

## State Your Secrets



When the government cloaks itself in privilege, judges must rule.

BY LOUIS FISHER

**T**he Bush administration has repeatedly invoked the state-secrets privilege to prevent private parties from gaining access to agency documents. These documents are sought in cases involving such important constitutional issues as domestic eavesdropping by the National Security Agency, extraordinary rendition (sending prisoners to be interrogated in countries that permit torture), and other disputes involving presidential power.

Allowing the executive branch to treat the privilege as an absolute bar to judicial review, as the Bush administration is attempting, would be profoundly unwise. It would let self-serving assertions by one of the litigants usurp the judge's authority. It would tilt control over the courtroom to executive power, deny to private litigants any opportunity for justice, and eliminate a vital check on governmental abuse.

The responsibility for deciding questions of privilege and access to evidence is central to the role of a judge in conducting a trial.

This authority is well established. In his well-known 1940 treatise on evidence, John Wigmore recognized the existence of “state secrets” but also concluded that the scope of the privilege had to be decided by a judge, not executive officials. He agreed that there “must be 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.” Yet he cautioned that this privilege “has been so often improperly invoked and so loosely misapplied that a strict definition of its legitimate limits must be made.”

Wigmore considered the claim of “state secrets” so abstract and useless that he divided it into eight categories, including exemptions from giving testimony, attending court, providing evidence by deposition, and disclosing communications by informers to government prosecutors. But on the duty to give evidence, he was unambiguous: “Let it be understood, then, that there is no exemption, for officials as such, or for the Executive as such, from the universal testimonial duty to give evidence in judicial investigations.” An exemption from attendance in court “does not involve any concession either of an exemption from the Executive’s general testimonial duty to furnish evidence or of a judicial inability to enforce the performance of that duty.”

Wigmore came down clearly on which branch should determine the necessity for secrecy. It was the judiciary: “Shall every subordinate in the department have access to the secret, and not the presiding officer of justice? Cannot the constitutionally coordinate body of government share the confidence? The truth cannot be escaped that a Court which abdicates its inherent function of determining the facts upon which the admissibility of evidence depends will furnish to bureaucratic officials too ample opportunities for abusing the privilege . . . Both principle and policy demand that the determination of the privilege shall be for the Court.”

### FOLLOW THE RULE

The issues explored by Wigmore resurfaced in the late 1960s and early 1970s, when expert committees attempted to define “state secrets” and determine which branch should decide the scope and application of privileges in court.

An advisory committee, appointed by Chief Justice Earl Warren, completed a preliminary draft of proposed rules of evidence in December 1968. Among the many proposals was Rule 5-09, covering “secrets of state.” It defined a secret of state as “information not open or theretofore officially disclosed to the public concerning the national defense or the international relations of the United States.” Nothing in that definition prevented the executive branch from releasing state secrets to a judge to be read in chambers. It merely restricted the disclosure of information to the public.

The committee drew language and ideas from the Supreme Court decision that first recognized the state-secrets privilege, *United States v. Reynolds* (1953). The committee agreed that the privilege may be claimed only by the chief officer of the department administering the subject matter that the secret concerned. That officer is then required to make a showing to the judge, “in whole or in part in the form of a written state-

ment.” The trial judge “may hear the matter in chambers, but all counsel are entitled to inspect the claim and showing and to be heard thereon.” The judge “may take any protective measure which the interests of the government and the furtherance of justice may require.”

If the judge sustains a claim of privilege for a state secret involving the government as a party, the court will have several options. If the claim deprives a private party of material evidence, the judge can make “any further orders which the interests of justice require, including striking the testimony of a witness, declaring a mistrial, finding against the government upon an issue as to which the evidence is relevant, or dismissing the action.” A note prepared by the advisory committee explained that the showing needed by the government to claim the privilege “represents a compromise between the complete abdication of judicial control which would result from accepting as final the decision of a departmental officer and the infringement upon security which would attend a requirement of complete disclosure to the judge, even though it be *in camera*.”

Left unexplained was what happens if a judge rejects the judgment of a department official. Can the document be read in chambers? Shared with plaintiff’s lawyer? Either way, the draft report placed final control with the judge, not the agency head.

Because of that feature and others, the Justice Department vigorously opposed the draft. It wanted the proposed rule changed to recognize that the executive’s classification of information as a state secret was final and binding on judges.

A revised draft, renumbering the rule from 5-09 to 509, was released in March 1972. It eliminated the definition of “a secret of state” and therefore had to strike “secret” from various places in the rule. The new draft rewrote the general rule of privilege to prevent any person from giving evidence upon a showing of “reasonable likelihood of danger that the disclosure of the evidence will be detrimental or injurious to the national defense or the international relations of the United States.” Despite the Justice Department’s opposition, final control remained with the judge.

### DYING IN CONGRESS

Several prominent members of Congress voiced their objections, partly because of the procedure used to adopt rules of evidence for the courts (giving Congress only 90 days to disapprove).

Some of the objections were aimed at Rule 509, which some lawmakers thought weakened the Supreme Court’s decision in *Reynolds*. Deputy Attorney General Richard Kleindienst told Congress the rule should be rewritten to recognize that the government had a privilege not to disclose “official information if such disclosure would be contrary to the public interest.” The Justice Department insisted that once a department official, pursuant to executive order, decided to classify information affecting national security, that judgment must be regarded as having “conclusive weight” in determining state secrets unless the classification was “clearly arbitrary and capricious.”

Which branch would decide that the classification was clearly arbitrary and capricious, and on what grounds? Would final judgment be left to the self-interest of the executive branch? Only a court could provide an effective, credible, and indepen-

dent check, and to reach an informed conclusion, the judge would have to examine the document.

The Supreme Court sent the proposed rules of evidence to Congress on Feb. 5, 1973, to take effect July 1, 1973. New language for Rule 509 included a redrafted definition of secret of state: "A 'secret of state' is a governmental secret relating to the national defense or the international relations of the United States."

Congress concluded that it lacked time to thoroughly review all the proposed rules of evidence within 90 days and vote to disapprove particular ones. It passed legislation to provide that the proposed rules "shall have no force or effect" unless expressly approved by Congress. Approval never came. Among the rejected rules was Rule 509.

#### PASSING RULE 501

Subsequently, Congress passed the rules of evidence in 1975, including Rule 501 on privileges. Rule 501 comes down squarely on the side of authorizing courts to decide the scope of a privilege. The rule covers all parties to a case, including the government. It does not recognize any authority on the part of the executive branch to dictate the reach of a privilege. There is no acknowledgment of state secrets.

Rule 501 expressly grants authority to the courts to decide privileges. The rule states: "Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law *as they may be interpreted by the courts* of the United States in the light of reason and experience." (Emphasis added.)

The only exception in Rule 501 concerns civil actions at the state level where state law supplies the rule of decision, and this wouldn't apply to the federal constitutional questions in which the Bush administration is asserting a state-secrets privilege.

The legislative history of Rule 501 explains how and why the provisions on state secrets were deleted. When the bill reached the House floor, it came with a closed rule, which prohibited amendments. The privileges covered by the rule (including those of government secrets, husband and wife, physician and patient, and reporters) were considered "matters of substantive law" rather than rules of evidence. In 1974, Rep. David Dennis (R-Ind.) told his colleagues, "[W]e were so divided on that subject ourselves, let alone what the House would be, that we would never get a bill if we got bogged down in that subject matter which really ought to be taken up separately in separate legislation." The Senate Judiciary Committee also reported on the fractious nature of the rule on privileges, including disputes over state secrets. Under those pressures, Congress abandoned Rule 509.

Executive officials who now invoke the state-secrets privilege need to understand that the branch that decides questions of privilege and evidence is the judiciary, not the executive.

They can learn much from their predecessors, including President George W. Bush's first director of the CIA. On Feb. 10, 2000, then-CIA Director George Tenet signed a formal claim of state-secrets privilege, adding: "I recognize it is the Court's decision rather than mine to determine whether requested material is relevant to matters being addressed in litigation." That language appears in Tenet's declaration in *Barlow v. United States* (2000) before the Court of Federal Claims.

It stands as a model of executive subordination to the rule of law and undergirds the constitutional principle of judicial independence. The current executive branch and reviewing courts can find helpful guidance there.

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