

People *v.* State

Security secrets must be weighed against Americans' broader interests.

BY LOUIS FISHER

In recent cases involving state secrets, federal judges typically put the plaintiff's interest on one side of the scale and the government's interest (or "national interest") on the other.

Not surprisingly, using this test, the individual loses every time. This approach protects neither the plaintiff nor the nation.

Consider, for example, the case of Khaled El-Masri, whose petition for review is now before the Supreme Court as it starts its October term. El-Masri, a German citizen, was vacationing in Macedonia in 2003. He was detained at the border because of confusion over his name. Macedonian officials thought he was Khalid al-Masri, a suspect from the al-Qaida Hamburg cell.

On Jan. 23, 2004, he was turned over to CIA agents who flew him to a secret prison called the "Salt Pit" in Kabul, Afghanistan, where he was held for five months under squalid conditions. He was repeatedly refused counsel or access to a representative of the German government.

The CIA finally concluded that his passport was genuine and it had imprisoned the wrong man. U.S. officials flew him to Albania, and he eventually got back to Germany. In 2005, El-Masri sued then-CIA Director George Tenet, the airlines used by the CIA, and other current and former employees of the agency. The Bush administration asserted the state secrets privilege to block litigation from moving to discovery and providing access to government documents.

THE NATIONAL INTEREST?

On May 12, 2006, Judge T. S. Ellis III of the U.S. District Court for the Eastern District of Virginia dis-

missed the lawsuit, holding that the government had validly asserted the privilege.

Ellis presented conflicting accounts of the constitutional role of the judiciary. On the one hand, courts "must not blindly accept the executive branch's assertion" but "must instead independently and carefully determine whether, in the circumstances, the claimed secrets deserve the protection of the privilege." On the other hand, "courts must bear in mind the executive branch's pre-eminent authority over military and diplomatic matters."

In considering the interests involved, Ellis ruled that whatever rights El-Masri possessed to vindicate his claims in court, "well-established and controlling legal principles require" that his "private interests must give way to the national interest in preserving state secrets."

There is no national interest in picking up the wrong person and keeping him in prison for five months, with no subsequent ability to seek damages and no opportunity to force the government to concede a mistake and make restitution. El-Masri was not merely presenting his own interests. He represented every individual, U.S. citizen or alien, who wants to avoid a similar fate.

It is in the national interest to prevent government abuse, especially when covered up by the state secrets privilege. It is in the national interest to have other branches of government, in this case the judiciary, independently supervise unilateral and illegal actions. It is in the national interest to have an effective system of checks and balances and a separation of powers.

At the end of his opinion, Ellis cautioned that nothing in his ruling "should be taken as a sign of judicial approval or disapproval of rendition programs; it is not intended to do either." But by accepting the state secrets privilege as readily

as he did and using the balancing model that he fashioned, he removed any opportunity for judicial check, scrutiny, or constraint on the extraordinary rendition program.

The “propriety and efficacy” of the program, he said, “are not proper grist for the judicial mill.” Why not?

Ellis observed that if El-Masri’s allegations were true, “or essentially true, then all fair-minded people,” including those who believe that state secrets must be protected and that renditions are necessary, “must also agree that El-Masri has suffered injuries as a result of our country’s mistake and deserves a remedy.” The source of that remedy, he said, must be the executive branch or Congress, not the judiciary.

Yet there is no reason to expect a remedy from the executive branch that initiated the program and blocked access to agency documents. If there are legitimate questions of illegality or even unconstitutionality, the courts are as qualified as Congress to render a judgment. To have courts look the other way does not promote the rule of law or protect the credibility of the judiciary.

SECURITY ERRORS

When the district court was affirmed this year, the U.S. Court of Appeals for the 4th Circuit too relied on a jerry-built, fallacious balancing test: “A plaintiff suffers this reversal not through any fault of his own, but because his personal interest in pursuing his civil claim is subordinated to the collective interest in national security.”

There is no collective interest in what the government did to El-Masri. National security is not advanced by detaining the wrong people and letting the executive officials who committed the mistake remain unaccountable, at liberty to repeat the error. There is no collective interest in having the United States mistreat people in this manner, while the world is watching and judging the health and vitality of our legal system.

U.S. officials say they want to spread America’s rule of law abroad. What kind of condition is it in here? Are courts independent bodies, capable of ensuring justice, or subordinate agents of the executive branch in national security?

THE PROPER WEIGHTS

The case of *John Doe v. Gonzales*, involving national security letters that demand information from recipients, adopts a more realistic balancing test.

The decision, issued on Sept. 7 by Judge Victor Marrero of the U.S. District Court for the Southern District of New York, concludes that parts of the USA Patriot Act revisions are unconstitutional because they do not afford adequate procedural safeguards and are not narrowly tailored to protect speech. Marrero also found the statutory provisions restricting judicial review to violate the separation of powers. These are the kinds of weighty constitutional issues that belong on the scale to counterbalance executive and legislative branch actions.

Marrero acknowledged that the government’s use of NSLs “to obtain private information about activities of individuals

using the Internet is a matter of the utmost public interest.” However valuable for investigative and law enforcement functions, NSLs nonetheless pose “profound concerns to our society.” He expressed a “compelling need” to ensure that NSLs be subject to “the safeguards of public accountability, checks and balances, and separation of powers that our Constitution prescribes.”

Marrero also objected to the standard of review provided by Congress for judicial action. The “deferential standard” of review created too great a danger that constitutionally protected speech would be suppressed, and it reflected an attempt by Congress and the executive branch “to infringe upon the judiciary’s designated role under the Constitution.”

NOT LIKE CHEVRON

Those who advocate deference for the courts in state secrets cases cite the Supreme Court’s decision in *Chevron USA Inc. v. National Resources Defense Council Inc.* (1984). Here, the Court concluded that when a federal court reviews an agency’s interpretation of a statute, and the law is silent or ambiguous about the issue being litigated, agency regulations are to be “given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.” If the agency’s interpretation is reasonable, it is “entitled to deference.”

Chevron has no application to the state secrets privilege. Administrative law is conducted in the open through statutes, notice-and-comment procedures that invite public participation, congressional hearings and oversight, and the opportunity for Congress to re-enter the picture at any time with restrictive appropriation riders or new legislation.

Those mechanisms have nothing to do with litigation involving state secrets. When an administration invokes the state secrets privilege, the sole check on arbitrary and possibly illegal executive action is the federal judiciary. Judges have to see in the complaint brought by a single individual the larger social, political, and constitutional issues that must be safeguarded and weighed against executive branch assertions.

WRONG FROM THE START

Judges turn to *United States v. Reynolds* (1953), which first recognized the state secrets privilege. Here the lower courts got the balancing test right; the Supreme Court got it wrong.

Three widows who lost their husbands (civilian engineers) in the crash of a B-29 sued the government, as they were entitled to do under the Federal Tort Claims Act. Both the district court and the U.S. Court of Appeals for the 3rd Circuit understood and applied the correct balance. If the government insisted on withholding from the widows documents, such as the official accident report, the government could do so but only at the cost of losing the case.

The district court took that position, and so did the 3rd Circuit. In supporting access to the accident report, the 3rd Circuit understood that the balance had already been decided by Congress when it passed the tort claims statute. In

this type of case, where the government has consented to be sued as a private person, with no special privileges, whatever claims of public interest might exist in withholding government documents “must yield to what Congress evidently regarded as the greater public interest involved in seeing that justice is done to persons injured by governmental operations whom it has authorized to enforce their claims by suit against the United States.” The balance should never have been *Three Widows v. The National Interest*. Their access to the accident report was the national interest.

The Supreme Court announced: “Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers.” Yet by not looking at the report, the Court abdicated. No principled objection could be raised by the executive branch to have the Court examine the report in chambers.

The Court assumed the claim of state secrets had merit. We know today that the report had no state secrets. By failing to examine the document, the *Reynolds* Court risked being fooled. As it turned out, it was.

Both Congress and the judiciary have an interest in seeing that courts are not hoodwinked again and do not lose the institutional independence they must exercise. The integrity and credibility of the judicial system are at stake. So is the rule of law.

Louis Fisher is a specialist in constitutional law with the Library of Congress. His book, In the Name of National Security: Unchecked Presidential Power and the Reynolds Case (2006), focuses on the state secrets privilege. The views here are personal, not institutional.