

# The bastard birth of the state secrets privilege

By R. Marc Kantrowitz



There is no question that the government has a right to protect its secrets, the release of which would jeopardize national security.

Today, we review the U.S. Supreme Court case that gave rise to that right.

### Three widows

At 1:20 p.m. on Oct. 6, 1948, 13 men boarded a B-29 on a secret mission to test radio equipment. Forty minutes later, at approximately 20,000 feet, fire broke out in one of the engines. The plane started to fall from the sky. Four men bailed out. The plane blew up.

Patricia Reynolds, 20, became a widow. A pregnant Phyllis Brauner was left with her 4-year-old daughter. And Elizabeth Palya had to raise two young sons and a 7-week-old daughter, Judy.

It was not surprising that suit was filed and discovery sought, one request being the Air Force's official accident investigation report. The government claimed that

*Judge R. Marc Kantrowitz sits on the Appeals Court. He currently is writing a book on the history of the Supreme Judicial Court. He thanks Lynn S. Muster, senior staff attorney at the Appeals Court, for her background research on the above column, which is based, in large part, on Barry Siegel's "Claim of Privilege."*

the air craft was engaged in "a highly secret mission" and that the release of the crash report, even to a judge privately viewing it, would jeopardize the nation's security. Ultimately, the matter landed before the Supreme Court.

It is important to place the case in the context of the times. In the words of President Truman, "a wave of hysteria" had engulfed

## LAW 'n HISTORY

America. Communism was on the march. Over a short period, China had been overrun and conquered; East Germany fell; Hungary elected a Communist government; eight Communist countries allied themselves in what would become the Warsaw Pact; and, most terrifying, the Soviet Union had The Bomb.

Against that backdrop, the court heard the case.

"Certainly there was a reasonable danger that the accident investigation report would contain references to the secret electronic equipment which was the primary concern of the mission," the court wrote.

Military secrets could not be divulged, and if, as a result, three widows could not ascertain the cause of

the crash that killed their husbands, that was the price to be paid to protect America's citizens from its many enemies around the world.

And, thus, the birth of the state secrets privilege.

Since the time of its release in 1953, *Reynolds* has been successfully cited hundreds of times to support the government's claims of national security, most recently in Guantanamo Bay.

That judges were often forced by *Reynolds* to fly blind, attempting to evaluate claims of the privilege without being allowed to even privately review the evidence at issue, was, once again, the high price of security.

The privilege expanded in time, ultimately embracing, in 1978, the mosaic theory wherein the D.C. Circuit Court of Appeals upheld the government's claim of privilege with regard to documents sought by Vietnam War protestors who had been subjected to surveillance and wiretapping.

As intelligence gathering "is more akin to the construction of a mosaic than it is to the management of a cloak and dagger affair," even seemingly innocuous bits and pieces of information may be classified, the court reasoned.

While the *Reynolds* case ultimately settled, obviously for less than it was worth, the cause of the crash was never definitively answered, leaving the families living in a state of uncertainty.

After so many decades in the dark, Judy Palya Loether, who had been a baby at the time of the crash, stumbled upon a shocking



AP PHOTO

revelation. Cruising the Internet, she connected with someone who compiled air accident reports. Included in his collection was the very report whose release the government had argued would jeopardize the country's safety.

Loether quickly secured the document and anxiously pored over it. She discovered heat shields that were never installed, a plane that was unfit to fly, several recurring maintenance problems that were never addressed, combustible coverings, pilot error and insufficient training. As for national security, the report contained nothing.

### Epilogue

On Sept. 14, 1950, the accident report and other supporting material came up for routine classifica-

tion review. The Air Force reduced its classification from top-level "secret" to third-level "restricted." No one involved in the case learned of the change.

The families returned to the nation's highest court, asking it to acknowledge that facts were improperly withheld and that the errors be corrected. The request was denied. The family then unsuccessfully filed a new action in federal court, with the adverse decision again upheld by the Supreme Court in 2006.

That same year, the American Bar Association adopted a resolution calling on Congress to regulate the state secrets doctrine. Testimony before the ABA delegates revealed that the "*Reynolds* decision was based on a lie that took five decades to unravel." 