Op-Ed Should the judiciary defer to the executive on national security issues?

In a historic case known as U.S. vs. Reynolds, the Supreme Court ruled in 1953 that the executive branch could keep certain matters of national security secret from the judicial branch. (J. Scott Applewhite / Associated Press)

By **Barry Siegel**

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Last Tuesday, in an hour-long oral argument conducted over the telephone, three judges from the U.S. 9th Circuit Court of Appeals listened to a Justice Department lawyer urge them to reinstate President Trump's ban on travel from seven largely Muslim nations. The lawyer, August E. Flentje, offered several reasons why they should do this, but one in particular seemed to disturb the judges. The judiciary, Flentje claimed, must defer to the executive branch when it comes to national security.

"This is a traditional national security judgment that is assigned to the political branches," Flentje declared.

"Are you arguing then," asked Judge Michelle T. Friedland, "that the president's decision in that regard is unreviewable?"

Yes, said Flentje.

This sounded eerily familiar — an echo from another legal controversy long ago. On Aug. 9, 1950, in a D.C. federal courthouse, a lawyer for the widows of three civilian engineers who died in the crash of an Air Force B-29 requested the accident report, expecting it would shed light on the cause of the disaster. An assistant U.S. attorney balked, insisting the report "cannot be furnished without seriously hampering national security" because "the aircraft in question" was "engaged in a highly secret mission" and carried "confidential equipment." In response, a skeptical U.S. District Judge William Kirkpatrick said, "I only want to know where your argument leads." The government's attorney made plain where it led: "We contend that the findings [of the executive branch] are binding … upon the Judiciary. You cannot review it or interpret it. That is what it comes down to."

> **"It is beyond question … that the federal judiciary retains the authority to adjudicate constitutional challenges to executive action.**
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> — From the 9th Circuit panel's ruling issued on Thursday

Kirkpatrick was having none of that argument. In June 1950, he ordered the government to hand over the accident report and all related documents. He wanted it known that the type of executive immunity from judicial review asserted by the government "had been fully considered and held not sustainable."

In an appeal filed to the U.S. 3rd Circuit Court of Appeals in April 1951, the government did more than challenge Kirkpatrick's ruling: It challenged Kirkpatrick's very right to make a ruling. Most fundamentally, the government now questioned whether any judge could force the executive branch to hand over documents it considered privileged: "We believe that the determination of what documents should not be disclosed … is … necessarily within the discretion and distinctive knowledge of the executive branch."

At a hearing Oct. 19, 1951, that assertion received much attention from a three-judge appellate panel led by Judge Albert Maris. What bothered Maris most was the government's assertion of unilateral executive power, free from judicial review, to decide what qualified as a national security secret. In a unanimous opinion filed two months later, upholding Kirkpatrick, Maris wrote: "The government of the United States is one of checks and balances. One of the principal checks is furnished by the independent judiciary which the Constitution established. Neither the executive nor the legislative branch of the government may constitutionally encroach upon the field which the Constitution has reserved for the judiciary."

More echoes: On Thursday, the 9th Circuit panel, in refusing to reinstate Trump's ban, unanimously rejected the administration's claim that courts cannot review a president's national security determinations. "It is beyond question," the judges said, "that the federal judiciary retains the authority to adjudicate constitutional challenges to executive action." Courts "owed substantial deference" to the executive branch on matters of national security, but "there is no precedent to support this claimed unreviewability," which "runs contrary to the fundamental structure of our constitutional democracy."

For the moment, Trump is weighing his options. (On Friday, administration officials gave contradictory information.) Eventually, however, this matter will get to the U.S. Supreme Court. That's what happened in the B-29 case, titled U.S. vs. Reynolds.

The chief justice back then was a Kentucky politician named Fred Vinson, a poker and drinking buddy of President Truman who in his seven years on the court displayed a pronounced inclination to support the government against any challenge to its power. Nowhere was this tendency more apparent than in cases involving matters of national security.

In U.S. vs. Reynolds, his perspective prevailed. After hearing oral argument, the justices, by a vote of 6 to 3, decided to reverse Maris and formally recognize, for the first time, the government's state secrets privilege. On March 9, 1953, Vinson, from the bench, announced and read from the decision he'd written.

The courts, Vinson said, can't abdicate control over the evidence "to the caprice of executive officers," but if the government can satisfy trial judges that "a reasonable danger" to national security exists, they shouldn't insist upon examining the documents.

Vinson, in other words, was asking jurists to fly blind. Which is precisely what he did in U.S. vs. Reynolds: "Certainly," he concluded, "there was a reasonable danger that the accident investigation would contain references to the secret electronic equipment which was the primary concern of the mission." But Vinson couldn't truly know for "certain," because the Supreme Court justices never read the disputed Air Force accident report. If they had, they would have seen that the report — declassified 50 years later — contained no references to a "highly secret mission" involving "confidential equipment." Rather, it documented an airplane crash caused by cockpit errors and shabby maintenance.

At bottom, Vinson's opinion represented an act of faith. We must believe the government, Vinson held, when it claims this B-29 accident report would reveal state secrets. We must trust that the government is telling us the truth.

As the litigation over Trump's travel ban bounces around the judicial system, everyone involved should keep in mind the chief lesson from U.S. vs. Reynolds*:* Don't trust the government.

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