No. 20-828

In the Supreme Court of the United States

FEDERAL BUREAU OF INVESTIGATION, ET AL.,
PETITIONERS

v.

YASSIR FAZAGA, ET AL.,
RESPONDENTS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR PROFESSOR BARRY SIEGEL AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

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INTEREST OF AMICUS CURIAE

Amicus curiae Professor Barry Siegel is an investigative journalist, professor of English, and Director of the Literary Journalism Program at the University of California, Irvine.* As a former national correspondent for the Los Angeles Times and recipient of the Pulitzer Prize, Professor Siegel has probed the Executive Branch's assertions of secrecy in the interest of national security. In 2008, Professor Siegel published *Claim of Privilege: A Mysterious Plane Crash, a Landmark Supreme Court Case, and the Rise of State Secrets* (2008) (*Claim of Privilege*), which chronicles the actual history underlying *United States* v. *Reynolds*, 345 U.S. 1 (1953). After scouring the historical record, Professor Siegel determined that the key Air Force report, which was shielded from judicial review, had been reclassified from "secret" to "restricted" one week before the district court ruled on the Executive's assertion of privilege.

Professor Siegel has an important and substantial interest in supporting a meaningful role for judicial oversight when the state-secrets privilege is invoked. Professor Siegel has examined ever-widening assertions of the state-secrets privilege post-*Reynolds*, concluding that diminishing judicial oversight is antithetical to a representative democracy that relies upon an informed citizenry. *Claim of Privilege* 193-201.

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* The parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part. No person or entity other than *amicus curiae* or his counsel made a monetary contribution to the brief's preparation or submission.

Reviewing the historical record of the Executive Branch's assertion of state secrets proves the wisdom of requiring judicial oversight.

INTRODUCTION

On September 14, 1950—one week before the district court ruled on the Executive Branch's assertion of a state-secrets privilege and two years before this Court heard argument in *Reynolds*—the Air Force downgraded the classification of the B-29 accident report. App., *infra*. The Air Force initially classified the report as "secret," meaning that disclosure "might endanger national security," but reduced the classification to "restricted"—"for official use only" and to preserve "administrative privacy"—after a routine review. *Claim of Privilege* 133.

No one informed *any* of the three courts reviewing the privilege assertion that the Air Force no longer believed the report implicated national-security concerns, and the Court's denial of judicial review of the "restricted" document kept the reclassification concealed. Since *Reynolds*, the state-secrets privilege has been protected by a nearly impenetrable wall of deference that has concealed otherwise non-secret government documentation to the detriment not only of the individual Americans seeking redress for government wrongs, but of a public entitled to know the Executive Branch's activities.

A democracy cannot always be transparent, because "protecting our national security sometimes requires keeping information about our military, intelligence, and diplomatic efforts secret." *General Dynamics Corp.* v. *United States*, 563 U.S. 478, 484 (2011). Taking that cue, the Federal Bureau of Investigation (FBI) suggests nobly that "[t]he Executive Branch as-

serts the state-secrets privilege not as a litigant seeking to prevail in any particular case but to safeguard the public interest." Gov't Br. 27. But the *actual* history underlying the assertion of the state-secrets privilege recognized in *Reynolds* underscores how an unchecked privilege can allow the Executive Branch to conceal its embarrassing mistakes, among other things. *Amicus curie* urges this Court to refocus this common-law privilege so that "[j]udicial control over the evidence in a case" is not "abdicated to the caprice of executive officers." *Reynolds*, 345 U.S. at 9-10.

Having obtained the benefit of a "state secret" in *Reynolds* when there was none, the Executive Branch (through the FBI) now hopes to cut off or significantly limit the private recourse created by Congress through the Federal Intelligence Surveillance Act (FISA). The parties' initial dispute before this Court concerns FISA's displacement of the state-secrets privilege. To the extent that a state-secrets privilege independent of FISA's strictures survives, the Court should direct courts to presumptively review *ex parte*, *in camera* documents or information asserted to contain state secrets. On remand here, this Court's articulation of a judicial-oversight requirement would apply to the review of any asserted state-secrets privilege beyond FISA's scope. See *Fazaga* v. *Fed. Bureau of Investigation*, 965 F.3d 1015, 1067 (9th Cir. 2020) ("[S]hould the FISA-covered electronic surveillance drop out of consideration, the Government is free to interpose a specifically tailored, properly raised state secrets privilege defense." (footnote omitted)).

The Federal Rules of Evidence charge this Court with the authority—and responsibility—to reconsider common-law privileges in the light of the Court's "reason and experience." Fed. R. Evid. 501. The historical record shows that, deliberately or not,

the Executive Branch has over designated as secret information related to activities that directly harm United States citizens, as in *Reynolds*. Two years before FISA was enacted, a Senate committee concluded that oversight by Article III judges through evaluation of the Executive's claim of a state-secrets privilege was a necessary check on the Executive's ever-expanding intelligence activities. See *Intelligence Activities and the Rights of Americans: Book II*, S. Rep. No. 755, 94th Cong., 2d Sess. 289, 293 (1976) (Select Committee to Study Governmental Operations with Respect to Intelligence Activities Report) (concluding intelligence abuses arose because "checks and balances designed by the framers of the Constitution to assure accountability have not been applied" and recommending "judicial review" as a "procedural check").

Reliance on Article III judges to assess claims of secrecy comports with congressional guidance, and there is no countervailing empirical or constitutional reason to suggest that limited judicial review to determine privilege undermines national security. In enacting FISA, Congress concluded that the Judiciary is not only competent to rule on issues of state secrets, but possesses unique expertise to "fashion discovery procedures, including inspection of material in chambers, and to issue orders as the interests of justice require, to allow plaintiffs with substantial claims to uncover enough factual material to argue their case, while protecting the secrecy * * * in which there is a legitimate security interest." Select Committee to Study Governmental Operations with Respect to Intelligence Activities Report 337. Reason and experience confirm Congress's insight. We need not trust the Executive Branch to make unilateral and unchecked determinations of secrecy when judges regularly and effectively protect sensitive information.

To be sure, the modern era presents concerning national-security threats, and often covert actions countering them are worthy of protection. But this environment also creates opportunities for Executive Branch encroachments on the constitutional rights of our Nation's citizens. The history of *Reynolds* and its progeny cautions strongly against unchecked deference to the Executive Branch. The concerns are especially acute given the proliferation of technology, with dragnet surveillance sweeping up unwary U.S. citizens. In keeping with its common-law duty, the Court should heed both the historical lessons from *Reynolds* and the guidance from Congress and direct Article III judges to presumptively favor *in camera* and *ex parte* review of assertions of secrecy by the Executive Branch.

SUMMARY OF ARGUMENT

The fiction of a "secret" Air Force Report of vital importance animated *Reynolds*. Unwittingly, this Court protected the "restricted" report, trusting that it had "all the evidence and circumstances" before it. *Reynolds*, 345 U.S. at 9. In truth, not one court ever had the actual "evidence and circumstances" before it. With the lessons of history—and review of that underlying information—in mind, *amicus curie* suggests that presumptive judicial review is necessary to prevent the problem of *Reynolds*.

Federal Rule of Evidence 501 requires this Court to revisit its articulated common-law privileges "in the light of reason and experience." Sixty-eight years of experience with a state-secret privilege premised on (at the very least) a mistake provides the reason and experience necessary to revamp how courts evaluate Executive claims for secrecy in the name of public interest.

ARGUMENT

The Executive Branch recycles the same argument it made in *Reynolds*: it, and it alone, must be trusted to act selflessly in the public interest when asserting the state-secrets privilege as it will—most assuredly—not consider its own, separate interests when making that determination. Compare Gov't Br. 27 ("The Executive Branch asserts the state-secrets privilege * * * to safeguard the public interest, regardless of whether doing so helps or harms the government's or any other party's litigation interests.") with Gov't Br. 60-61, *United States* v. *Reynolds*, 345 U.S. 1 (1953) (No. 21), 1952 WL 82378, at *60-61 (claiming that an executive official asserting the state-secrets privilege "is the person best qualified to" weigh "both the policy reasons for preserving secrecy and the opposing policy reasons for securing the fullest possible information for litigants," without considering whether "his own interests will be best served by preserving secrecy"). But the deference afforded to the Executive Branch is unsupported by the historical record. Worse, the increasing vagueness of the Executive Branch's assertions of privilege hamstrings the limited judicial scrutiny possible since *Reynolds*.

A. The Judiciary May Modify Common-Law Privileges in Light of Reason and Experience

1. The majesty of the common law is its flexibility to reject antiquated views from the past

Federal Rule of Evidence 501 provides that, absent directives from the Constitution, statutes, or rules prescribed by this Court, "a claim of privilege" is governed by "[t]he common law—as interpreted by United States courts in the light of reason and experience." By

"enacting Rule 501, Congress manifested an affirmative intention not to freeze the law of privilege," preferring "to leave the door open to change." *Trammel* v. *United States*, 445 U.S. 40, 47 (1980). Common-law privileges evolve—for example, in 1933, this Court altered course by recognizing the competency of a wife to testify in her husband's defense, concluding that it was "the duty of the court" to apply the common law "in accordance with present-day standards of wisdom and justice rather than in accordance with some outworn and antiquated rule of the past." *Funk* v. *United States*, 290 U.S. 371, 382 (1933). "This flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law." *Hurtado* v. *California*, 110 U.S. 516, 530 (1884).

When fashioning privileges against disclosure, courts "start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional." *United States* v. *Bryan*, 339 U.S. 323, 331 (1950). "Every exemption from testifying or producing records thus presupposes a very real interest to be protected" and "its validity must be assessed." *Id.* at 332; see also *Jaffee* v. *Redmond*, 518 U.S. 1, 11 (1996) (recognizing a psychotherapist-patient privilege after weighing "the significant public and private interests supporting recognition of the privilege" against the "modest" "likely evidentiary benefit that would result from the denial of the privilege").

The state secrets evidentiary privilege is an invention of the common law and, as such, is subject to the current reason and experience of the Court, and in keeping with the "purpose of Congress's design." *In re Queen's Univ. at Kingston*, 820 F.3d 1287, 1298 (Fed. Cir. 2016); see also *id.* ("[R]eason and experience com-

pel us to recognize a patent-agent privilege that is co-extensive with the rights granted to patent agents by Congress.").

2. The state secrets evidentiary privilege is a creature of the common law

The state-secrets privilege is designed to protect the Executive Branch's legitimate interest in preserving secrets in litigation that, if revealed, would directly harm national security. At the time *Reynolds* was decided, the Court had already recognized a state secrets justiciability rule with constitutional underpinnings that prevented litigation of government-contracting disputes that risked disclosure of confidential matters. *Totten* v. *United States*, 92 U.S. 105, 107 (1875); *see also Reynolds*, 345 U.S. at 11 n.26 (1953) (citing *Totten*, "where the very subject matter of the action, a contract to perform espionage, was a matter of state secret"). But *Reynolds* addressed the more limited question of an evidentiary privilege arising from the common law: "*Reynolds* was about the admission of evidence. It decided a purely evidentiary dispute by applying evidentiary rules: The privileged information is excluded and the trial goes on without it." *General Dynamics Corp.*, 563 U.S. at 485. In *Reynolds*, the Court found it "unnecessary to pass upon" the "constitutional overtones" raised by the parties, finding its compromise of an evidentiary privilege under the common law "a narrower ground for decision." 345 U.S. at 6.[1]

Sixty-eight years of experience with the *Reyn-*

[1] See also *In re Nat'l Sec. Agency Telecommunications Recs. Litig.*, 564 F. Supp. 2d 1109, 1123 (N.D. Cal. 2008) ("The [*Reynolds*] Court declined to address the constitutional question whether Congress could limit Executive Branch authority to withhold sensitive documents, but merely interpreted and applied federal common law.").

olds privilege, including the Executive Branch's erroneous invocation of it in 1950, should inform the doctrine today. The increasing Executive reliance on the privilege, now buttressed by significant lower-court expansion of its scope analyzed through a prism of deference, combined with an increasing assertion of the privilege against Americans who do not knowingly engage with secret activities, independently or collectively, underscore the need to clarify and limit the state-secrets privilege. Experience with FISA shows that enlisting the Judiciary to review assertions of privilege will lead to a more precise recognition of any national-security privilege.

B. The History of the State-Secrets Privilege: *Reynolds* through the War on Terror

1. The state secrets evidentiary privilege is established in *Reynolds*

Reynolds began when the widows of three civilian contractors brought a wrongful-death lawsuit based on government negligence in maintaining a B-29 that crashed.[2] *Reynolds*, 345 U.S. at 3. The critical piece of evidence to establish that negligence was the Air Force accident report. *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).[3] But the Executive Branch incorrectly

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[2] The B-29 bomber was hardly a secret to anyone by 1949. In November 1947, the commanding general of the Air Force, Gen. Carl Spaatz, publicly acknowledged that the Soviet Air Force held "quantities of a Russian version of the B-29 bombers," explaining that in 1944, "two B-29's fell into [the Soviet Union's] possession." Charles Hurd, *Russian Air Gain Noted by Spaatz*, NY Times (Nov. 18, 1947). When asked: "Do you believe that Russia actually is manufacturing B-29's at this time?" Spaatz replied: "We believe that they are." *Id.*

[3] See also *Claim of Privilege* 153-54, 177-79.

asserted that the report contained state secrets and could not be produced, even to an Article III judge.

As the courts evaluated the Executive's claim in the early 1950s, fears of war with the Soviet Union undoubtedly underlay the then "present-day standards of wisdom and justice." *Funk*, 290 U.S. at 382. Even so, the district court and Third Circuit each rejected the Executive's position based on their respective reason and experience, holding that the accident report should be produced *in camera* and *ex parte* to assess the Executive's claim. *Brauner* v. *United States*, Amended Order re Production and Inspection of Documents (E.D. Pa. Sept. 21, 1950). In a prescient insight, Judge Albert Maris's Third Circuit decision expressed concern that, by preventing disclosure of the purportedly privileged accident report even to the court itself, it would be "but a small step" for the Executive "to assert a privilege against any disclosure of records merely because they might prove embarrassing to government officers." *Reynolds* v. *United States*, 192 F.2d 987, 995 (3d Cir. 1951), rev'd, 345 U.S. 1 (1953).

This Court reversed, accepting the government's demonstrably false assertion that *any* "examination of the evidence, even by the judge alone, in chambers" could "jeopardize the security which the privilege is meant to protect." *Reynolds*, 345 U.S. at 10. The Court thus foreclosed direct judicial examination of the government's assertion of state-secrets privilege, even though that examination would have revealed the reclassification of the report. See App., *infra*. Seeking "a formula of compromise," the Court required that judges be informed of the circumstances that would support a claim of privilege, for "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." *Id.* at 9-10; see also *id.* at 8 (requiring courts to "determine whether

the circumstances are appropriate for the claim of privilege * * * without forcing a disclosure").[4] In so holding, this Court trusted the Executive to be acting, first and foremost, in the public interest for the protection of national security and to be accurate in its presentation to a court reviewing a state secrets privilege assertion.

The fundamental error underlying *Reynolds* has been known for decades. After the accident report was fully declassified in 1996, one of the decedents' daughters came across the document. *Claim of Privilege* 205-06, 210-11. Instead of state secrets, the report contained an embarrassing array of Air Force negligence. App., *infra*; see also Barry Siegel, *Judging State Secrets: Who Decides—and How?*, in *After Snowden: Privacy, Secrecy, and Security in the Information Age* 160 (David Cole, et al. eds., 2015) (*Judging State Secrets*) (explaining that the report identified "[a]mong the causes of the crash: an irregular flight team, missing heat shields that led to an engine fire, noncompliance with technical orders, inadvertent shutdown of a functioning engine, inability to maintain air speed, 'confusion' among the crew, and the failure to brief civilians on emergency procedures"). Other scholars have directly refuted the government's assertion that state secrets were protected by this Court's decision, yet *Reynolds* still stands.[5]

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[4] Although the accident report was excluded, the widows were permitted to proceed on their claims, to the extent possible, by relying on other discoverable evidence.

[5] See, *e.g.*, D. A. Jeremy Telman, *Intolerable Abuses: Rendition for Torture and the State Secrets Privilege*, 63 Ala. L. Rev. 429, 465-66 (2012) ("When the government eventually declassified the report plaintiffs sought in Reynolds, it contained no secret information relating to the electronic equipment aboard the aircraft."); Sudha Setty,

2. With a license to withhold evidence, Executive assertions of the state-secrets privilege increase

Despite questions about its conduct from Congress, the Judiciary, voters, journalists, and historians, the Executive Branch has asserted the state-secrets privilege with increasing fervor. With judicial review limited to the "circumstances" of the privilege claim, invocations are nearly always successful, and invocations of the privilege have exponentially increased with little ability to rein in over designations.

Ironically, it was dicta in *United States* v. *Nixon*, 418 U.S. 683 (1974)—where Executive Branch misconduct was under a Special Prosecutor's microscope—that provided a roadmap to Executive Branch officers seeking to insulate their conduct from scrutiny.[6] In *Nixon*, the Court rejected a claim of executive privilege "[a]bsent a claim of need to protect military, diplomatic, or sensitive national security secrets." *Id.* at 706. President Nixon was required to produce the materials to the Watergate Special Prosecutor because he had failed to "place his claim of privilege on the ground they are military or diplomatic secrets." *Id.* at 710. Despite the ruling having nothing to do with the state-secrets privilege, the Court noted in passing that, in the face of invocations of that privilege, "the courts have

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Litigating Secrets: Comparative Perspectives on the State Secrets Privilege, 75 Brook. L. Rev. 201, 207-08 (2009) ("[T]here were no military secrets in the report, as claimed by the government, but there was evidence that the plane lacked standard safeguards that might have prevented its crash—the very negligence on which the family members in Reynolds based their lawsuit.").

[6] The privilege was invoked five times in the twenty-three years between the *Reynolds* decision and 1976, and was invoked sixty-two times in the subsequent twenty-four years. *Claim of Privilege* 195.

traditionally shown the utmost deference to Presidential responsibilities." *Id.*

"Utmost deference" became the new rallying cry, with the undercurrent that the Judiciary was ill equipped to appreciate national-security issues. Thus, the courts—implored to apply "utmost deference" to often ill-described "circumstances"—had little choice but to accept state secrets privilege invocations, even to encompass admittedly "trivial" information. This resulted in not only a dramatic expansion of what could be a privileged "state secret," but also required dismissal of the suit to preserve information well beyond the asserted secret.

In two cases stemming from surveillance and wiretapping of Vietnam War protesters, the Executive refused to provide confirmation of whether plaintiffs' communications had been intercepted by the National Security Agency (NSA). Plaintiffs disclaimed any interest in seeking information as to whom the NSA had targeted or the methods employed, seeking only to learn whether their personal communications had been intercepted. *Halkin* v. *Helms*, 598 F.2d 1, 8 (D.C. Cir. 1978) (*Halkin I*). Labeling plaintiffs' argument as "naïve," the D.C. Circuit speculated that "[t]housands of bits and pieces of seemingly innocuous information can be analyzed" in order to reveal a state secret, and accordingly, even "trivial" pieces of information "should not be divulged." *Id.* at 8-9; see also *Ellsberg* v. *Mitchell*, 709 F.2d 51, 58 n.31 (D.C. Cir. 1983) (concluding that "the probability that a particular disclosure will have an adverse effect on national security is difficult to assess, particularly for a judge with little expertise

in this area").[7] But see *Halkin I*, 598 F.2d at 15 (Bazelon, J. statement opposing denial of rehearing en banc) ("While judges should acknowledge[] their limitation in areas where they lack expertise, the difficult task of assessing a claim of 'state secrets' privilege calls for a particularly judicial expertise balancing the government's need for secrecy against the rights of individuals." (footnote omitted)).

Halkin I is the logical extension of a "circumstances" test that is coupled with deference: a "mosaic" that can only be properly understood by the Executive Branch. The D.C. Circuit applied this deferential "mosaic" theory again in a subsequent appeal, holding that, even though "the identities of the plaintiffs who were subjected to surveillance" would not be covered by the state-secrets privilege, "armed with this information and the mass of facts to be culled from the public record" (*i.e.*, the "circumstances") and "based upon their personal knowledge of their own contacts," appellants could potentially "deduce" information that would be covered by the privilege. *Halkin* v. *Helms*, 690 F.2d 977, 993 n.57 (D.C. Cir. 1982) (*Halkin II*).[8]

Similarly, in *Black* v. *United States*, Black, an electrical engineer who worked on military projects for defense contractors, alleged that he was harassed and

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[7] *Ellsberg* did, however, approve of the use of *in camera* inspection of an affidavit "in situations in which close examination of the government's assertions [of the state-secrets privilege] is warranted." 709 F.2d at 63.

[8] Worse still, the premise of the "mosaic" theory is inherently speculative because courts are told that to evaluate the secret, they needed to understand an array of information they do not, and cannot, have; naturally, as a court's guesswork increases, so does deference. Under this "mosaic" rubric, the D.C. Circuit thus found itself "ill-equipped to become sufficiently steeped in foreign intelligence matters to serve effectively in the review of secrecy classifications in that area." *Halkin I*, 598 F.2d at 9.

psychologically tormented by government officials after his return from an international trip (including being "drugged in his own home with a substance that produced terrifying hallucinations"). 62 F.3d 1115, 1116-17 (8th Cir. 1995). The Executive invoked the state-secrets privilege not only to withhold information as to whether government officials had contacted Black but to obtain dismissal, supporting the assertion with a public declaration and additional *in camera*, *ex parte* declarations. *Id.* at 1117. After review, the district court agreed that "confirming or denying Black's allegations that he was contacted by agents of the CIA would provide foreign intelligence analysts with information concerning this nation's intelligence priorities and procedures." *Black* v. *United States*, 900 F. Supp. 1129, 1134 (D. Minn. 1994). The Eighth Circuit affirmed based on its "independent *in camera ex parte* review of the government's state secrets claim"; it reasoned that dismissal of the suit was warranted because "[t]he information covered by the privilege [was] at the core of Black's claims and * * * the litigation [could not] be tailored to accommodate the loss of the privileged information." *Black*, 62 F.3d at 1119.

The Ninth Circuit took a similar path in *Kasza* v. *Browner*, which involved claims under the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6972, brought to enforce compliance with RCRA's requirements at a classified facility maintained by the U.S. Air Force. 133 F.3d 1159, 1162 (9th Cir.), cert. denied, 525 U.S. 967 (1998). The Air Force refused to produce almost all information requested in discovery on the basis of the "mosaic" theory of the state-secrets privilege and supported that claim with an unclassified declaration from the Secretary of the Air Force as well as two classified declarations submit-

ted for *in camera* review. *Id.* at 1163, 1165. The district court upheld the applicability of the state-secrets doctrine and entered summary judgment in favor of the Air Force. *Id.* at 1163.

On appeal, plaintiff challenged the "mosaic" theory and asserted that the privilege had been used to cover up environmental crimes. But the Ninth Circuit affirmed, not only accepting the Executive's invocation of the mosaic theory but concluding that the state-secrets privilege barred evidence pertaining to classified *and unclassified* information regarding the Air Force facility because "if seemingly innocuous information is part of a classified mosaic, the state secrets privilege may be invoked to bar its disclosure and the court cannot order the government to disentangle this information from other classified information." *Id.* at 1166. The Ninth Circuit went on to affirm the dismissal of the suit without reaching all of the plaintiff's challenges to the Executive's invocation of privilege because it was satisfied that, regardless of the merits, "any further proceeding in th[e] matter would jeopardize national security." *Id.* at 1170.[9]

An en banc panel of the Fourth Circuit took this utmost deference approach further still, requiring dismissal *even where* plaintiffs did not seek any purportedly secret evidence, thus expanding the scope of a privilege far beyond its Rule 501 roots and rejecting potential protections by a district court. Initially, a three-judge panel of the Fourth Circuit found that,

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[9] See also *Heine* v. *Raus*, 399 F.2d 785, 789-90 (4th Cir. 1968) (reasoning that it was powerless to "penetrate the cloak of secrecy which surrounds the CIA"); *id.* ("While the claim of secrecy prevents our obtaining a clear view of the entire scene, the Director's sworn, but undocumented, claims are enough to support the claim of governmental privilege. That ought to be enough when the statements are those of an official in so responsible an office.").

even though the state-secrets privilege had been properly invoked, "if plaintiff has sufficient admissible evidence to enable a factfinder to decide in its favor without resort to the privileged material, then the potential helpfulness to plaintiff's case of other secret, inadmissible information is not grounds for dismissal." *Farnsworth Cannon, Inc.* v. *Grimes*, 635 F.2d 268, 271 (4th Cir. 1980). When the defendant contended that essential elements of its defense would reveal state secrets, the Fourth Circuit initially held fast to a remedy other than dismissal, focusing on the ability of the district court to "explor[e] techniques to reduce those tensions" including, if needed, securing counsel who could be afforded security clearance and examining "the possibility of a waiver by the parties of a jury trial, with an in camera disposition by the court." *Id.* at 275-76. But an en banc panel reversed after reviewing only an *ex parte* affidavit from the Secretary of the Navy, concluding that the plaintiff could not proceed even "without resort to any of the excluded information." *Id.* at 281. In fact, disclosure of the "circumstances" of the purportedly privileged material was itself supposedly risky, even with district court safeguards. According to the en banc court, any protection of the secret would erode as "the plaintiff * * * would have every incentive to probe as close to the core secrets *as the trial judge would permit*" and, as a result, "any attempt * * * to establish a prima facie case would so threaten disclosure of state secrets"—even after excluding secret information—that "the preservation of [those] state secrets precludes any further attempt to pursue this litigation." *Id.* (emphasis added). In essence, the en banc Fourth Circuit vastly expanded the reach of state-secrets protection well beyond the secret itself, so that no inquiry at all to non-secret aspects could even be entertained.

Because courts so readily defer, it is nearly impossible to assess whether invocations of the privilege are typically justified. Deference assumes a fidelity to the record that was strikingly absent in *Reynolds*. Experience teaches that executive overreach is routine: when Judge Trenga conducted a survey of thirty one federal district and circuit court judges tasked with assessing claims of state secrets, he found that judges frequently determined that the Executive over classified its materials. Anthony John Trenga, *What Judges Say and Do in Deciding National Security Cases: The Example of the State Secrets Privilege*, 9 Harv. Nat'l Sec. J. 1, 51 (2018) (describing judges' observations of "'egregious' over classification of information," "a lack of 'discipline' in classifying documents that caused secrecy claims to expand to anything sensitive," and "agenc[ies'] 'inability to think in terms of limits' when asserting privileges and the 'bureaucratic inclination' towards 'overstatement and overprotection'").

Consider yet another noteworthy instance of over classification: In 1971, Solicitor General Erwin Griswold adamantly protested the impending publication of the Pentagon Papers, characterizing the "matter [as] involving the possibility of grave and immediate danger to the security of the United States." *United States* v. *Washington Post Co.*, 446 F.2d 1327, 1331 (D.C. Cir. 1971), aff'd *sub nom. New York Times Co.* v. *United States*, 403 U.S. 713 (1971). Two decades later, Griswold admitted that: "I have never seen any trace of a threat to the national security from the publication [of the Pentagon Papers]" and went on to explain that "any person who has considerable experience with classified material" will find "that there is massive over classification and that the principal concern of the classifiers is not with national security but rather with governmental embarrassment of one sort or another." Erwin

Griswold, *Secrets Not Worth Keeping*, Wash. Post (Feb. 15, 1989).

3. After 9/11, concerns about national security shift increasingly inwards to impact unknowing American citizens

In the majority of the Court's pre-9/11 state secrets privilege cases, the plaintiffs had notice of their engagement with government actors in activities that would necessarily involve state secrets because they did so voluntarily and knowingly. And courts have observed the importance of this notice when sustaining the privilege. For example, in 1956, the District of Maryland upheld the Executive's refusal to answer interrogatories on the basis of the state-secrets privilege, finding that when the insurance companies "issued their insurance policies" for military ships, "they knew, or should have known, that where military secrets and similar matters are at stake, certain information is privileged." *Republic of China* v. *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 142 F. Supp. 551, 556-57 (D. Md. 1956) (applying *Reynolds* to permit the case to go forward with the exclusion of the sensitive evidence); see also *Black*, 62 F.3d at 1116 (involving "an electrical engineer who possessed government security clearances and worked on military-related projects for various defense contractors"); *Northrop Corp.* v. *McDonnell Douglas Corp.*, 751 F.2d 395, 397 (D.C. Cir. 1984) (involving defense contractors building a secret military plane).

The national-security response to the September 11 attacks exposed millions of Americans to secret surveillance, potentially subjecting them to clandestine programs without any prior notice. In 2005, the New York Times publicized the existence of a massive Na-

tional Security Agency wiretapping program, triggering widespread public outrage and multiple lawsuits. See James Risen & Eric Lichtblau, *Bush Lets US Spy on Callers Without Courts*, NY Times (Dec. 16, 2005).

In response to the public outrage, the Executive Branch publicly acknowledged the existence of the program. *Judging State Secrets* 175. Behind the courthouse doors, however, the Executive's strategy was the opposite. In addition to the Executive invoking the state-secrets privilege in practically every case, it consistently demanded not only exclusion of evidence, but dismissal of the suits, more often arguing that the "very subject matter" of the suits was a state secret. In one instance, the government went so far as to argue that adjudicating the suit would create a national-security threat by confirming the existence of the program, even if an *ex parte* review found that the program was unlawful. Gov't Reply Br. at 20, *Hepting* v. *AT&T Corp.*, 439 F. Supp. 2d 974 (N.D. Cal. 2006) (No. 06-0672).

At this point, it had become clear that the Executive Branch's position had fully shifted from the "circumstances" standard—and the even broader "mosaic" standard—to a standard so broad that it bore little resemblance to the original evidentiary bar. Now, the Executive's position had collapsed the evidentiary privilege and the *Totten* bar's "very-subject-matter" test, essentially demanding dismissal whenever the suit—according to the Executive's say-so—touched on "state secrets."

The government had become so bold in its stance that it seized onto this position even when the subject matter had already become public. This prompted some pushback from the Judiciary. For instance, in the NSA cases, courts rejected the Executive's assertion that the very subject matter of the NSA wiretapping

was a state secret, noting that by the time these lawsuits had reached the courthouse, the existence of the wiretapping program had been widely publicized and even acknowledged by the President. Peter Baker, *President Acknowledges Approving Secretive Eavesdropping*, Wash. Post (Dec. 18, 2005). As the Ninth Circuit put it: "[T]he government is hard-pressed to sustain its claim that the very subject matter of the litigation is a state secret. Unlike a truly secret or 'black box' program * * * the government has moved affirmatively to engage in public discourse about the [program]." *Al-Haramain Islamic Found., Inc.* v. *Bush*, 507 F.3d 1190, 1193 (9th Cir. 2007); see also *ACLU* v. *Nat'l Sec. Agency*, 493 F.3d 644, 651 n.2 (6th Cir. 2007) ("Because the government has already acknowledged the existence of the warrantless wiretapping in this case, there is no risk of such disclosure and the rule of non-justiciability does not apply.").

Similarly, in *Mohamed* v. *Jeppesen Dataplan, Inc.*, five individuals who allegedly had been detained and tortured by the CIA sought damages from a private company that had provided transportation and other logistical support to the CIA. 614 F.3d 1070, 1073, 1091 (9th Cir. 2010) (en banc), cert. denied, 563 U.S. 1002 (2011). At the district court, the government successfully pressed its very-subject-matter argument through the submission of both public and classified declarations, even though the Executive had publicly acknowledged the existence of the program. *Id.* at 1076-77, 1090. On appeal, Judge Hawkins summarized the Executive's position at oral argument by posing the following question: "So any time the executive branch of the government says the fact is classified, it means it cannot be examined?" In response, the government predictably advised the court not to "play[] with fire" by allowing the suit to proceed. *Judging State Secrets*

195 (quoting Maura Dolan & Carol J. Williams, *Court Urged to Deny Rendition Trial*, LA Times (Feb. 10, 2009)). The *Jeppesen Dataplan, Inc.* panel initially reversed, reasoning that "the 'very subject matter' bar has no logical limit," and that the Executive Branch's position requires the Judiciary to virtually "cordon off all secret government actions from judicial scrutiny, immunizing the CIA and its partners from the demands and limits of the law." *Mohamed* v. *Jeppesen Dataplan, Inc.*, 579 F.3d 943, 955 (9th Cir. 2009), rev'd en banc, 614 F.3d 1070, 1087 (9th Cir. 2010), cert. denied, 563 U.S. 1002 (2011). A narrowly divided en banc panel affirmed the district court's dismissal, and while it did not fully endorse the government's invocation of the very-subject-matter argument, it nevertheless concluded that dismissal was warranted because there was "no feasible way to litigate Jeppesen's alleged liability without creating unjustified risk of divulging state secrets." *Jeppesen Dataplan, Inc.*, 614 F.3d at 1087.

Despite the notable instances of pushback by courts, the Executive Branch has continued to press its very-subject-matter argument—and at times, successfully so. In *El-Masri* v. *United States*, El-Masri sued the former CIA Director and others, claiming that the CIA had kidnapped, tortured, and held him against his will in Afghanistan for five months before they realized that they were mistaken about his identity. 479 F.3d 296, 299 (4th Cir.), cert. denied, 552 U.S. 947 (2007). The United States intervened to invoke the state-secrets privilege and to seek dismissal, submitting a public and a classified declaration to explain why further proceedings would risk the disclosure of protected information. *Id.* at 299-301. The Fourth Circuit, in affirming the district court's dismissal, went out of its way to endorse the government's very-subject-matter argument. Conflating the *Reynolds* evidentiary bar

with the *Totten* nonjusticibility doctrine, the Fourth Circuit cited to both to conclude that "some matters are so pervaded by state secrets as to be incapable of judicial resolution." *Id.* at 306.

Since *Reynolds*, the Executive's aggressive invocation of the state-secrets privilege has allowed it to effectively force dismissal at the simple utterance of the phrase "state secret." What was once an evidentiary privilege that required a demonstration of relevant "circumstances" to protect actual secrets has morphed into a near-absolute privilege that covers trivial and public information, and is protected by a wall of utmost deference. And modern domestic surveillance activities have resulted in unprecedented numbers of Americans interacting with secret government programs, usually without any knowledge that they are doing so. Unlike the contractors in *Reynolds* and *General Dynamics*, or the spy in *Totten*, who had knowingly engaged in secret government-activities, modern plaintiffs such as Fazaga face the possibility that a court will not vindicate their rights based on an interaction with secret government-activities about which they had no notice at all. In fact, here, the Los Angeles FBI Director expressly misled the community he was surveilling, explaining in a public address at a local mosque that the FBI would not send informants to monitor mosques. Resp. Br. 9. The informant began surveilling Plaintiffs' mosque less than a month later, having already begun training at the time of the address. *Id.*

C. This Court Should Protect the Proper Role of Courts When the State-Secrets Privilege Is Invoked

1. Experience shows that the state-secrets privilege needs repair

Despite the conflict between Reynolds' view of the privileged material and the historical record, the state secrets evidentiary privilege has expanded into a more broadly used and stronger tool for the Executive Branch than the *Reynolds* Court could have envisioned. *Reynolds* required courts to assess invocations of the privilege based on "all the evidence and circumstances," 345 U.S. at 9, but the Executive's current interpretation of the evidentiary privilege, which stands somewhere between the "mosaic" theory and the "very-subject-matter" bar, is devoid of any meaningful consideration of specific circumstances. "Judicial control over the evidence in a case" has in fact been "abdicated to the caprice of executive officers," *Reynolds*, 345 U.S. at 9-10, when even "trivial" pieces of information are protected from judicial review. *Halkin I*, 598 F.2d at 9 (stating that courts "are ill-equipped" "to serve effectively in the review of secrecy classifications"). This watered-down, deference-driven version of judicial review fails to protect the public interest from executive excess.[10] And the Executive Branch is incentivized to over classify sensitive material when determining what ought to be made public in litigation against it.

Of course, the key benefit of common-law privileges is their flexibility; as courts develop experience

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[10] "[W]e know from long experience that the executive branch often reacts too harshly in circumstances of felt necessity and underestimates the damage to civil liberties." Fred Korematsu Amicus Br. 3, *Rasul* v. *Bush*, 542 U.S. 466 (2004) (No. 03-334), 2004 WL 103832, at *3.

with how privileges are invoked and applied, courts fine-tune their contours. This Court's "oft-repeated observation that 'the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions'" is applicable here. *Jaffee*, 518 U.S. at 8 (quoting *Funk*, 290 U.S. at 383). That observation is codified in Federal Rule of Evidence 501, providing that the Court should apply the common law in light of the Court's reason and experience. *Amicus curie* supports a strong evidentiary privilege with presumptive *in camera*, *ex parte* review that properly protects America's national security. Our Article III courts are up to the task.

The history of the state-secrets privilege highlights the importance of the potential for a judicial check on an executive assertion of privilege. Where courts have been willing to serve as that check, they have the tools to craft responses that provide meaningful protections for state secrets. But a doctrine of dismissal whenever the privilege is invoked is both unnecessary and damaging to the separation-of-powers framework.

2. The procedures provided by Congress in FISA for judicial review substantially alleviate the potential for abuse while preserving the critical role of the state-secrets privilege

Where the state-secrets privilege is successfully invoked, that privilege "compels the subordination of [litigants'] interest in the pursuit of their claims to the executive's duty to preserve our national security." *Halkin II*, 690 F.2d at 1001. "[T]his means that remedies for constitutional violations that cannot be proven under existing legal standards, if there are to be such remedies, must be provided by Congress." *Id.*

Congress has sought to limit judicial deference to the Executive via the state-secrets privilege on at least two occasions. First, in 1973, Congress rejected the proposed Rule 509 in the draft Federal Rules of Evidence. Proposed Rule 509 would have codified the state-secrets privilege and barred courts even from *in camera* review of information credibly claimed to be "relating to the national defense or the international relations of the United States." *Rules of Evidence for United States Courts and Magistrates*, 56 F.R.D. 183, 251 (1973). Congress rejected this proposal of broad deference to the Executive, instead enacting a version of Rule 501 that holds courts to their common-law duty to shape privileges according to prudence and experience. Edward J. Imwinkelried, *An Hegelian Approach to Privileges under Federal Rule of Evidence 501: The Restrictive Thesis, the Expansive Antithesis, and the Contextual Synthesis*, 73 Neb. L. Rev. 511, 512-14 (1994). Five years later, Congress affirmed the Judiciary's role in providing a check on executive assertion of the state-secrets privilege by enacting FISA. In enacting FISA, Congress explicitly endorsed the competence of any federal court to review, assess, and rule on issues relating to state secrets.[11]

This is a sensible approach, for judges evaluate and decide delicate questions of privilege as a matter of course in all species of litigation. American courts have

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[11] The Executive Branch at times, seems to imply that an Article III court is not competent to determine what is a state secret. In passing FISA, Congress evidently disagreed. 50 U.S.C. 1806(f) (stating that in the context of a FISA claim, where "the Attorney General files an affidavit under oath that disclosure * * * would harm the national security of the United States," any United States district court presented with the claim "shall" "review in camera and ex parte" the "materials relating to the surveillance" in order to determine whether the surveillance "was lawfully authorized and conducted").

been evaluating state-secrets claims for more than two-hundred years. See Donohue Amicus Br. 8. And courts have done so without damaging national-security interests in any way. See Former Federal Judges Amicus Br. 22, *United States* v. *Zubaydah* (Aug. 20, 2021) (No. 20-827) (Federal Judges Amicus Br.) (citing Cass R. Sunstein, *National Security, Liberty, and the D.C. Circuit*, 73 Geo. Wash. L. Rev. 693, 702 (2005)); see also *Fazaga*, 965 F.3d at 1048 ("Critically, the FISA approach does not publicly expose the state secrets.").

The Executive Branch's Petition and Brief here treat *in camera* review of a secret document to assess a claim of privilege as tantamount to public disclosure. Gov't Pet. 15; Gov't Br. 38. This assumption is not well-founded. Although leaks from the Executive Branch are—to its chagrin—plentiful, *amicus curiae* is not aware of a single instance where politically sensitive leaks have originated with the judicial branch. Cf. Merrit Kennedy, *Ex-CIA Employee Accused of Leaking Documents to WikiLeaks Goes on Trial*, NPR (Feb. 3, 2020) (identifying a former CIA software engineer as the source of the "Vault 7" leak, one of the largest leaks in CIA history); Glen Greenwald, *Edward Snowden: The Whistleblower Behind the NSA Surveillance Revelations*, Guardian (June 11, 2013) (identifying Edward Snowden, a former NSA contractor, as the person responsible for the leaks that exposed the NSA's wiretapping program).

A group of former federal judges, as *amici curiae* in *United States* v. *Zubaydah*, have highlighted the special competency of the Judiciary to evaluate claims of privilege in a manner that protects national security and the rights of individuals. Federal Judges Amicus Br. Congress has repeatedly endorsed this core competency, entrusting the Judiciary to evaluate sensitive information held by the government and the

degree to which that information should be disclosed to or used by the public, if at all.

As particularly relevant to this case, Congress entrusted the Judiciary to evaluate claims of secrecy in the national security surveillance context through FISA. FISA requires courts to evaluate secret information *in camera* and *ex parte* to determine whether the collection was lawful and whether the information should be disclosed to an aggrieved party, "under appropriate security procedures and protective orders." 50 U.S.C. 1806(f). Notably, Congress entrusted this responsibility to *any* federal court that might need to make determinations of secrecy. *Id.* Elsewhere in the Act, Congress carefully erected a system of judicial oversight over all domestic electronic surveillance activities on U.S. citizens and permanent residents by the Executive Branch, and provided a system of appellate review. 50 U.S.C. 1802 & 1803. Congress in fact proscribed *any* domestic surveillance of U.S. citizens and permanent residents without some form of judicial oversight. 50 U.S.C. 1802.

Congress has also assigned to the Judiciary responsibility over a wide variety of other sensitive government-information. For example, the Classified Information Procedures Act provides for *in camera* review of classified information at issue in criminal cases. 18a U.S.C. 4 & 6. Likewise, the Freedom of Information Act permits those requesting information from a government agency who are denied access to that information to take their request to a federal court that "may examine" the at-issue information *in camera*. 5 U.S.C. 552(a)(4)(B).

These enactments demonstrate the trust and confidence Congress places in the Judiciary as well as Congress' recognition of the importance of checks and

balances on the Executive Branch in the national-security context. Without judicial oversight, invocation of the state-secrets privilege becomes a de facto immunity for the Executive Branch—without an opportunity to evaluate the claim of privilege, the Judiciary is essentially directed to dismiss the claim solely based on another branch's say-so. Such an end-run around the checks and balances of our Constitutional system is unacceptable. See The Federalist No. 51, 349 (J. Cooke ed. 1961) ("But the greatest security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means * * * to resist encroachments of the others.").

The promise of *Reynolds*' protection for national-security secrets has, sadly, not been realized. We must learn from our history so as not to repeat our errors. That original mistake has created the specter of protecting Executive misconduct antithetical to a democracy, all by way of "utmost" deference and dismissals, when the approach driven by logic and experience should be a judicial philosophy of respect, but verification. The common law requires that this Court consider these historical lessons when further shaping the contours of the state secrets evidentiary privilege.

CONCLUSION

This case provides this Court with a valuable opportunity to reshape thes state-secrets privilege to reflect the experience and logic of the Judiciary and to find the right balance in an inquiry that examines both national-security assertions and individual rights.

Respectfully submitted.

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Counsel for Amicus Curiae

September 28, 2021

APPENDIX

APPENDIX

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[p.1]*

REPORT OF SPECIAL INVESTIGATION OF AIRCRAFT ACCIDENT INVOLVING TB-29-100XX NO. 45-21866

1. DATE AND TIME OF ACCIDENT: 6 October 1948, approximately 1408 EST
2. LOCATION OF ACCIDENT: Approximately 2 miles south of Waycross, Georgia
3. AIRCRAFT TYPE, MODEL, SERIES AND SERIAL NUMBER: TB-29-100XX No. 45-21866
4. AIRCRAFT HOME STATION AND ORGANIZATION:
   3150th Electronics Squadron
   Robins Air Force Base
   Robins Field, Ca, AMC
5. RESULTS TO AIRCRAFT: Demolished
6. HISTORY OF AIRCRAFT AND ENGINES:
   Aircraft: Date of Manufacture – 19 September **19XX**
   Total Hours - 305:00
   Date of last overhaul – New

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BY [illegible] DATE 3 JAN. 49

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ENGINES	1	2	3	4
Model	R-3350-57	R-3350-57	R-3350-57A	R-3350-57A
Number	M-460686	D-310027	D-310035	D-310313
Total hours	112:35	224:45	116:40	255:20
Hours since last major overhaul	112:35	New	New	15:20
Overhauling depot	OCAMA	Not appl.	Not appl.	OCAMA
Propeller model	Curtis K1.	Curtis K1.	Curtis K1.	Curtis K1.
Hours since last major overhaul	113:35	New	New	15:20

The aircraft was accepted with a total of 70 hours at Wright AFB on 25 June 1947. Records of the aircraft's history prior to this time were not available for study by the accident investigators.

7. PILOT, HOME STATION AND ORGANIZATION:
Ralph W. Irwin, AO-666261
Captain, USAF
1st Experimental Air Service Squadron
1st Experimental Guided Missile Group
Proving Ground Command
Eglin AFB, Eglin Field, Florida

8. PILOT HISTORY:

Flying Time	1st Pilot or Solo Student	Other Pilot or Other Student
Total hours	2507:00	616:00
Hours this type	2149:00	505:00
Hours this model	931:00	359:00

[p.2]*

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Flying Time	1st Pilot or Solo Student	Other Pilot or Other Student
Hours last 90 days	51:00	45:00
Hours last 30 days	13:00	8:00
Hours last 24 hours	1:00	0:00
Actual combat hours	327:00	109:00

Instrument rating: White, 30 March 1948, Eglin AFB, Florida

9. COPILOT, HOME STATION AND ORGANIZATION:
Herbert W. Moore, Jr.,
AO-48322
Captain, USAF
3150th Electronics Squadron
Robins Air Force Base
Robins Field, Ga., AMC

10. COPILOT HISTORY:

Flying Time	1st Pilot or Sole Student	Other Pilot Other Student
Total hours	2210:00	743:00
Hours this type	1524:00	261:00
Hours this model	0:00	71:00
Hours last 90 days	0:00	20:00
Hours last 30 days	0:00	8:00
Hours last 24 hours	0:00	1:00

Actual combat hours: 340:00

11. OTHER CREW MEMBERS, HOME STATION, ORGANIZATION AND HISTORY: See par. 12.

12. RESULTS TO CREW AND PASSENGERS:

Pilot – Capt. Ralph R. Irwin, AO-666261, Fatal

Copilot – Capt. Herbert W. Moore, Jr., AO-48322, No injury

Engineer – T/Sgt. Earl W. Murrhee, AF-1417471, 3150th Electronics Squadron, Robins Air Force Base, Robins Field, Ga., No injury

12. RESULTS TO CREW AND PASSENGERS: (Contd)

Radio operator – T/Sgt. Melvin T. Walker, AF-6921342, 3150th Electronics Squadron, Robins Air Force Base, Robins Field, Ga., Fatal

Left scanner – T/Sgt. Walter J. Peny, AF-6900255, 3150th Electronics Squadron, Robins Air Force Base, Robins Field, Ga. Minor injury

Right scanner – M/Sgt. Jack G. York, AF-6968181, 3150th Electronics Sq., Robins Air Force Base, Robins Field, Ga., Fatal

[p.3]*

AP – T/Sgt. Dervin T. Irvin, AF-6953492, 3150th Electronics Squadron, Robins Air Force Base, Robins Field, Ga., Fatal
Navigator - 1st Lt., Lawrence W. Pence, Jr., AO-762068, 1st Exp. Air Service Sq. 1st Exp. Guided Missile Group, PGC, Eglin Air Force Base, Eglin Field, Florida, Fatal
Passenger – A. Palya, Civilian, RCA, Camden, N.J. – Fatal
Passenger – R. E. Cox, Civilian, Wright-Patterson Air Force Base – Fatal
Passenger – Robert Reynolds, Civilian, RCA, Camden, N.J. – Fatal
Passenger – E. A. Nechler, Civilian, Franklin Institute of Technology, Philadelphia, Pa. – Minor injury
Passenger – W. H. Brauner, Civilian, Franklin Institute of Technology, Philadelphia, Pa. – Fatal

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13. NARRATION OF EVENTS:

On 6 October 1948 B-29 No. 45-21566, piloted by Capt. Ralph W. Irwin, AO-666261, took off from Robins AFB, on a research and development mission. The flight was to be a 5-hour mission for the purpose of completing an electronics project assigned to the organization. The landing list included the crew of 8 and 5 civilian technical representatives affiliated with the project. Three of the civilians were employed by the Radio Corporation of America and two by the Franklin Institute of Technology. The normal preflight and before takeoff checks were made by the crew and the takeoff and climb to 18,500 feet was without incident. Upon reaching approximately 18,500 feet the manifold pressure on No. 1 engine dropped to about 20 inches. An attempt 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. The crew was advised by the pilot to put on their parachutes and a descent and depressurization were started. During the process of feathering No. 1 a fire broke out that engulfed the aft half of the engine and the flames extended past the left scanner's window. Attempts to extinguish the fire by use of the engine fire extinguishers were to no avail. The manifold pressure on engine No. 2 then dropped to approximately 20 inches and about this time the main landing gear switch was activated and then the bomb bay doors were opened. Coincidental with the opening of the bomb bay doors the aircraft went into a spin to the left. The aircraft entered the spin violently and the centrifugal forces developed made movements by the personnel difficult. Two occupants in the

13. NARRATION OF EVENTS: (Contd)

forward compartment and two in the waist were able [p.4]* to abandon the aircraft and successfully opened their parachutes. The remaining six in the waist and three in the forward compartment were later found in or near the wreckage which was located approximately 2 miles south of Waycross, Georgia.

14. FACTS:

a. The flight was an authorized research and development mission and all civilian passengers were authorized to participate in aerial flights under the provision of paragraph 1A(6) AR 95-90 dated 26 April 1947.

b. Three of the five civilians on the landing list had previously flown in B-29's assigned to this squadron. (Exhibits I-1, I-2, I-3)

(1) A. Palya

(2) Richard B. Cox

(3) Robert B. Reynolds

c. Two of the civilians that were included on the landing list had never previously flown with the organization and there was no record of previous B-29 flying time. (Exhibit I-4, I-5)

(1) Will Brauner

(2) Eugene A. Meckler

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14. FACTS: (Contd)

d. The crew members had not previously flown together as a crew prior to the date of the accident. (Exhibit B-1, 06, B-2 Q37).

e. Weather was not a factor in this accident in that all sequences for the area were above VFR minimum. (Exhibit G).

f. The B-29 had approximately 15 hours flying time since the last 100 hours inspection. The aircraft was last flown six days prior to the date of the accident. No write ups reported by the pilot on Form I-A were considered applicable to the subject accident. (Exhibit H).

g. 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. (Exhibit G-13).

h. Form F, Weight and Balance Clearance, was filed with Operations Section and the aircraft was loaded within the permissible 00 limits. (Exhibit F).

[p.5]*

i. Take-off and climb to altitude was accomplished without incident and all engine instrument readings were normal until an altitude of between 15,000 and 20,000 feet was attained when the manifold pressure on No.1 engine dropped to 20 inches. (Exhibit B-2 Q47).

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14. FACTS: (Contd)

j. The engineer attempted to restore the manifold pressure by utilizing the manual amplifier system. This proved unsuccessful and a new amplifier was installed. Then this failed to rectify the situation, the engine was feathered on the direction of the pilot. (Exhibit B-2 Q47).

k. Before the No. 1 engine was in a full feathered position, the left scanner and engineer observed a discoloration of the access doors to the engine accessory section. Fire broke out immediately according to the engineer's and scanner's statements. (Exhibit B-3 Q94).

l. The fire extinguishers were utilized in an attempt to extinguish the fire; however, according to the engineer's statement it helped only momentarily. Fire was next observed to engulf the entire engine and the wing area immediately to the rear of No. 1 engine. (Exhibits B-2 Q45, B-3 Q94).

m. The pilot, when feathering No. 1 engine, inadvertently hit the feather switch on No. 4 engine; however, according to the testimony the copilot immediately pressed the switch to unfeather No. 4 engine. (Exhibit B-1 Q10).

n. The copilot lowered the gear by the normal method after the engineer's attempt to lower the nose gear failed. (Exhibit B-1 Q11).

o. Bomb bay doors were opened by the pilot and according to the engineer and copilot the aircraft went into a spin to the left immediately after the doors were opened. (Exhibits B-1 Q11, B-2 Q48).

p. Several 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 that time. (Exhibits C, 4, 5, 6, 7, 8, 9, 10 and 11).

14. FACTS: (Contd)

q. Examination of the wreckage revealed that No. 2, 3 and 4 engines showed no evidence of fire. The No. 1 engine showed evidence of fire around the right collector ring and supercharger and considerable melted and burned metal was found throughout the area from the accessory section to the supercharger. The No. 1 propeller was in the full feathered position. The No. 4 propeller blades were also found in the full feathered position. (Exhibit J).

[p.6]*

r. The crew was alerted to prepare to abandon the aircraft and the pilot started to descend and depressurize the aircraft. (Exhibit B.3 Q94).

s. Movement of personnel in the aircraft was greatly restricted by the centrifugal force imparted by the spin and only the left scanner, Sgt. Peny and a civilian technician, Mr. Meckler, were able to successfully abandon the aircraft from the rear compartment through the bomb bay. The copilot, Capt. Moore, and flight engineer, Sgt. Murrhee, were the only persons that successfully parachuted from the forward compartment through the nose wheel escape hatch.

t. The bodies of T/Sgt. Melvin, T. Walker and Lt. Lawrence N. Pence, Jr. were found free of the aircraft, with parachutes partially opened. Mr. Palya's body was also found free of the aircraft with parachute not released.

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14. FACTS: (Contd)

Apparently all three persons left the aircraft too late to successfully utilize their parachutes. (Exhibit G-12).

u. Inspection of the wreckage that was scattered over an area of two miles failed to disclose any evidence of fire either before or after the crash, except in the case mentioned in paragraph q above. (Exhibit J.)

v. Nine occupants were fatally injured in the crash. Two persons received minor injuries and two escaped without injury. (Exhibit G-12).

w. Investigation disclosed that the 3150th Electronics Squadron has not established permanent flying crews in the performance of their experimental flights. The organization had six pilots present for duty at the time of the accident. (Exhibit B-4 Q107).

x. The passengers and crew including the civilian passengers were not briefed prior to take-off on emergency procedures in accordance with AF Regulation 60-5. (Exhibits B-3 Q55 and 90, C-2).

y. 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 as specified in AF Regulation 60-5. (Exhibit B-4 Q117, 119, 120 and 121).

15. DISCUSSION:

a. The pilot in feathering the No. 1 engine, inadvertently hit the feathering switch on the No. 4 engine. According to testimony, the copilot immediately pressed the switch to unfeather No. 4, however, since the propeller on the No. 4 engine was found in the feathered position,

15. DISCUSSION: (Contd)

it is believed that his attempt to unfeather this engine was unsuccessful.

[p.7]*

b. No. 1 engine showed evidence of fire around the right collector ring and supercharger, and considerable melted and burned metal was found throughout the area from the accessory section to the supercharger. The propeller was in the full feathered position.

c. The burned and damaged state of No.1 engine and examination of the other evidence available did not allow positive establishment of the causes for the fire and drop in manifold pressure. 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.

d. The breaks found in the collector ring also lead to two possibilities which singularly or in combination could have caused the drop in the No. 1 engine manifold pressure.

(1) The fire from the collector ring could have burned a hole in the induction system thus permitting a loss in manifold pressure.

[* The following stamps and marginalia are found on page 7 of the original document:]

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15. DISCUSSION: (Contd)

(2) The loss of exhaust gases through the breaks in the collector ring could have been sufficient to reduce the effectiveness of the turbo superchargers to a point where they could only maintain 20 inches of manifold pressure.

e. A possibility for the loss in manifold pressure on No. 2 engine is that the flight engineer inadvertently shut off the fuel for this engine during the process of feathering No. 1. The flight engineer is very positive, however, in his belief that this mistake was not made.

f. Two possible causes for the aircraft's entering into a spin are:

(1) The pilot inadvertently caused the aircraft to stall. This possibility is discredited, however, by the pilot's experience and by the fact that the copilot observed the aircraft to be in a descending attitude, just prior to its entry into the spin.

(2) The large fire in the No. 1 engine may have reduced the lift of the left wing sufficiently to cause the aircraft to fall off into a spin.

g. The disintegration of the aircraft which occurred during the spin was probably contributed to by the fire existing in the No. 1 engine.

h. The opinions of the maintenance personnel were contradictory; however, the Form 41B bears out the opinions of those who believed that the aircraft required more than the normal amount of maintenance. This aircraft was in commission 48.7% of the time since 1 April 1948, as compared to the Air Force average or 57% of B-29 aircraft in commission for a similar 6-month period.

15. DISCUSSION: (Contd)

[p.8]*

i. Vibrations reported in the aircraft's Form 41B in several instances could have been contributed to the maintenance required on the fuel system and other portions of the aircraft. These vibrations may or may not have been caused by loose rivets in the horizontal stabilizer undetected because of non-compliance with Technical Order 01-20EJ-99 which requires inspection of these rivets.

j. Confusion may have existed among the crew during this accident; however, the period of time from the start of the fire until the aircraft entered a spin was very short.

k. The projects which the 3150th Electronics Squadron were conducting require aircraft capable of dropping bombs and operating at altitudes of 20,000 feet and above.

16. CONCLUSIONS:

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.

[* The following stamps and marginalia are found on page 8 of the original document:]

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17. RECOMMENDATIONS:

a. That a copy of the memorandum report of this investigation be forwarded to the Commanding General, Air Material Command for information and any action deemed appropriate.

b. That all Air Force agencies wherein civilian personnel participate in aerial flight in military aircraft be required to indoctrinate these civilians in the proper emergency procedures and in the use of emergency equipment appropriate to the types of aircraft in which they will be flying. This indoctrination should be in addition to and not in lieu of the prior to flight briefings required by AF Regulation 60-5.

c. That all agencies place special emphasis on the employment of highly qualified maintenance and flight personnel and the establishment of minimum permanent flight crews consisting of pilot, copilot and flight engineer for projects of this nature.

d. That where ever feasible flight test aircraft be bailed to the commercial concern conducting the test.

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e. That consistent with normal security measures, the civilian agency concerned be given the privilege of satisfying themselves as to the airworthiness of aircraft in which they are flying when bailment is not feasible.

[* The following stamps and marginalia are found on page 9 of the original document:]

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17. RECOMMENDATIONS: (Contd)

f. That copies of official AF accident reports not be sent to civilian agencies.

18. STATEMENT OF REBUTTAL: Not applicable.

JOHN W. PERSONS
Colonel, USAF
Chief, Flying Safety Division