



## Freedom Versus Secrecy in Government

Or so the Americans who tortured Binyam Mohamed ([who has now been released](#)) claim. Nor did they ever prove their suspicions in court.

Perhaps that's because those suspicions, inherited from the Pakistani police, are shaky at best. Authorities "detained" Mr. Mohamed when he tried to fly out of Karachi's airport on someone else's passport in 2002. Given Pakistan's insouciance towards things like evidence and standards of guilt, Mr. Mohamed may well be innocent of everything alleged against him. But that didn't save him from torture "[by and on behalf of the United States](#)," when his captors handed him over to American custody. U.S. "[officials](#)" [wearing masks](#) hustled him aboard a plane to Morocco. There they tortured him. The Feds quaintly presume that the Constitution's leash stretches only to our borders and that they may mangle men with impunity overseas.



Mr. Mohamed eventually wound up in Guantanamo Bay. He rots there to this day, still without trial. He also became one of the five brutalized victims on whose behalf the American Civil Liberties Union (ACLU) sued Jeppesen DataPlan Inc., a subsidiary of Boeing and owner of the planes that flew Mr. Mohamed from one horror to the next. He and the ACLU have their gall, sniffs the *Wall Street Journal*: companies like Jeppesen DataPlan simply "[thought they were doing their patriotic duty by lending a hand](#)."

The ACLU initiated its lawsuit in 2007. Although it didn't name the Bush Administration as a party, the government tried to quash the litigation anyway because of state secrets: the Feds insist that allowing five broken men a chance at justice somehow endangers the United States.

Earlier this month, the ACLU tried again. And the Department of Justice (DOJ), now under new management, took the same tired tack: it urged the court to protect state secrets by dismissing the lawsuit.

Yep, this is the DOJ of Barack Obama, the guy who endlessly hawked "Change!" [Folks who believed a politician](#), and a campaigning one at that, are crying foul. [Folks who rejected](#) such silly rhetoric are crowing "I told you so!" But the problem goes deeper than which brand of mountebank currently infests the White House. The concept of state secrets itself is at fault.

This nonsense dates to the late 1940's, when [a B-29 Superfortress crashed](#) after taking off from Robins Air Force Base in Georgia and killed three of the civilian engineers aboard. Investigators blamed the Air Force and its gross negligence. The Feds refused to divulge this embarrassing report even as the



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bereaved families sought an explanation for their tragedy. The families sued. Alas, coughing up details about the crash could reveal military mysteries – or so the government’s executive branch claimed. Its judicial branch agreed. The court sided with the Truman Administration against the three widows and their children in *United States v. Reynolds*, creating the “state secrets privilege.”

Since that dark day, the Feds have skulked behind this excuse [perhaps 50 times](#). The Bush Administration accounts for about half that number. And no wonder: though state secrets once withheld only specific evidence or testimony (however crucial), it now kills the entire case.

Indeed, courts roll over and play dead so subserviently that the privilege “[has been described](#) as the ‘nuclear bomb of legal tactics’ and the “government’s nuclear option when it comes to litigation.”” When the Electronic Frontier Foundation tried to sue AT&T and the National Security Agency for eavesdropping on American citizens without warrants, [state secrets thwarted it](#). Ditto for [the ACLU’s cases](#) against the same outrage. Ironic, isn’t it, given the State’s lust to overhear every last one of our secrets.

Nor are Mr. Mohamed *et al.* the only victims denied their day in court to preserve the nation. So was Khalid El-Masri, a German citizen the CIA imprisoned and tortured in Afghanistan after mistaking him for a suspected terrorist. A federal judge dismissed his suit against the CIA when the Feds averred it posed a “[‘grave risk’ ... to national security by exposing government secrets.](#)” More likely, it posed a grave risk to the CIA by exposing its incompetence and brutality.

Then there was [Maher Arar, a Canadian the Feds “rendered” to Syria](#). Interrogators there not only tortured Mr. Arar based on American allegations of his membership in Al Qaeda, they also “investigat[ed]” him, according to Imad Moustapha, a Syrian diplomat: “We traced links. We traced relations. We tried to find anything. We couldn’t.” They finally declared him “completely innocent.” When Mr. Arar sued his American kidnappers, then-Attorney General John Ashcroft and former Homeland Security Secretary Tom Ridge “[assert\[ed\] the state secrets privilege.](#)”

“State secrets” is a get-out-of-jail-free card that exempts government from scrutiny. That’s already potent. But combine it with [sovereign immunity](#), and you have total, unlimited power. Sovereign immunity shields the government from liability for wrongdoing; state secrets lets it protect its accomplices as well. The latter transforms Jeppesen DataPlan from the Feds’ partner in crime — and one its victims can sue — into something untouchable and unaccountable. Who will resist the Feds’ pressure to torture, eavesdrop, or otherwise shred the Constitution when state secrets works such magic?

Obviously, the Constitution never mentions such balderdash. Nor does it endow its limited government with such limitless power. But we can go further: state secrets also violates the spirit of the Second Amendment. The Second’s guarantee of our right to keep and bear weapons means to arm us as much – and more – than any agent of the government. How else can we live free? If the army and cops and SWAT teams and even the [preposterous Postal Police](#) outgun us, how do we repel tyranny? The Founding Fathers understood what happens when rulers boast more fire-power than citizens: hence, the Amendment’s absolute prohibition against “infringing” our right to self-defense.

Likewise, government should enjoy mighty few privileges – and none that we don’t. Every defendant the State drags into court would love to argue that an overriding reason compels dismissing the charges against him. Yet trials proceed daily. Allowing the government the dodge of state secrets means that torturers, eavesdroppers, the criminally negligent, and other psychopaths will continue savaging us.



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But secrecy is necessary sometimes, isn't it? The Supreme Court decided *Reynolds* in 1953 as the Cold War was heating up — "[a time of vigorous preparation for national defense,](#)" as Chief Justice Fred Vinson put it. Didn't America's struggle against communism warrant secrecy?

Remember that the Feds waged that war largely against us, as they have the ones on terror and drugs. Then as now, the nation's existence was supposedly at stake; then as now, government ruined lives with slander, innuendo, blacklists, watchlists. Should the State wield that much power? Should secrecy protect its evil?

Some might argue that an actual war justifies clandestine behavior. They could point to [Christmas 1776](#), when the Continental Army marched through a stormy night for Trenton, New Jersey. General George Washington planned a complicated, coordinated attack on the 1500 Hessians bivouacked there at one of the American Revolution's most desperate moments. Defeat was unthinkable, both militarily (Washington was gambling most of his troops) and psychologically: Patriots had watched their army flee the superior Redcoats long enough. Victory depended on secrecy, to the point that Continental pickets arrested anyone entering or leaving Trenton. Washington's tactics succeeded brilliantly. The Americans captured almost 1000 Hessians, their guns and ammunition.

But George Washingtons are few and far between; secrecy in the hands of lesser mortals becomes a killer. The next year, a British general also planned a surprise attack, this time on American regiments as they slept near Paoli, Pennsylvania. Secrecy was again essential, so General Charles Grey ordered his men to remove the flints from their muskets and use their bayonets instead; his aide, Captain John Andre, explained that "firing discovered us to the enemy...and produced a confusion favorable to the escape of the Rebels..."

The ploy gave "No Flint" Grey his nickname and an easy though immoral victory: almost 240 Americans killed, wounded or captured against 9 British casualties. It also cautions us against covert operations, even by the military, even during war. Far from protecting national security, secrecy abets murder, skullduggery, lies, torture and other crimes.

The more secrets government keeps, the more liberty we lose.

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