
February 2, 2008

EDITORIAL

Secrets and Rights

President Bush's excesses in the name of fighting terrorism are legion. To avoid accountability, his administration has repeatedly sought early dismissal of lawsuits that might finally expose government misconduct, brandishing flimsy claims that going forward would put national security secrets at risk.

The courts have been far too willing to go along. In cases involving serious allegations of kidnapping, torture and unlawful domestic eavesdropping, judges have blocked plaintiffs from pursuing their claims without taking a hard look at the government's basis for invoking the so-called state secrets privilege: its insistence that revealing certain documents or other evidence would endanger the nation's security.

As a result, victims of serious abuse have been denied justice, fundamental rights have been violated and the constitutional system of checks and balances has been grievously undermined.

Congress — which has allowed itself to be bullied on national security issues for far too long — may now be ready to push back. The House and Senate are developing legislation that would give victims fair access to the courts and make it harder for the government to hide illegal or embarrassing conduct behind such unsupported claims.

Last week, Senator Edward Kennedy, the Massachusetts Democrat, and Arlen Specter, Republican of Pennsylvania, jointly introduced the State Secrets Protection Act. The measure would require judges to examine the actual documents or other evidence for which the state secrets privilege is invoked, rather than relying on government affidavits asserting that the evidence is too sensitive to be publicly disclosed. Senator Patrick Leahy, chairman of the Senate Judiciary Committee and an important supporter of the reform, has scheduled a hearing on the bill for Feb. 13. Representative Jerrold Nadler, Democrat of New York, expects to introduce a similar measure in the House.

Of course, legitimate secrets need to be protected, and the legislation contains safeguards to ensure that.

To allow cases to go forward, the bill gives judges the authority to order the government to provide unclassified or redacted substitutes. It also gives those making claims against the government a chance to make a preliminary case using evidence that they have gathered on their own.

In October, the Supreme Court passed up an opportunity to rein in the administration's abuse of state secrets claims and establish new procedures for dealing with potentially sensitive evidence.

The justices declined to take up the case of Khaled el-Masri, an innocent German citizen of Lebanese descent who was kidnapped, detained and tortured in a secret overseas prison as part of the administration's extraordinary rendition program. Lower federal courts had dismissed Mr. Masri's civil lawsuit, reflexively bowing to the administration's claim that proceeding would compromise national security.

Since the Supreme Court has abdicated its responsibility, Congress must now act. Too many laws have been violated, and

too many Americans and others have been harmed under a phony claim of national security.

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