



# the state secrets privilege

government  
abuse of  
power

Post-9/11, the Bush administration has expanded the use of the state secrets privilege (SSP) to withhold evidence and dismiss cases that challenge the administration in U.S. courts. In doing so, the Bush administration is threatening judicial oversight and legal challenges of the Executive Branch's unraveling of civil rights and disregard for human rights in the name of the "war on terror."

## what is state secrets privilege?

The state secrets privilege is a common law privilege that allows the head of an executive department to refuse to produce evidence in a court case on the grounds that the evidence is secret information that would harm national security or foreign relation interests if disclosed.

## when & how was the state secrets privilege established?

The state secrets privilege originates in England where the law allows the king or queen the "Crown Privilege," which grants the monarch the absolute right to refuse to share information with Parliament or the courts. The U.S. Supreme Court then borrowed the SSP almost entirely from the U.K. during a Cold War case, *Reynolds v. United States*, 345 U.S. 1 (1953). The Court did so without discussing the differences between our system of checks and balances and England's system where Parliament is all powerful.

## what happens when ssp is used?

When the SSP is invoked, the government submits an affidavit saying that any court proceedings would risk disclosure of secrets that would threaten national security and then asks the court to dismiss the suit. Previous uses of the SSP by the government have most commonly been at the discovery stage, asking the courts to deny people access to documents or witnesses. More recently - and more troublingly - the government has invoked the SSP in the very beginning of cases to dismiss them altogether.

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."

## how does state secrets privilege undermine democracy?

The state secrets privilege undermines the very idea of an independent judiciary; contradicts the core idea of judicial review, which is independent judges making independent evaluations of all of the facts; and essentially allows the executive branch to dictate to the federal courts what cases they can and can't hear.

While proponents of the SSP state that it is invoked to protect national security, it does not do so. The U.S. judicial system already has very effective systems in place to review sensitive information, such as closing the courtroom, placing briefs under seal, and requiring security clearance of all involved parties. Instead, the SSP allows government officials to evade accountability for illegal acts and to conceal such acts from the public, which is not in the interest of national security.

## how is bush abusing ssp?

The Bush administration is using the state secrets privilege far more than any administration and is using it to cover up its own illegal behavior. So far, it has invoked the privilege to dismiss cases that fight illegal government spying on American citizens, challenge the government's use of torture and rendition, and other cases that seek to hold the Bush administration accountable for abusing executive power and violating the human rights of both citizens and non-citizens.

Instead of merely employing the privilege to deny attorneys access to evidence (as it was used in the past), the Bush administration is using the state secrets privilege to get courts to dismiss cases at their very beginning stages. In doing so, the Bush administration is trying to disarm the courts from being able to check the power of the executive branch.

**The state secrets privilege can be overturned at any point by Congress or the Supreme Court. Make the SSP a priority for your elected officials and community today.**