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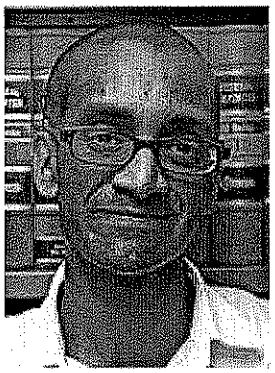
The State Secrets Privilege and Executive Misconduct

JURIST Special Guest Columnist Shayana Kadidal, one of the lead attorneys on the **Center for Constitutional Rights**' challenge to the NSA domestic surveillance program, says that the government's invocation of the state secrets privilege in a motion to dismiss the case filed late last week contradicts the core idea of judicial review and essentially allows the executive branch to dictate to the federal courts what cases they can and can't hear...



A few minutes before midnight last Friday, the government filed a motion to dismiss the Center for Constitutional Rights' **lawsuit against the National Security Agency's warrantless wiretapping program** on the grounds that allowing the litigation to go forward would jeopardize "state secrets." (Their heavily redacted but still very long brief is available **here**.)

It its most basic terms, invocation of the state secrets privilege involves the government submitting an affidavit from a department head saying that any court proceedings would risk disclosure of secrets that would threaten grave damage to national security, and asking the court to dismiss the suit based solely on those grounds. Previous invocations of the privilege by the government have most commonly been at the discovery stage, asking the courts to deny private litigants access to documents or witnesses, but more recently the government has moved to dismiss a spate of cases — most notably torture-rendition cases on behalf of **Maher Arar** and Khaled El-Masri — **at the pleading stage**. In these cases the government has argued that to even answer the complaint by confirming or denying its allegations would risk the disclosure of secrets that could cause "exceptionally grave damage to the national security." (This is a particularly perplexing assertion in our case, where administration officials went on an extensive public speaking campaign in defense of the legality of the NSA program; indeed, we filed a motion for summary judgment two months ago based on these public admissions.)

Typically, when faced with sensitive evidence, a court might close the

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courtroom, place briefs under seal, and make the other side's attorneys promise not to divulge the information, or even make them seek security clearance in rare cases. In the government's view, the state secrets privilege says that isn't good enough for some secrets. For the most sensitive secrets, even the judge cannot be trusted to hear the secret matter. Whether the risk of disclosure is in fact real if litigation is allowed to continue, and whether grave damage to national security will result in the event of disclosure, are purely executive determinations which the court is compelled to accept uncritically. The judge may not call the executive official who executes the affidavit setting forth these determinations into court for further scrutiny of his claims, even in camera. And all this is the case "even where allegations of unlawful or unconstitutional [executive] actions are at issue." Or so the government's argument goes.

If it seems to you that this view of the privilege contradicts the core idea of judicial review — independent judges making independent evaluations of the facts and how the law applies to them — and essentially allows the executive branch to dictate to the federal courts what cases they can and can't hear, you are correct. From whence did such an absolutist doctrine enter American law? Conservatives — particularly those offended by the Supreme Court's invocation of international legal opinion in its recent *Atkins*, *Lawrence*, and *Roper* decisions — will be alarmed by the fact that it came from a foreign legal system with a decidedly different attitude towards separation of powers.

In the Cold War-era case that established the state secrets privilege — *United States v. Reynolds*, 345 U.S. 1 (1953) — the Supreme Court noted that cases discussing this sort of broad privilege "ha[d] been limited in this country" but that the "English experience has been more extensive." Essentially our Supreme Court imported the state secrets privilege from British law.

The Court did so without giving thought to serious differences between our system of government and theirs. The British government is organized around the idea of Parliamentary supremacy. Although British judges review statutes for consistency with the (unwritten) constitution, all they can do is issue a "statement of incompatibility" — unlike our courts which routinely declare laws void as unconstitutional. If Parliament decides not to take a ruling from the highest courts seriously, it has the last word, not the courts. The Prime Minister is an agent of Parliament— unlike our President, he is not elected directly by the people, and he serves at the pleasure of Parliament. The highest court — the Law Lords — is technically a committee of the upper house of Parliament (the House of Lords). The very idea of separation of powers is to this extent foreign to the English system, and so we shouldn't be surprised that they developed a "state secrets" privilege that lets the executive trump judicial review.

So much for the claims of logic. What has experience taught us about the privilege in practice? Sadly, five decades of living with it has shown that the privilege is frequently invoked to cover up executive mistakes.

In the *Reynolds* case itself, a B-29 bomber crammed with intelligence equipment crashed, killing several civilians on board. Their widows sued. The government withheld the official accident report from the widows, saying it "cannot be furnished without seriously hampering national security, flying safety and the development of highly technical and secret military equipment." In 2000, 52 years after the crash, the report was finally declassified.

Did the withheld "state secret" documents show anything about a "secret mission," "newly developing electronic devices," or anything else the military should have kept secret? No, they did not. Instead, all they showed was that the crash and resulting deaths were caused by ordinary negligence. (The civilians didn't receive training in how to bail out in emergencies, and the plane itself was a chronic maintenance problem, "not ... safe for flight" (read about it yourself at pp.20 and 22-24 of **this pdf**)).

Similar cover-ups have been at work in several recent cases where the government has managed to successfully assert the state secrets privilege. One of them involved Sibel Edmonds, a Turkish translator hired by the FBI who was appalled at what she saw inside the agency's translation section and complained to her superiors. Like many whistleblowers before her, she was fired. She brought suit, and the government successfully argued that the state secrets privilege was an absolute bar to her suit going forward. (Adding insult to injury, she was barred from the courtroom during the argument of her appeal.) The Supreme Court declined to review the case.

What was it she was trying to tell her supervisors that got her fired? Among other things: that a translator sent to Guantánamo to translate Farsi detainee interviews didn't speak that language, and that foreign diplomats suspected of spying in the U.S. were having their wiretaps translated *by their own relatives* who worked for the FBI. Rather than let those serious national security breaches see the light of day (and perhaps become subjects of an embarrassing outside investigation), the FBI fired her, and then successfully managed to deprive her of her vindication in court, courtesy of the state secrets privilege.

The Edmonds case reveals the rot at the heart of the government's "war on terror" — that the legal shortcuts the administration has used, by removing oversight, ended up weakening law enforcement's efforts against terrorism by diminishing accountability. The same applies to the massive detention sweeps that have alienated immigrant communities — law enforcement's most valuable ally, its eyes and ears on the street— from the federal authorities, and to the warrantless and most likely suspicionless surveillance carried out by the NSA — which the *New York Times* and *Washington Post* exposed as being vast sinkholes of effort for the agents forced to follow the NSA's dead leads.

Defenders of the State Secrets privilege justify it with a "greater good" argument: A trivial case — say, a slip-and-fall accident at Los Alamos —

should not be allowed to risk disclosure of the entire Manhattan project, even where that risk is small (for example, the risk of an accidental disclosure from a good-faith failure to obey a court's protective orders). The injustice in the individual case is outweighed by the greater good (and only the executive has the expertise to balance the injustice against the risk).

Even the superficial appeal of this argument is tempered by the notion that judges cannot be trusted to strike the balance of interests—as they do in so many other contexts. But the apologia ignores another "greater good" argument: that the (still-)greater good is served by maintaining the separation of powers by denying the executive a trump card that would allow it to cover up its abuses, its incompetence, and its willful disregard for the will of Congress — as in *Reynolds*, *Edmonds*, and now our case, where the government states in its motion to dismiss:

> [To argue that plaintiffs'] "private interests must give way to the national interest in state secrets"... is not to say that there is no forum to weigh the weighty matters at issue, which remain[] a matter of considerable public interest and debate, but that the resolution of these issues must be left to the political branches of government.

Yet, short of impeachment, it is impossible to envision what a Congressional check would look like in the absence of judicial enforcement. By allowing the President to smother judicial review in the crib, the ultimate power of the Constitution (through the voice of judges) and the Congress to tell the executive "no" is lost.

The Nazi political theorist Carl Schmitt declared that true sovereignty resided with whoever could decide when the state of exception to ordinary political life existed. Other constitutional systems (often, ironically, those formed in the shadow of totalitarianism) have chosen to place this power to declare emergencies and trump the ordinary rule of law in one branch of government or even one official. Our system stands in stark contrast. Here, judges have always been the ultimate deciders (perhaps "referees" captures their more restrained role more accurately) in the delicate three-way balance of powers between branches. Appropriately, they will have the final word on whether the state secrets privilege excuses what we assert is a vast array of unlawful behavior orchestrated by the President of the United States.

Shayana Kadidal is a staff attorney at the Center for Constitutional Rights and one of the lead attorneys on the Center's challenge to the NSA Surveillance Program, Center for Constitutional Rights v. Bush.

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