Supreme Court of the United States

Abdul Shareef v. Barack Obama

By Tyler Hall

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 48-15162-342

ABDUL SHAREEF
Plaintiff-Appellant

v.

BARACK OBAMA, et al.
Defendant—Appellee

PRIOR HISTORY: Appeal from the US District Court for the District of Columbia

DISPOSITION: Affirmed

MAJORITY OPINION BY: PALMER, Circuit Judge, joined by five others
DISSENTING OPINION BY: BARTLET, Circuit Judge, joined by three others
DISSENTING OPINION BY: WHITMORE, Circuit Judge

COUNSEL: Allen Shore for Plaintiff-Appellant; Samuel Seaborn for Defendant-Appellee

BACKGROUND

Abdul Shareef is a Saudi Arabian citizen who is suing eleven agents of the United States government, including President Barack Obama and CIA Director Leon Panetta, for what he alleges to be an unlawful rendition and torture in violation of his rights. Shareef alleges that the Central Intelligence Agency ("CIA") is operating an "extraordinary rendition" program, by which it works in concert with other governments to capture suspects abroad and utilize interrogation methods that would otherwise be prohibited under federal or international law.

Shareef alleges that he was detained on immigration charges while on a trip to Sweden. While there, he was transferred into American custody and flown to Afghanistan. He alleges he was held in Afghanistan for two years, - specifically in a small, windowless cell and frequently subjected to electric shocks, beatings, and sleep deprivation. During this time, he was allegedly coerced into a false confession. He was subsequently transferred to Saudi Arabia, where he was convicted of terrorism charges and sentenced to fifteen years in prison. Shareef further claims that virtually all of these events have been publicly acknowledged by the Swedish government.

He filed suit in the US District Court for the District of Columbia. The United States government, acting on behalf of the defendants, asserted the state secrets privilege, a privilege the government may try to invoke whenever it believes court proceedings could put sensitive national security information at risk. The government further moved to dismiss the case, again based on the state secrets privilege.

Judge Sundquist, after reading a sealed affidavit filed by CIA Director Panetta, agreed and dismissed the case. Shareef then appealed to the DC Circuit Court of Appeals—this court—arguing that the state secrets privilege does not provide for a case to be summarily dismissed, and instead merely governs what evidence is admissible in an open trial.

A three judge panel of this Court again ruled in favor of the Government, upholding the dismissal of the lawsuit by a 2-1 margin. Citing inter- and intra-judicial conflict, Shareef asked to have his case heard *En Banc*—that is, by the entire DC Court of Appeals, rather than just a three judge panel. We accepted the request. This is a record of the *En Banc* proceedings.

The State Secrets Privilege

The state secrets privilege is a doctrine in United States law that allows the government to protect national security information from being exposed in a trial. Importantly, the government is currently not required to disclose the specifics of the information, even in private to the judge. Instead, a senior official typically submits a sworn affidavit explaining in general terms how the information in question relates to

military secrets. Director Panetta's sworn affidavit read:

> I, Leon Edward Panetta, Director of the United States Central Intelligence Agency, do hereby invoke the state secrets privilege in the case of *Shareef v. Obama*. The case deals extensively with secret CIA programs, and any disclosure of related facts would necessarily implicate CIA procedures, organizational structures, and ongoing operations. I firmly believe that disclosure of these related facts would aid our enemies and harm the national security of the United States.

The law is, however, somewhat unclear about the procedures after the judge determines that the state secrets privilege applies. Courts have disagreed about whether to dismiss the case entirely upon confirming the state secrets privilege or merely to exclude specific pieces of evidence but let the lawsuit as a whole proceed, as well as what circumstances lead to either scenario.

Origins of the State Secrets Privilege

The state secrets doctrine first appeared in *Totten v. United States*, an 1875 Supreme Court decision. *Totten* involved a Civil War-era spy who was promised $200 per month by President Lincoln to spy for the Union. Though he successfully worked as a spy, he was never paid. *Totten* was the lawsuit filed by his family to recover the money.

In a unanimous opinion, the Supreme Court ruled in favor of the government and dismissed the case. It held that "public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters the law itself regards as confidential." The Court further added that "much greater reason exists for the application of this principle to cases of contract for a secret service with the government." Importantly, *Totten* has never been overturned or overruled, and is still governing precedent today.

The next major state secrets case—and the one that explicitly laid out the doctrine—was *United States v. Reynolds* (1953).

Reynolds involved three Air Force contractors who were killed when a B-29 Superfortress crashed in 1948. Consequently, their widows filed a lawsuit against the United States Government, seeking damages for the crash. In the discovery phase of the trial (the phase when each party is required to turn over copies of its evidence to the other side), the widows requested a copy of the accident report of the crash. The government refused, claiming that to do so would threaten national security. Furthermore, the government refused to even grant the trial judge an opportunity to view the accident report. Because the government refused to release the documents, the trial court issued a directed verdict in favor of the plaintiffs.

However, the government appealed the case to the Supreme Court, who, in a 6-3 decision, ruled in favor of the United States. The majority formally recognized that a "privilege against revealing military secrets" exists, and can be claimed by the government.

The Scope of the State Secrets Privilege—Comparing *Totten* and *Reynolds*

One of the key legal questions surrounding the state secrets privilege lies in the relation of *Totten* to *Reynolds* and vice versa. The crucial distinction seems to lie in the judicial action that should be taken after the government invokes the state secrets privilege.

Totten seems to suggest that the state secrets privilege governs the justiciability of cases— in other words, that it determines whether or not a specific case can even be tried at all. The Court specifically noted that the state secrets privilege— at least within the context of *Totten*—"forbids the maintenance of any suit in a court of justice."

However, it is unclear how broadly applicable the *Totten* holdings actually are. *Totten* dealt not with military secrets in a general context, but specifically with a situation where there existed a secret contract between the plaintiff and the government. Furthermore, some of the logic in the opinion seems to indicate that the ruling was predicated on specific circumstances unique to a situation where there is secret contract between a plaintiff and the government. The opinion repeatedly refers to the parties not as the "plaintiff" and "defendant", but as "employer" and "agent", indicating that the Court may

have viewed the case as specific to the circumstances of a secret contract.

Most strikingly, the Court notes that "The secrecy which such contracts impose precludes any action for their enforcement. The publicity produced by such an action would itself be a breach of a contract of that kind." This line in particular might suggest that the case was dismissed not because it dealt with state secrets, but because the lawsuit itself constituted a breach of contract.

United States v. Reynolds, however, involved a broader set of circumstances and a more generally applicable holding. Yet *Reynolds* is somewhat unclear on how the privilege should be applied. Should it be treated as a rule of justiciability, as in *Totten*? Or should it be a rule of evidence, allowing cases to go forward when the government claims state secrets, but simply withholding evidence on a case-by-case basis?

In analyzing and explaining the state secrets privilege, the *Reynolds* majority uses the privilege against self-incrimination as an analogy. This provides some insight into the mindset of the Court, since the privilege against self-incrimination is an evidentiary privilege. When a defendant exercises his right against self-incrimination, he is merely able to exclude evidence that otherwise would have been a part of the trial (his testimony about the incriminating facts).

On the other hand, the majority in *Reynolds* specifically mentions and incorporates the holdings in *Totten* into their opinion. In the later portions of the opinion, the Court notes that "even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake." Here the majority cited *Totten*, describing case as one where "the very subject matter of the action…was a matter of state secret," so "the action was dismissed on the pleadings without ever reaching the question of evidence." The fact that the *Reynolds* Court seemingly endorses—and perhaps even broadens—the holdings in *Totten* lends strength to the interpretation of the state secrets privilege as a rule of justiciability.

The State Secrets Privilege in the Modern Era

The most recent Supreme Court case dealing with the state

secrets privilege was the 2006 decision in *Tenet v. Doe*. The case had facts similar to those in *Totten*— a Russian intelligence officer worked for the CIA during the Cold War, and was promised financial security for life in exchange. When the CIA reneged on the deal, he sued in federal court. Reaffirming *Totten*, though breaking little new jurisprudential ground, the Supreme Court ruled unanimously in favor of the government.

More interesting, relevant, and potentially far-reaching are a pair of conflicting opinions issued by two different Circuit Courts. Both, like the case at hand, deal with the fallout from the CIA's alleged program of extraordinary rendition and torture.

The first, the 2007 case of *El-Masri v. United States*, was decided in the Fourth Circuit Court of Appeals. Khalid El-Masri was an alleged victim of the CIA's rendition program who responded by suing the US Government. The Government asserted the state secrets program and moved to immediately dismiss the case. The trial court agreed, and the Fourth Circuit upheld the ruling on appeal.

Citing *Totten,* the Fourth Circuit held that the case needed to be dismissed because "some matters are so pervaded by state secrets as to be incapable of judicial resolution once the privilege has been invoked." Even more broadly, the majority noted that "in an attempt to make out a prima facie case during an actual trial, the plaintiff and its lawyers would have every incentive to probe as close to the core secrets as the trial judge would permit." Because such a situation "would inevitably be revealing," the case necessarily must be dismissed.

The key fact behind the decision of the Fourth Circuit to dismiss the case was the degree to which the state secrets were central to the case. They noted that a case must be dismissed if "privileged information will be so central to the litigation that any attempt to proceed will threaten that information's disclosure."

It is, however, important to note that the ideological makeup of the Fourth Circuit Court of Appeals is not necessarily representative of either the country or the judiciary as a whole. On the contrary, many observers regard the Fourth Circuit as the most conservative appeals court in the country.

On the other hand, the Ninth Circuit, which decided the other recent state secrets case, is typically regarded as the most liberal appeals court in the nation. And in the 2009 case of *Mohamed et al. v. Jeppesen Data Plan*, the Ninth Circuit ruled against the government, refusing to dismiss a case under the state secrets doctrine.

The Ninth Circuit ruled that the holdings in *Totten* and the holdings in *Reynolds* are parallel and separate. Crucially, the majority held that the *Totten* holdings—in which the lawsuit was dismissed under the state secrets doctrine—were confined merely to situations in which the plaintiff had a secret contract with the government.

Having separated it from *Totten*, the Ninth Circuit was further able to view the state secrets rule created in *Reynolds* as a separate, broad, and purely evidentiary one. The Ninth Circuit held that successful invocation of the state secrets privilege "requires 'simply that the evidence is unavailable, as though a witness had died, and the case will proceed accordingly, with no consequences save those from the loss of evidence'"

Separation of Powers

The United States government, as created in the US Constitution, is a government of separated powers. The first three articles of the Constitution created three separate branches—legislative, executive, and judiciary—with distinct powers and responsibilities.

Cases dealing with the state secrets privilege create a conflict between the executive and judicial branches. The Constitution, in Article II, decrees that "The President shall be Commander in Chief of the Army and Navy of the United States." Consequently, it is primarily the president's responsibility to maintain the national security of the United States— which means it is his responsibility to protect crucial state and military secrets.

At the same time, however, the Constitution, this time in Article III, notes that "The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be

made, under their authority." Consequently, it is the responsibility of the judiciary to fairly and justly examine and decide all cases that come before the courts.

Of course, these two constitutionally mandated responsibilities are mutually exclusive. It is impossible for the judiciary to conduct a full trial of a case like this one while the executive branch simultaneously protects all state secrets from being released. As a result, any just decision on the state secrets doctrine must come to some sort of resolution between the two conflicting responsibilities.

In *Reynolds*, for example Supreme Court acknowledged that "Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers. Yet we will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case." The majority hoped to strike a balance between the two responsibilities, forcing the executive branch to give some sort of sworn affidavit to the judge and submitting to his determination of whether the burden for applying the state secrets privilege was met. At the same time, however, the majority did not force the executive branch to reveal all the specifics of the state secrets in question, as that would not only go against its constitutionally mandated responsibility, but go against the very purpose of the state secrets doctrine.

A responsible jurist must decide—is the *Reynolds* compromise still just and valid, or do modern day changes in the function and actions of the different branches of government necessitate a rebalancing?

Foreign Policy Considerations

The current state of world affairs and US foreign policy must also impact a judge's decision on the state secrets doctrine. Current foreign and military affairs necessarily impact the balance of executive and judicial power, as well as the relative importance of protecting state secrets.

No one will argue that the world we live in today is identical to the world we lived in a decade ago. On September 11, 2001, the way Americans view foreign policy and national security was forever altered. The 9/11 attacks—the first and only

ones of their magnitude to take place on US soil—killed more than 3,000 civilians and caused more than $30 billion in economic damage.

But even more than that, 9/11 marked a paradigm shifting on both national defense and modern warfare. Unlike conventional warfare, the Global War on Terror launched after September 11 elevated the importance of intelligence gathering. Because terrorists are small, secretive, non-state actors, and are typically undeterred by potential US military responses, it is particularly crucial that US intelligence services discover and stop potential attacks in their early stages.

Yet at the same time, perhaps the executive branch has pushed the boundaries of civil liberties too far in the years since September 11. The USA PATRIOT Act, a controversial bill that gave intelligence agencies wide ranging powers to conduct surveillance operations on both US and non-US citizens, was passed in October of 2001 and subsequently reauthorized in May of 2006. The bill has been criticized by groups such as the American Civil Liberties Union as a violation of the First, Fourth, and Fifth Amendments which they believe "vastly expands the FBI's power to spy on ordinary people living in the United States, including United States citizens."

Recent administrations have greatly increased the use of the state secrets privilege. For example, in the years between 1954—the year after the privilege was formally recognized in *United States v. Reynolds*—and 2001, the privilege was used 55 times. Yet in the four years after 2001, the executive branch invoked the state secrets privilege 23 times. To compound this troubling fact, studies suggest that courts rarely challenge the President's claim of state secrets, denying the privilege on only four occasions since 1953.

These potential civil liberties violations and abuse of the state secrets privilege may call for increased scrutiny into claims of privilege by the judiciary. On the other hand, the pressing global situation, and the need for powerful intelligence gathering tools in the Global War on Terror may indicate a greater need for deference to the Executive and his duty to protect national security.

OPINIONS OF THE DC CIRCUIT

PALMER, Circuit Judge, joined by BAUER, ALMEIDA, MASON, MANNING, and BUCHANON, Circuit Judges:

In this case, an appeal from the US District Court for the District of Columbia, the petitioner asks us to reverse the District Court's dismissal of his case. The dismissal at the trial court level took place after the respondents, President Obama and the United States of America, asserted the state secrets privilege. The petitioner asserts that the state secrets doctrine should not apply to his case, due to the extraordinary circumstances of his alleged capture, rendition, and torture. He further asserts that even if the government could legally invoke the state secrets privilege, it was improper for the trial judge to dismiss the case based on the privilege.

Typically, a judicial evaluation of a state secrets claim involves a three-pronged test.

- Has the proper procedure for the state secrets privilege been followed?
- Is the information in question truly a state secret worthy of shielding from judicial inquiry?
- What is the proper legal remedy?

The first prong is easily resolved— the party claiming the state secrets privilege was the United States government, and it did so in a timely manner.

The second prong is slightly less simplistic. Because the state secrets doctrine, by its very nature, is designed to ensure that military secrets never fall outside the hands of high level executive branch officials, the judiciary is not informed of the specific state secrets at issue. Instead, as in this case, we are provided with a general sworn affidavit by a high ranking official involved in the matter—in this case, CIA Director Leon Panetta. As the Fourth Circuit has so eloquently noted, this prong "pits the judiciary's search for truth against the Executive's duty to maintain the nation's security."

Some of my brother judges would argue that we ought not to give this deference to the executive branch. Yet they make these arguments in opposition to clear Supreme Court precedent and our traditional deference to national security concerns.

The Supreme Court has noted repeatedly the importance of judicial deference to the executive branch—particularly when dealing

with military and intelligence matters, a subject with which judges often have little to no expertise. In *United States v. Nixon* (1974), for example, the Supreme Court held that "the courts will the utmost deference to Presidential acts in the performance of an Article II function." Article II of the Constitution clearly provides that a chief responsibility of the President is to act as "Commander in Chief of the Army and Navy of the United States." As the Court has noted in cases such as *Department of the Navy v. Egan* (1988), the duty to protect national secrets falls within this constitutional mandate.

And *United States v. Nixon* is far from the only precedent dealing with deference to the executive. In *Chi & S Air Lines Inc. v. Waterman SS Corp.* (1948), the Supreme Court prevented the judiciary from encroaching onto Presidential responsibilities when dealing with foreign policy. In particular, the ruling limited the courts' role when dealing with "information properly held secret." More recently, in *Jama v. Immigration and Customs Enforcement* (2005), the Supreme Court reaffirmed the judiciary's "customary policy of deference to the President in matters of foreign affairs."

The importance of foreign policy and military deference to the executive branch is only strengthened by current world affairs. The United States is currently embroiled in two wars, and the specter of September 11 still looms large over all our military and foreign policy decisions. Both Supreme Court precedent and current world affairs make it clear that—at least in the realm of state secrets—the judiciary must provide a reasonable degree of deference to the Executive.

Keeping America's tenuous global position in mind, we turn to the final prong of the test—the legal remedy. This requires us to examine the scope of the state secrets doctrine. Should the case be summarily dismissed, or should we merely exclude evidence that appears to relate to state secrets?

The crucial precedent in this determination is the 1875 decision in *Totten v. United States*. In *Totten*, the Supreme Court, in a lawsuit over a breach of a secret contract between a Civil War-era spy and President Lincoln, ruled in effect that the specifics of the contract were a state secret. Importantly, the *Totten* Court chose to completely dismiss the case, rather than merely exclude specific pieces of evidence. The unanimous majority noted that "public policy forbids the maintenance of any

suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential."

The *Totten* case represents a beginning of the state secrets doctrine—a doctrine that was clearly and explicitly articulated in the subsequent, related case of *United States v. Reynolds*. Broadening and interpreting *Totten* and the state secrets privilege, the majority noted that the state secrets privilege in *Totten* led to a dismissal because "the very subject matter of the action…was a matter of state secret."

It is this "very subject matter" test that we apply to the case at hand. If litigating this case will necessarily bring to light secrets or information that the privilege is designed to protect, we have no choice but to dismiss the lawsuit. As we have previously noted, we agree that many of the details surrounding the CIA's extraordinary rendition and interrogation programs are state secrets, and should not be revealed. Any further inquiry into this matter would surely reveal justifiably secret information—whether it is the procedure of CIA interrogations, the structure of the CIA's intelligence gathering hierarchy, or some other fact or parcel of information important to our national defense.

However, the plaintiff alleges that the details of *his* rendition and interrogation have been exposed—indeed, they have been publicly acknowledged by the Swedish government, and reported by various domestic and foreign news agencies. He argues that we should exclude the true secrets, but litigate based on the publicly available evidence, which would both preserve his rights and protect the United States' national security.

We find these arguments unpersuasive. The issue is not whether the case can be described, or whether Mr. Shareef can explain the circumstances surrounding his extradition without disclosing protected information. Instead, we must ask whether the very act of litigating this case could reasonably cause the protected information to be disclosed.

Even if the specific events surrounding the alleged rendition of the plaintiff have been released into the public forum, there is no question—as we have already found—that many details surrounding general extradition and interrogation procedures and locations are still classified as state secrets. We find it difficult to believe that a prolonged and undoubtedly high profile trial would never once encounter any information relating

to CIA organization, operations, or procedures.

Particularly troubling is a point that has been previously made by our brothers on the Fourth Circuit Court of Appeals. They note that "in an attempt to make out a prima facie case during an actual trial, the plaintiff and its lawyers would have every incentive to probe as close to the core secrets as the trial judge would permit." It is a simple fact that the very thing that defines our adversarial judicial system—vigorous advocates on each side—would inevitably lead to a disclosure of the information the state secrets privilege is designed to protect. And even if we are to assume that the plaintiff can make a prima facie case without discussing state secrets, are we to make a leap of faith and similarly believe the government will be able to properly defend itself without discussing protected information?

While we realize the gravity of dismissing this case based on the state secrets privilege, as Mr. Shareef will in effect be denied his day in court, we find this dismissal necessary and unavoidable in service of the greater good to our country's national security. We hereby affirm the ruling of the district court, and dismiss the action.

So Ordered

BARTLET, Circuit Judge, joined by McGARRY, LYMAN, and ZIEGLER, Circuit Judges Dissenting:

Though I agree that the state secrets privilege exists, and is procedurally applicable to this case, I find myself compelled to disagree— and disagree strongly—with the remedy proposed by the majority. The state secrets privilege as it applies to the instant case is not a rule of justiciability, designed to dismiss entire cases, but merely a rule of evidence, that will suppress particular pieces of private, classified information while still allowing the case as a whole to proceed.

The majority's first error was in analyzing the history of the state secrets doctrine. *Totten v. United States* and *United States v. Reynolds* are not interrelated cases designed to synergize with one another. Instead, the language of *Reynolds* makes clear that they are two parallel strands of the state secrets doctrine, with different types of analysis and—most crucially—different judicial remedies for correspondingly different types of cases.

The majority relies heavily on *Totten*—the only major Supreme Court precedent to categorically dismiss a case under the state secrets privilege—in its holdings. *Totten*, however, was not a generally applicable state secrets case. On the contrary, its holdings only truly applied to limited circumstances in which the plaintiff was party to a secret contract with the government.

The *Totten* Court dismissed the lawsuit not because it revealed military secrets or threatened national security, but because of the implications relating to breach of contract. The Supreme Court noted that "The secrecy which such contracts impose precludes any action for their enforcement. The publicity produced by an action would itself be a breach of a contract of that kind, and thus defeat a recovery."

It is clear that neither the facts nor the underlying logic of the *Totten* holding apply to this case, in which there is no secret agreement with the government, and no contract being enforced or breached. Consequently, the remedy used in *Totten*, a complete dismissal of the case, is also inapplicable to the case at hand.

The governing precedent, then, is *United States v. Reynolds*, a case with a much more broadly applicable fact pattern. Like this case, *Reynolds* dealt with a basic tort lawsuit. Unlike *Totten*, however, the Court restricted its proposed remedy to an evidentiary-based rule, merely preventing the use of secret evidence, "as though a witness had died." The Court further noted that the state secrets privilege is a privilege "as that term is understood in the law of *evidence*" (emphasis added). It emphasized that the state secrets privileged was "well established in the law of evidence."

Not only is *Reynolds* and its evidentiary-based holding the correct precedent to apply, based on the facts of this case, it also provides for the soundest resolution of the conflict this case raises between the executive and judicial branches of the government. The majority felt the need to define an either/or choice between the superiority of the branches. Ultimately, they chose to provide an absolute deference to the claims of the Executive, dismissing the case based solely on the state secrets privilege. Not only is this the wrong choice, it is a wholly unnecessary choice.

As the majority did in *Reynolds*, the best course here would

be to pursue "some like formula of compromise." As in *Reynolds*, the Court will merely remove specific pieces of protected evidence, both protecting the state secrets—and the Executive's duty to maintain the country's national security—and allowing the case to proceed forward—thereby upholding the judiciary's responsibility to seek out the truth.

As in *Reynolds*, it seems appropriate to analogize here to another evidentiary privilege, the attorney-client privilege. As our brothers on the Ninth Circuit Court have noted, the Supreme Court has held that—when dealing with attorney-client privilege, "invocation of that privilege does not create a 'zone of silence' around the content of privileged communications." In other words, while our colleagues in the majority may advocate dismissal because the subject matter of the case is secret. Yet it is not the province of the state secrets privilege, nor the duty of the courts, to exclude whole swaths of tangentially related information via a dismissal of the case. Instead, *Reynolds* compels us to merely exclude *evidence.*

I hold no opinion as to whether or not the plaintiffs' allegations are factually true. Yet I hold fast to the belief that, based on precedent and principle, they should have the opportunity to attempt to make a *prima facie* case before a court of law using the public, unprivileged evidence available to them.

Therefore I respectfully **Dissent**

WHITMORE, Circuit Judge, Dissenting:

Not only do I dissent, but I do so with the fundamental belief that the majority's ruling in this case violates the constitutional duties of the judicial branch. I find myself compelled to ask, as the great Chief Justice John Marshall did more than two hundred years ago, "Why does a judge swear to discharge his duties agreeably to the Constitution of the United States, if that Constitution forms no rule for his government?"

As the Supreme Court noted in the very case of *United States v. Reynolds* that the majority cites to support their arguments, "Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." Yet that is exactly what this ruling will encourage—a surrender of the judicial search for truth, bowing instead to unsubstantiated claims of the executive branch.

I disagree—and disagree strongly—with the majority's holding to allow the state secrets privilege to be invoked with only a vague affidavit submitted by an intelligence official. I see little reason to continue this practice, and much constitutional justification for instead requiring private, *in camera* disclosures of the specific facts to the judge before the privilege may be invoked.

In *United States v. Reynolds*, the Supreme Court acknowledged that a court case is never fully isolated from the tangential events that surround it, opining that "In the instant case we cannot escape judicial notice that this is a time of vigorous preparation for national defense." I find that unlike the events surrounding *Reynolds*—which was decided at the height of the Cold War—the events surrounding this case ought to lead us to a position less deferential to the Executive and more vigorous in our search for truth and justice.

Benjamin Franklin once said, "Those who can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety." Yet recent politicians— in both the executive and legislative branch— have seemingly ignored this maxim. In 2001 Congress—at the urging of the President—passed the USA PATRIOT Act, a law that was renewed in 2005 and is still on the books today. The PATRIOT Act brings about a laundry list of constitutional violations. It allows surveillance of both US and non-US citizens. It creates "sneak and peek" warrants, which don't require the FBI to inform a suspect that the search warrant has been issued. It greatly expands the private, consumer information that telecommunication companies are required to disclose to federal agencies. It allows the FBI to seize copies of any "tangible things"—books, records reports, documents, and other private, personally identifiable information—all without bothering to show probable cause.

Ultimately, this act—and others like it—constitutes a massive broadening of executive powers. This state of events calls not for increased judicial deference, but increased judicial scrutiny. For us to continue to defer to the executive—to continue to rubber-stamp the plethora of state secrets claims and constitutional violations that have occurred this decade—goes against the very purpose the framers envisioned when they created a government of separate powers.

Further, the idea that America is made safer by suppressing

lawsuits and dissent is preposterous. Foreign policy success—particularly when fighting a war on terror—cannot be measured by the number of terrorists killed or the number of suspects interrogated. We are fighting a war of ideas—a war that can only be won by building personal relationships with and boosting America's image as a land of hope and freedom.

Yet what perhaps troubles me most about the majority's ruling in this case is the idea that judges cannot be trusted to conduct *in camera* reviews of classified materials. In the words of Justice John Paul Stevens, this ruling simply constitutes "an unstated lack of confidence in the impartiality and capacity of the judges who would make the critical decisions." There is no valid reason to deny judges the right to examine supposed state secrets that does not simultaneously advance a view of judges as either untrustworthy or incompetent.

The great Chief Justice John Marshall believed that "The government of the United States has been emphatically termed a government of laws, and not of men." I have devoted my own life to this ideal—an optimistic hope that in this great American experiment called democracy, justice and fairness will forever triumph over the capricious whims of politicians. Today, the majority has declared its support for a government of men, not of laws, and a jurisprudence of fear, not of hope. I cannot sign onto such an opinion.

Therefore I **Dissent**