawyer was part of a process that resulted in submission of two false statements as part of the Air Force responses to plaintiffs' interrogatories at the trial court stage, and other lawyers participated in the drafting and submission of misleading and deceptive statements submitted by the Secretary of the Air Force and the Judge Advocate General to a federal judge. They also participated in the misrepresentation that the taking of the depositions of the three surviving servicemen would permit the plaintiffs to determine the cause of the plane accident without relying upon privileged evidence. By acquiescing in a set of circumstances that denied the Justice Department lawyers access to the disputed documents, the lawyers became complicit in the misrepresentation of the contents of the disputed documents in the brief filed in the Supreme Court.

Taken together, the conduct of senior Air Force officials and the government lawyers in *Reynolds* illustrates the willingness on the part of the executive to take advantage of the trust they assume judges have in the trustworthiness of the senior executive branch officers—lawyers and non-lawyers—and to abuse that trust by abusing the state secrets privilege.⁵¹⁸ This conduct also suggests that senior executive officials

⁵¹⁸ Although Constantine C. Menges's memoir, *Inside the National Security Council: The True Story of the Making and Unmaking of Reagan's Foreign Policy*, is focused on the deceit and the abuse of trust within the executive branch, the fact that senior executive branch officials were willing to deceive the president—in this case President Reagan—who appointed them to their high offices helps validates the idea that no one should underestimate the capacity of

assume that even if the courts suspected that the executive abused judicial reliance on executive trustworthiness, the courts would seek to avoid creating a legal context in which the courts forced the disclosure of executive manipulation and deceptiveness.

As shocking as the conduct of the executive and its lawyers were in *Reynolds*, it was conduct of the Supreme Court that was even more disappointing. As is so well known, the Court has “no influence over the sword or the purse,” and thus has, as Alexander Hamilton wrote, “neither Force nor Will, but merely judgment.”⁵¹⁹ By design, the Court’s authority rests upon the persuasiveness of its opinions, and that persuasiveness in turn depends upon many considerations including the forthrightness of those opinions. Because the Supreme Court’s decision in *Reynolds* rested so strongly on pretense and misleading and deceptive statements, the *Reynolds* opinion betrayed important expectations.

Several aspects of the decision support this judgment. First, the majority opinion in *Reynolds* constructed a set of legal rules that engineered a result that the opinion explicitly denied it endorsed. The opinion insisted that courts should remain in control of the evidence and assure that the executive did not abuse the state secret privilege, but the Court’s announced rules in *Reynolds* prevented courts from doing just that—remaining in control of the evidence and in guarding against the abuse of the privilege. Instead of granting the executive a de facto absolute state secrets privilege, the majority should have affirmed the lower court judgment and permitted the trial judge to inspect the documents in camera, ex parte. Such a result would have achieved what the court stated it was seeking to achieve, namely, to assure that judges remained in control of the evidence and in protecting the judicial process from executive abuse of the privilege while simultaneously protecting legitimate national security interests. What the majority did manage to accomplish in this aspect of its opinion was the avoidance of a “showdown” between the executive and the judiciary, but it did so at the cost of upholding the rule of law. Second, the majority improperly

individuals to employ deceit and mendacity in the service of ends they consider of great significance. See CONSTANTINE C. MENGES, *INSIDE THE NATIONAL SECURITY COUNCIL: THE TRUE STORY OF THE MAKING AND UNMAKING OF REAGAN’S FOREIGN POLICY* (1988). Menges wrote:

This book describes dramatic and hard-fought inside battles about major foreign policy issues . . . in which I participated. The episodes illustrate how the foreign policy process worked well—and how it failed. There was secret plotting by cabinet-level officials who deliberately kept their peers in the dark hoping to create situations that would assure their policy views prevailed. This included what seemed to me calculated attempts to keep information about major foreign events and plans from President Reagan himself.

Id. at 12.

⁵¹⁹ THE FEDERALIST NO. 78 (Alexander Hamilton).

applied the newly minted legal rules announced in *Reynolds* to the facts of that case. The majority upheld the privilege in the case even though the facts of the case, as summarized by Vinson himself, did not support that outcome. Moreover, statements in the opinion undercut any suggestion that Vinson's misapplication of the new rules for the state secrets privilege was the result of inadvertence or good faith. Third, because the majority knew that the depositions would be useless, it is difficult to escape the conclusion that in remanding the case the majority was mainly interested in making it appear that it was committed to providing the plaintiffs with a judicial remedy as opposed to actually providing one.

Vinson's opinion in *Reynolds* was part of a series of events intended to protect the Air Force's reputation and the court's public standing. Moreover, by denying the courts a meaningful role in future cases when the executive claims a state secrets privilege, the Vinson opinion undercut the capacity of the courts to uphold the rule of law and undermined a governing structure of checks and balances.

D. Consequences

The *Reynolds* decision has had many consequences. The *Reynolds* rules granted the executive a de facto absolute state secrets privilege, and by the mid-1970s the executive began to assert this privilege with increasing frequency by comparison to its use during the entire prior history of the Republic.⁵²⁰ That increasing use was attributable not only to the rise of the national security state and the imperial presidency, but to the fact that the courts had granted the executive a very effective weapon to use to defeat legal actions.

Not only did the executive use the privilege more frequently beginning almost forty years ago, but courts—and here the driving force was generated by the various Courts of Appeals—vastly expanded the scope of the privilege beyond the scope of the privilege in the *Reynolds* case. The doctrinal tools used by courts to make the privilege sweeping in character and near fatal to any opposing claim included the

⁵²⁰ See ROBERT M. PALLITTO & WILLIAM G. WEAVER, PRESIDENTIAL SECRECY AND THE LAW 106 (2007) ("Use of the state secrets privilege in courts has grown significantly over the last several decades. In the twenty-three years between the decision in *Reynolds* and the election of Jimmy Carter in 1976, there are eleven reported cases where the government invoked the privilege. Since 1977 there have been more than seventy reported cases where courts ruled on invocation of the privilege."); see also Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 FORDHAM L. REV. 1931, 1938 (2007) ("For over two decades following *Reynolds*, the executive rarely asserted the state secrets privilege But starting in 1977, the executive raised the privilege with greater frequency. Between 1953 and 1976, there were only eleven reported cases addressing the privilege; between 1977 and 2001 there were fifty-nine reported cases." (footnotes omitted)).

employment of the so-called Mosaic theory; the creation of the Unacceptable Risk doctrine; the dismissal of an action on the basis of the privilege before a responsive pleading was filed, even though the plaintiff claims it will not rely upon privileged evidence; and the dismissal of an action in its entirety when there is a risk that privileged evidence may limit or compromise a defense.⁵²¹

The de facto privilege has certainly permitted—perhaps invited, if not encouraged—executive abuse of the privilege.⁵²² In that regard, the abuse of the privilege by the Air Force in *Reynolds* to conceal its own misconduct simply foreshadowed executive branch conduct in succeeding decades. Moreover, the privilege has been extended to shield not only misconduct but allegedly illegal conduct by executive officers.⁵²³

The irony of these developments of the last four decades is that the *Reynolds* rule has accomplished just the opposite of what Chief Justice Vinson seems to have sought, namely a rule that would keep the courts out of controversy in cases implicating national security. Vinson sought to achieve his goal by granting the executive a de facto absolute privilege. He probably expected that the executive would assert the privilege no more in the future than in the past, and thus the privilege announced in *Reynolds* would be rarely used. His predictions held up for twenty years, but not after that. The result has been that courts sustain the privilege in highly controversial and nationally prominent cases, and that the courts' rulings have embroiled the courts in intense controversy. This controversy is fueled not by executive exasperation with the judiciary but by the plaintiffs' criticism of both the executive and the judiciary. Thus, the showdown Vinson avoided in *Reynolds* has

⁵²¹ See *supra* note 8.

⁵²² Plaintiffs' lawyer, Charles J. Biddle, understood that an absolute privilege—de facto or de jure—would result in, to use Vinson's terms, executive "caprice." In a letter dated March 18, 1952, addressed to Theodore Mattern, Biddle wrote:

This is probably as good a time as any to have the legal question come before the Supreme Court in view of all the scandals about Government officials. If the head of a government department is to be permitted to himself decide whether or not to give out information free from any direction by the courts, it would indeed furnish a great opportunity to cover up things in the Department which they would rather not have come to light.

Letter from Charles J. Biddle to Theodore Mattern (Mar. 18, 1952) (on file with author).

⁵²³ The Obama administration's decision to funnel all claims for a state secrets privilege through a group of senior lawyers in the Department of Justice constitutes an implied admission that the executive branch had abused the privilege and that procedures were required to guard against its future abuse. Moreover, it is worth emphasizing that there is no evidence that the contemporary state secrets privilege that grants the executive a de facto absolute privilege is required to protect the national security. The belief underlining the Third Circuit's decision in *Reynolds* that federal judges can be trusted to parse the issues with a sensitive eye towards national security concerns, see *Reynolds v. United States*, 192 F.2d 987, 997 (3d Cir. 1951), *rev'd*, 345 U.S. 1 (1953), remains unchallenged.

been redefined as a confrontation between parties seeking judicial relief against an abusive executive and the courts failing to provide a forum for redress.

Lastly, the *Reynolds* case helped inaugurate and define what I term the Age of Deference.⁵²⁴ This is the period that commences with the end of World War II and the dawn of the modern day national security state and continues to today. It is a period in which federal courts—mainly under the leadership of the Supreme Court—have created and redefined one legal doctrine after another, the effect of which is to insulate the executive branch from any meaningful judicial review in cases implicating national security.⁵²⁵ These doctrines are broad in scope and near-iron clad. Thus, the executive can function within this judicially built fortress without any of the accountability or transparency that results from the adjudication of serious claims in a public courtroom. The result has been a serious distortion in the nation’s governing structure and a weakening of institutional commitments to the rule of law.⁵²⁶

⁵²⁴ See *supra* notes 13–16, 18 and accompanying text.

⁵²⁵ See, e.g., *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (articulating a new and more demanding pleading standard for evaluating the sufficiency of a complaint: the first step requires the exclusion of conclusory allegations; the second step requires an assessment of whether a plausible fit exists between the non-conclusory facts alleged and the judicial relief claimed); *Tenet v. Doe*, 544 U.S. 1, 3 (2005) (expanding the rule in *Totten v. United States*, 92 U.S. 105 (1876), “prohibiting suits against the Government based on covert espionage agreements”); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (imposing more demanding standing requirements); *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983) (delimiting Congress’s role in agency oversight by declaring the one-house legislative veto unconstitutional); *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (declaring that the president is absolutely immune from civil damages liability for his official acts); *Goldwater v. Carter*, 444 U.S. 996 (1979) (plurality opinion) (dismissing action on the ground that the case presented a non-justiciable political question); *United States v. Nixon*, 418 U.S. 683 (1974) (granting the president a constitutionally based executive privilege); *United States v. Reynolds*, 345 U.S. 1 (1953) (announcing new rules to guide the application of the state secrets privilege); *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010) (applying the state secrets privilege before a responsive pleading is filed on the ground that the litigation presents an unacceptable risk that a state secret may be inadvertently make public); *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009) (dismissing action on the ground that no *Bivens* claim for relief is available on the facts of the case absent congressional authorization).

⁵²⁶ It is common place today to claim that the “activism” of the federal courts today saps the vitality of the democratic process. It no longer seems to matter to the many who make this claim what empirical basis is; the mere recitation of a few nationally prominent decisions in what is frequently termed the national “cultural wars,” seems to be adequate to make the claim to those who assert it an unassailable truism. See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003) (declaring unconstitutional a Texas statute making homosexual sodomy a crime); *Roe v. Wade*, 410 U.S. 113 (1973) (declaring that a woman has a constitutionally protected right to an abortion). Thus, Judge J. Harvie Wilkinson, III of the Fourth Circuit Court of Appeals has recently added his voice to that chorus, though in doing so he not only deplores “judicial activism” but also what he terms “cosmic constitutional theory,” which he claims, in one paragraph, are “taking us down the road to judicial hegemony where self-governance at the heart of our political order cannot thrive,” and in the next asserts: “[C]osmic constitutional theory has done real damage to the rule of law, the role of courts in our society, and the ideals

VII. THE LAST APPEAL

A. *Justice Denied*

In early 2000, Judith Palya Loether, a daughter of Albert H. Palya, one of the civilian engineers who died in the 1948 crash, “came across an internet website offering access to recently-declassified military aircraft accidents reports.”⁵²⁷ Subsequently she obtained the Air Force Investigation Report and the three witness statements that senior Air Force officials had represented, a half century earlier, contained military secrets that would injure the national security if disclosed.⁵²⁸ To her surprise, the confidential documents contained “nothing approaching a ‘military secret.’ There is not one mention of the secret mission or the secret equipment that had occupied these men” on the day they died in the crash of the B-29 bomber.”⁵²⁹ Eventually she and others,⁵³⁰ including Patricia J. Reynolds—now Patricia J. Herring and the spouse of Robert Reynolds—secured legal representation from the same law firm that brought the original case—the Philadelphia law firm of Drinker Biddle & Reath LLP—and initiated suit to reopen the case and “to set aside the settlement agreement reached fifty years earlier on the grounds that the settlement was procured by the Air Force’s claim of privilege, through which it committed a fraud on the Court actionable under Rule 60(b)’s savings clause.”⁵³¹

They claimed that the Air Force’s accident report and the three witness statements contained no military secrets.⁵³² Instead, they

of restraint that the greatest judges in our country once embraced. But the worst damage of all has been to democracy itself, which theory has emboldened judges to displace.” J. HARVIE WILKINSON, III, *COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNANCE* 4 (2012). Whatever may be said about “judicial hegemony” in contemporary times, there can be no doubt that the cluster of cases that constitute the Age of Deference are at the opposite end of the “judicial activism” spectrum. In addition, it is clear that these cases invite, if not encourage, executive branch abuse of power, and that they inflict great damage on the rule of law and the effectiveness of a governing structure of checks and balances.

⁵²⁷ Independent Action for Relief from Judgment to Remedy Fraud on the Court, *supra* note 38, at 2, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *104, *105–07. This complaint was filed in the United States District Court for the Eastern District of Pennsylvania by Wilson M. Brown, III and Jeff A. Almeida of Drinker Biddle & Reath LLP, a Philadelphia law firm that represented the three widows in the original damage action authorized by the Federal Tort Claims Act against the United States. *See id.* at 15–16 2005 U.S. S. Ct. Briefs LEXIS 2430, at *104, *125–27.

⁵²⁸ *Id.* at 11–12, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *104, *119–122.

⁵²⁹ *Id.* at 2–3, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *104, *105–09.

⁵³⁰ The other parties to the suit included Susan Brauner, Catherine Brauner, William Palya, and Robert Palya, as living heirs of the deceased William H. Brauner and Phyllis Brauner, and Albert H. Palya and Elizabeth Palya. *Id.* at 1, 2005 U.S. S. Ct. Briefs LEXIS, at *104, *104–105.

⁵³¹ Herring v. United States, No. Civ.A.03-CV-5500-LDD, 2004 WL 2040272, at *2 (E.D. Pa. Sept. 10, 2004), *aff’d*, 424 F.3d 384 (3d Cir. 2005).

⁵³² Independent Action for Relief from Judgment to Remedy Fraud on the Court, *supra* note

maintained, these recently declassified documents established that the B-29 that crashed in 1948 was not fit for flying;⁵³³ that the crew had not previously flown together;⁵³⁴ and that the civilian engineers who died in the crash had not been instructed about emergency exit procedures.⁵³⁵ Thus, the descendants claimed that high government Air Force officials had deliberately and intentionally submitted false information to the court, that the submitted information was central to the court's reasoning and judgment in the case, and that this fraud on the court warranted the exceptional relief of vacating the earlier final judgment.⁵³⁶ After two efforts before the Supreme Court, one before a United States District Court and another before a Court of Appeals, these family members lost in their effort to gain a hearing to reopen the judgment in the case.

Initially the families sought relief before the Supreme Court because it was the Supreme Court that had issued the highly important 1953 decision.⁵³⁷ But on June 23, 2003, the Court refused to consider the matter.⁵³⁸ At that point, the families applied to the United States District Court for the Eastern District of Pennsylvania for relief, the very court in which the original damage action was first filed. They claimed that the settlement agreement reached fifty years earlier was the result of the Air Force successfully asserting a fraudulent claim of privilege.⁵³⁹

The United States District Judge Legrome D. Davis denied relief. He stated that although the disputed documents provide "no thorough

38, at 11, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *104, *119–21.

⁵³³ *Id.*

⁵³⁴ Independent Action for Relief from Judgment to Remedy Fraud on the Court, *supra* note 79, at 1, 12, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *104, *121 (Complaint); *id.* Exhibit J, at 103, 110, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *198, *205 (Persons Report).

⁵³⁵ *Id.* Exhibit J, at 103, 113, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *198, *210. As the report stated in its official language: "The aircraft is not considered to have been safe for flight because of non-compliance with Technical Orders 01-20EJ-177 and 01-20EJ-178," "Fire developed in the No. 1 engine as a result of the failure of the right exhaust collector ring," and "AF Regulation 60-5 was violated in that the passengers and crew were not properly briefed." *Id.* Exhibit J, at 103, 116, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *198, *213–14. Taken together, the findings had the following implications: the plane was unfit for flying because it lacked heat shields designed to prevent engine fires as required by Air Force technical orders; the lack of heat shields contributed to causing the fire that the extinguishers failed to extinguish; the crew had not previously flown together in violation of Air Force rules and the lack of flying experience as a team contributed to misjudgments that, in turn, contributed to the crash; and the crew had not trained the civilians in escape procedures, which contributed to the outcome that the dead civilian engineers did not parachute safely from the plane.

⁵³⁶ Independent Action for Relief from Judgment to Remedy Fraud on the Court, *supra* note 38, 2005 U.S. S. Ct. Briefs LEXIS 2430, at *104.

⁵³⁷ The descendants sought leave from the Supreme Court to file a petition for a writ of error coram nobis, which the court denied. *In re Herring*, 539 U.S. 940 (2003).

⁵³⁸ *Id.*

⁵³⁹ *Herring v. United States*, No. Civ.A.03-CV-5500-LDD, 2004 WL 2040272, at *2 (E.D. Pa. Sept. 10, 2004), *aff'd*, 424 F.3d 384 (3d Cir. 2005).

exploration of the secret mission”⁵⁴⁰ and do not “refer to any newly developed electronic devices or secret electronic equipment,”⁵⁴¹ the report did “describe the mission in question as an ‘electronics project’ and an ‘authorized research and development mission.’”⁵⁴²

The family members appealed Judge Davis’s judgment to the Court of Appeals for the Third Circuit.⁵⁴³ That court, sitting in a panel of three judges—Judges Samuel A. Alito, Franklin Van Antwerpen and Ruggero Aldisert—affirmed the district court’s judgment in an opinion written by Judge Aldisert. Judge Aldisert wrote that the affidavits submitted by senior Air Force officials did not constitute fraud on the court during the original litigation because they had claimed that the disputed documents contained information which was in fact in the disputed documents indicating that the B-29 that crashed was engaged in a secret mission testing secret military equipment.⁵⁴⁴ More precisely, the opinion stated that the affidavits submitted by Secretary of the Air Force Finletter and Judge Advocate General Harmon “can be reasonably read to assert privilege over technical information about the B-29,” such as the plane’s “mission,” its “operation,” or its “performance,” as opposed to just the “confidential equipment” it had on board for testing.⁵⁴⁵

The families had one last hope: an appeal to the Supreme Court. They filed their papers; the government responded with its papers. A decision to review the case required four of the nine Justices to vote in favor of granting certiorari and reviewing the case. The ultimate vote is not known. But the disposition is. At least six members of the Court did not favor review. The families’ petition was denied.⁵⁴⁶ That ended the appeal, and the litigation begun a half-century earlier came to an end for a second time.

B. *Unreasonable Deference*

In the effort to re-open this tragic case, the descendants hit a judicially-constructed brick wall. That was not altogether a surprise. The policies against reopening a judgment are strong and the legal requirements for vacating a judgment on grounds of fraud are demanding.⁵⁴⁷ But it is likely that the judicial resistance to reopening the judgment in *Herring* was reinforced by another factor.

⁵⁴⁰ *Id.* at *6.

⁵⁴¹ *Id.* at *8.

⁵⁴² *Id.* at *6.

⁵⁴³ See *Herring v. United States*, 424 F.3d 384 (3d Cir. 2005).

⁵⁴⁴ *Id.* at 392.

⁵⁴⁵ *Id.*

⁵⁴⁶ *Herring v. United States*, 547 U.S. 1123 (2006).

⁵⁴⁷ In *Herring v. United States*, the Third Circuit stated the challenge facing any party

By the time the families had moved to reopen the case, the federal courts, pursuant to the Supreme Court's direction, had for over a half-century displayed the "utmost deference" towards the executive branch in cases implicating national security.⁵⁴⁸ Thus, although the family members of the civilian engineers who died in B-29 #866 in 1948 over Waycross, Georgia, initially lost before the Supreme Court in 1953 because of the state secret privilege, they lost before the federal courts for a second time in 2005 because of a broad rule of deference the *Reynolds* case helped generate. Thus, the *Reynolds* decision forms two bookends demarking the Age of Deference—the 1953 Supreme Court decision that helped launch the era and the 2006 Supreme Court refusal to review the case, a decision emblematic of the era's maturity.

Thirteen federal judges—one district court judge, three circuit judges, and nine Supreme Court Justices—participated in the review of the *Reynolds* case in light of the previously confidential Air Force documents. That process produced two opinions, one at the district court and one at the circuit court; no one on the Supreme Court wrote an opinion in this case. Neither of the two published opinions contains the faintest criticism of the conduct of the executive branch or of the government lawyers in the original litigation. And that is true even though it seems totally implausible that judges who reviewed the case did not conclude that Air Force officials and Department of Justice lawyers had manipulated, misled and deceived the courts in the initial case. Indeed, the reasoning of both published opinions makes it seem as if reasonable judges were willing to go to unreasonable lengths to construct—indeed, invent—an explanation as to why Air Force officials sixty years earlier had acted in good faith and with sufficient cause.⁵⁴⁹

wishing to reopen a case on grounds of fraud as follows: "The presumption against the reopening of a case that has gone through the appellate process all the way to the United States Supreme Court and reached final judgment must be not just a high hurdle to climb but a steep cliff-face to scale." 424 F.3d at 386.

⁵⁴⁸ United States v. Nixon, 418 U.S. 683, 710 (1974).

⁵⁴⁹ For example, consider the opinion of the Third Circuit written by Judge Aldisert. That opinion claims that the privilege was properly sustained if Finletter's affidavit can be "reasonably read to include . . . the workings of the B-29." *Herring*, 424 F.3d at 391. Judge Aldisert asserts that if the privilege asserted by Finletter can be understood to include the "workings of the B-29" as opposed to the secret electronic equipment, "the Appellants' assertion that the Air Force claim of military secrets privilege misrepresented the nature of the information contained in the accident report over which the privilege was asserted falls apart." *Id.* At that point, Aldisert claims that Finletter and Harmon objected to disclosure of the plane's mission, as well as "information concerning its operation or performance," and that such an objection was properly protected by the privilege at the time. *Id.* at 392 (quoting Claim of Privilege). Judge Aldisert's claims about what information was properly privileged in 1950, when Finletter and Harmon signed their affidavits, have no support in the historical record. As already noted, the news reports of the crash of Bomber #866 revealed that the plane was on a special mission to test secret electronic equipment. See sources cited *supra* note 40. Furthermore, the *New York Times* had already published many reports on the operation and performance of the B-29. See Leviero, *supra* note 91, at 2. Also, the Soviet Union had three

American-made B-29 planes in its possession which it used to manufacture its own version of a B-29. But Judge Aldisert argued the following in footnote three of the opinion: “Even if we concluded that the Air Force’s claim of privilege could not be read to include concern about revealing the workings of the B-29, we would be obligated to consider whether certain information contained in the accident report actually revealed sensitive information about the mission and the electronic equipment involved.” 424 F.3d at 391 n.3. At that point, Aldisert made reference to three concerns: “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.’” *Id.* (quoting Report of Special investigation). Although there may not have been public reports identifying the 3150th Electronics Squadron as the unit involved in the tests, the other factors were established as part of the public record. *See supra* notes 112–113 and accompanying text.

United States District Judge Davis’s opinion relied upon reasoning and factual allegations similarly unsupported by the historical record. The relevant portion of Judge Davis’s discussion of the matter follows:

In 1948, amid Communist paranoia, it is hardly shocking to contemplate an Air Force eager to protect from public view the accident investigation report that mentions modifications needed for the B-29, and by extension the Tu-4. [The Tu-4 was a Soviet version of the B-29 that was made possible when three B-29s were forced to land in Vladivostok, Russia in 1944. The Soviets released the crew but kept the planes and used reverse engineering to build a copy of the B-29—the Tu-4. *Herring v. United States*, 2004 WL 2040272, at *8.] By no means, will this Court draw firm conclusions as to military intelligence concerns in existence some fifty years ago. Rather, we will examine the events contemporaneous to the accident only in order to shed light on factors surrounding the Air Force’s assertion of military privilege. It is at least conceivable that were the accident investigation report released, it might have alerted the otherwise unaware Soviets to a technical problem in the Tu-4 that the May 1, 1947 technical order sought to remedy in the B-29. Though the Plaintiffs argue that the Air Force deliberately hid its obvious negligence behind fraudulent affidavits, disclosure of this now seemingly innocuous report would reveal far more than the negligence Plaintiffs read; it may have been of great moment to sophisticated intelligence analysts and Soviet engineers alike. Viewed against this political and technical backdrop, it seems that the accident investigation report may have reasonably contained sufficient intelligence, if not about the secret equipment or mission, then about ongoing developments in Air Force technical engineering, to warrant an assertion of the military secrets privilege.

Herring, 2004 WL 2040272, at *9 (footnotes omitted).

Judge Davis’s reasoning is unsupported by history. The Soviets did not need the Persons investigation report to alert them to the B-29 engine fire problem. The Soviets were alerted to the B-29 engine fires because the B-29s that made emergency landings in Russia were “on fire,” *How Soviets Copied America’s Best Bomber During WWII*, CNN.COM, Jan. 25, 2001 (on file with author), and because news reports made it clear that the B-29s frequently experienced devastating engine fires, *see supra* notes 78–80 and accompanying text. Moreover, the Soviets did not need the disclosure of the *Persons Report* to inform them that the Air Force was trying to remedy the B-29 engine problem because the *New York Times* reported that fact a full six weeks before the *Persons Report* was even completed, and a full ten months before Secretary Finletter and Judge Advocate General Harmon submitted statements to District Judge Kirkpatrick claiming that the report was privileged. The newspaper reported that fact when General Hoyt S. Vandenberg, Air Force Chief of Staff, ordered grounded all B-29s “that have not been modernized mechanically,” to limit, what General Curtis LeMay, head of the Strategic Air Command, stated was “too many engine fires.” *U.S. Grounds B-29’s*, *supra* note 78, at 1. Judge Davis’s claim that the *Persons Report* contained information about the design of the so-called heat shields intended to minimize or eliminate engine fires was false. The report contained no such information.

By so doing, these thirteen members of the federal judiciary seem to fulfill Associate Justice Robert Jackson's pessimism that in times of national crisis the nation's judges cannot be relied upon to uphold restraints upon the exercise of raw power. In an opinion rendered in the year of the *Reynolds* plane crash, Jackson upheld rent control legislation under the banner of the "undefined and undefinable 'war power'"⁵⁵⁰:

No one will question that this power is the most dangerous one to free government in the whole catalogue of powers. It usually is invoked in haste and excitement when calm legislative consideration of constitutional limitation is difficult. It is executed in a time of patriotic fervor that makes moderation unpopular. And, worst of all, it is interpreted by judges under the influence of the same passions and pressures.⁵⁵¹

In reaching their results, these judges surely acted in good faith, but their conceptions of their responsibilities as Article III judges seem disturbingly deferential. Rather than understanding federal judges to be "public officers whose responsibility under the Constitution is just as great as that of the heads of the executive departments," as Judge Maris did,⁵⁵² these judges seem to understand their role in cases implicating national security as little more than being an extension of the executive branch.⁵⁵³ Or, as Alexander Bickel once commented on the outlook of the Vinson court: "Far from entering new claims to judicial supremacy, it seemed at times to forget even its independence."⁵⁵⁴

By any fair measure, the judges in the *Herring* case owed more by way of basic fairness to the descendants whose family members had died in the service of the nation than they delivered,⁵⁵⁵ and they owed more

⁵⁵⁰ *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 146 (1948) (Jackson, J., concurring).

⁵⁵¹ *Id.*

⁵⁵² *United States v. Reynolds*, 192 F.2d 987, 997 (3d Cir. 1951), *rev'd*, 345 U.S. 1 (1953).

⁵⁵³ In considering the relationship between the judiciary and the executive, it is worth noting former Supreme Court Justice John Paul Stevens' observation:

Burger's opinion for the Court in *United States v. Nixon* (1974) required President Nixon to produce the tape recordings that eventually led to his resignation. The decision not only had a historic effect on American politics and society but also powerfully illustrated the integrity and independence of the Court. It may well have done more to inspire the confidence in the work of judges that is the true backbone of the rule of law than any other decision in the history of the Court.

JOHN PAUL STEVENS, *FIVE CHIEFS: A SUPREME COURT MEMOIR* 114 (2011). It was in the *Nixon* case that Chief Justice Burger also stated that the Court should show the "utmost deference" in national security matters, *United States v. Nixon*, 418 U.S. 683, 710 (1974), but whether Justice Stevens agreed with that formulation is certainly open to question given some opinions written after 9/11. What was important to Justice Stevens in the *Nixon* case was the Court's insistence upon its own "integrity" and its own "independence" from the executive branch as a source of the Court's own legitimacy and public standing. See STEVENS, *supra*, at 114.

⁵⁵⁴ ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 5 (1970).

⁵⁵⁵ Judicial opinions sustaining the state secrets privilege during the last three decades contain very little if any sympathy, compassion, or solicitude for the plaintiffs who claim a legal

to the nation by way of a forthright statement of reasons in support of the judgment than they offered in their opinions. Indeed, their judicial

wrong and who are denied a legal remedy because of the privilege. Because the plaintiffs in these cases may not be United States citizens and because the executive branch may challenge the veracity of the allegations of these individuals, it may seem that judges are willing to accept the harsh outcomes resulting from sustaining the state secrets privilege because the plaintiffs disadvantaged by the privilege are not necessarily loyal United States citizens (though they may be). The outcome in the *Reynolds* case belies such a supposition. In *Reynolds*, loyal United States citizens serving the national defense interests and their family members are as disadvantaged by the privilege as any. In contrast, judges seem more open to empathy and sympathy for any defendant who may be disadvantaged by the state secrets privilege. Thus, consider Justice Scalia's over-flowing regard for a defendant who might be harmed by a privilege:

It seems to us, however, that the effect of our determination with regard to the state secrets privilege is to prevent this issue from proceeding. As noted earlier, we honored the invocation of that privilege because we satisfied ourselves that the in camera affidavit set forth the genuine reason for denial of employment, and that that reason could not be disclosed without risking impairment of the national security. As a result of that necessary process, the court knows that the reason Daniel Molerio was not hired had nothing to do with Dagoberto Molerio's assertion of First Amendment rights. Although there may be enough circumstantial evidence to permit a jury to come to that erroneous conclusion, it would be a mockery of justice for the court—knowing the erroneousness—to participate in that exercise. This is not a case like *Ellsberg v. Mitchell*, in which the court's consideration of the state secrets privilege did not ipso facto disclose to the court the validity of the defense—so that the latter could (at least in the special circumstances of that case) be left to be resolved by subsequent in camera proceedings. Here, by contrast, we know that further activity in this case would involve an attempt, however well intentioned, to convince the jury of a falsehood.

Molerio v. FBI, 749 F.2d 815, 825 (D.C. Cir. 1984). Note that then-Circuit Judge Scalia emphasized that justice would be mocked if a court entered a judgment against a defendant who had not violated the law, but he makes no mention of the converse, namely the injustice inherent in the dismissal of an action in which the defendant violated the plaintiff's rights but in which the invocation of the privilege barred the plaintiff from having sufficient evidence to prove the relevant factual points. *Id.* A Fourth Circuit panel in *Farnsworth Cannon, Inc. v. Grimes*, acknowledged this point:

Defendant further urges that, when the government asserts a privilege which deprives a defendant of the evidence needed to establish a valid defense, the court should shield the defendant from the effect of the deprivation by dismissing the action. (Understandably, but inconsistently, defendant does not suggest analogous protection for plaintiffs whom an assertion of privilege may deprive of valid causes of action.)

635 F.2d 268, 271 (4th Cir. 1980). Judge Learned Hand also endorsed a neutral hand in the application of evidentiary privileges:

There certainly is no such excuse. We agree that there may be evidence—"state secrets"—to divulge which will imperil "national security"; and which the Government cannot, and should not, be required to divulge. *Salus rei publicae suprema lex*. The immunity from disclosure of the names or statements of informers is an instance of the same doctrine. This privilege will often impose a grievous hardship, for it may deprive parties to civil actions, or even to criminal prosecutions of power to assert their rights or to defend themselves. That is a consequence of any evidentiary privilege.

United States v. Coplon, 185 F.2d 629, 638 (2d Cir. 1950) (footnotes omitted).

conduct was of such character that one is inclined to ask, as another judge asked in a different case with regard to different judges: “[I]n calmer times, wise people will ask themselves: how could such able and worthy judges have done that?”⁵⁵⁶

We aspire to be a nation of laws and not a nation subject to executive privilege. And for most citizens, day-in and day-out, we are that. But we fall too short too often of these important aspirations, especially when the executive branch claims that the nation’s security is implicated. Although it is true that we will have no order without security, and no liberty without order, it is also true that our security, our order, and our liberty will be less than what they might be if courts fail in their primary duty to uphold the rule of law even when the executive claims that the rule of law is incompatible with national security.

The Supreme Court failed to fulfill its primary responsibility in the 1953 *Reynolds* litigation and the judges who participated in the recent re-litigation of the *Reynolds* case did the same. In so doing, they put at risk much more than injustice to identified individuals; they put at risk a complicated governing scheme that prizes both security and liberty and that is dependent upon an independent judiciary to fulfill its mandate to check and balance robust executive authority.

The hallmark of a “civilized polity,” one federal judge recently stated, is the granting of “redress,” and “[i]n the United States, for better or worse, courts are, almost universally, involved.”⁵⁵⁷ Perhaps in time, federal judges will be less timid and less compromising in adhering to and upholding this basic and valued political principle even in cases implicating national security.

⁵⁵⁶ *Arar v. Ashcroft*, 585 F.3d 559, 630 (2d Cir. 2009) (Calabresi, J., dissenting).

⁵⁵⁷ *Id.* at 638.