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State Secrets in The Sunlight

March 26th, 2008

In February and March this year, two bills on an obscure federal-court rule of evidence were introduced in the House and the Senate. This arcane corner of federal procedural law—the “state secrets” privilege—has far-reaching consequences. It is a cornerstone on which the “legacy” of the Bush Administration is now being built.

The “state secrets” privilege is used by the government to ask courts to exclude evidence that might disclose sensitive information about national security matters, and it impinges on the heart of the Constitution’s system of separated powers: the relationship between the executive branch and the courts. From the early Stuart era, the Founders of the Constitution drew inspiration from English judges who had stood up to arbitrary or tyrannical uses of executive power.

This core idea of the judiciary as a check on executive authority, however, has waned in the glare of late twentieth-century security panics. In signal cases during the 1970s on wiretapping and executive privilege, the Court has left open inchoate “national security” exceptions to constitutional protections. Entering the post-9/11 era, therefore, the solidity of constitutional protections against executive predations on national security grounds remained uncertain.

After 9/11, there has been a public perception of judicial assertiveness thanks to a string of Supreme Court cases in 2004 and 2006 repudiating executive power claims.

But the Supreme Court only takes a fraction of the cases that arise in the lower courts. And the story of national security cases in the lower federal courts is in sharp contrast to results in the marquee cases in the High Court. Generally, lower courts have been more hostile to challenges to executive power than the Supreme Court—especially when it comes to “state secrets.”

In a string of important cases concerning immigration detention, extraordinary rendition and warrantless wiretapping, the lower federal courts have rejected challenges to different national security policies that trench deeply on executive powers.

In each of these cases, the courts have declined to allow plaintiffs even entrance to the courtroom, on the ground that a “state secret” (or some synonym), was at stake. And in each of these cases, the courts have in essence taken the government’s word that no litigation is feasible and closed the court-house door wholesale, rather than allowing

litigation to proceed while carefully sifting specific pieces of evidence to guard against improper disclosures.

Particularly perverse is the denial of a forum to journalists and scholars who are likely victims of NSA surveillance. After the Sixth Circuit's judgment, these plaintiffs are in a double-bind. They cannot show they have been harmed by the NSA because they have no evidence that they have been spied on. But because any such evidence is a "state secret," they are denied any judicial opportunity to gather it.

Hence, judicial acceptance of the government's claim that "state secrets" are at issue, and that these secrets mean a plaintiff cannot be allowed even into the courthouse have a substantial impact on oversight and accountability.

The "state secrets" privilege does not merely entail that those harmed by reckless or foolish security policy are deprived of a day in court. When a plaintiff cannot air evidence in his own custody of government wrongdoing in court, the public also loses a constitutionally mandated avenue for testing their government's claims to be acting lawfully and in line with the nation's best interests. One of the Constitution's two devices for systemic executive accountability—the other being congressional oversight—expires.

Perversely, this pushes people inside and outside government to rely instead on informal mechanisms of oversight—that is, whistle-blowing and leaking to the press. By repudiating structured means for challenging wrongdoing, that is, the executive subtly communicates to those inside government who come across malfeasance that the only option for redress is exposure by hook or crook.

Ironically, therefore, the refusal to allow judicial review pushes us toward an unregulated and ad hoc system of oversight through leaks and whistleblowers, where the chance that truly harmful disclosures might be made is perhaps higher. (This is merely one of many instances in which self-serving government policies on security can have a perverse consequence).

Further, the "state secrets" privilege shores up the Bush Administration's legacy on national security. Most obviously, in the short run, it guards against embarrassing disclosures that might mar its final year (although it is hard to see how this is in the national interest).

In the medium term, it disables the public from making any real assessment of whether the reputational harms from our national security policy—which some think almost irreparable—are worth the candle.

And in the long term, the "state secrets" privilege makes it more likely that whatever errors the Administration has fallen into in responding to the post-9/11 terrorist threat will not be corrected—but entrenched beyond this election.

The new legislation regulating "state secrets" is no panacea. But it does significantly discourage the kind of threshold dismissals that occurred in recent cases. Certainly, it does not guarantee that judges will be sufficiently skeptical of executive branch claims. At minimum, though, it reminds and directs judges toward the fulfillment of the role that the Constitution assigns to them—a co-equal component of the federal government to guard against the foibles and errors of its more powerful sibling branches.

Aziz Huq, the author, will join Eric Lichtblau, Charlie Savage, Bruce Fein and Hina Shamsi in a discussion on "How To Restore Constitutional Order?" at the National Press Club (Zenger Room) on March 27 at 1pm.

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By **The Brennan Center for Justice at NYU School of Law**

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