The state secrets privilege, when properly invoked, permits the government to block the release of any information in a lawsuit that, if disclosed, would cause harm to national security. However, the Bush administration is increasingly using the privilege to dismiss entire lawsuits at the onset. The government has invoked the privilege to evade accountability for torture, to silence national security whistleblowers, and even to dismiss a lawsuit alleging racial discrimination. This once-rare tool is being used not to protect the nation from harm, but to cover up the government’s illegal actions and prevent further embarrassment.

In the ACLU’s landmark case challenging the Bush administration’s warrantless wiretapping program, a federal court rejected the government’s claim that the lawsuit could not proceed because of state secrets. In her August 17, 2006 ruling in ACLU v. NSA, Judge Anna Diggs Taylor recognized that the government had publicly acknowledged that President Bush authorized the National Security Agency to wiretap Americans without warrants, and thus it could not claim that discussing the program in court would harm national security.

Although the state secrets privilege has existed in some form since the early 19th century, its modern use, and the rules governing its invocation, derive from the landmark Supreme Court case United States v. Reynolds, 345 U.S. 1 (1953). In Reynolds, the widows of three civilians who died in the crash of a military plane in Georgia filed a wrongful death action against the government. In response to their request for the accident report, the government insisted that the report could not be disclosed because it contained information about secret military equipment that was being tested aboard the aircraft during the fatal flight. When the accident report was finally declassified in 2004, it contained no details whatsoever about secret equipment. The government’s true motivation in asserting the state secrets privilege was to cover up its own negligence.

While the Supreme Court upheld the use of the privilege in Reynolds, it did not dismiss the lawsuit. Instead the Court recognized the potential for abuse of the privilege, and placed restrictions on its use to ensure the power would not be “lightly invoked.”
Last year, in the ACLU's case El-Masri v. Tenet, which challenges the illegal kidnapping of Khaled El-Masri, a German national, the U.S. District Court for the Eastern District of Virginia accepted the CIA’s invocation of the state secrets privilege to dismiss El-Masri’s entire lawsuit. The CIA claimed that the simple fact of holding proceedings would jeopardize state secrets, notwithstanding the vast amount of information that has already been made public about El-Masri and the United States’ “extraordinary rendition” program. While it might be appropriate to protect classified evidence during the course of the case, the ACLU called the dismissal at such an early stage “unjust, unnecessary, and improper.” An appeal is pending.

Unless the courts reject the government’s overbroad claims of privilege, the government will have every incentive to continue invoking “state secrets” as a shield against embarrassing disclosures.

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