THE STATE SECRET PROTECTION ACT

This will get dragged into court right away, even assuming Congressmen Conyers, Nadler, Delahunt, Petri and Congresswoman Lofgren can get it passed. Still, with Obama's inexcusable support for Bush's state secrets invocation the other day, there's no time like the present to really push this bill, which would establish a CIPA-like process to allow the admission of evidence over which the executive has invoked State Secrets. (via email)

> Congressmembers Jerrold Nadler (NY-08), Chair of the Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties, Thomas Petri (WI-6), House Judiciary Chairman John Conyers, Jr. (MI-14), Bill Delahunt (MA-10) and Zoe Lofgren (CA-16) today reintroduced legislation that would ensure meaningful judicial determination of the state secrets privilege. The bi-partisan State Secret Protection Act of 2009 would curb abuse of the privilege while providing protection for valid state secrets.
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> "**The Administration's decision this week to adopt its predecessor's argument that the state secret privilege requires the outright dismissal of a case challenging rendition to torture was a step in the wrong direction and a reminder that legislation is required to ensure meaningful review of the state secret privilege**," said Rep. Nadler. "This important bill recognizes that protecting sensitive information is an important responsibility for any administration and requires that courts protect legitimate state secrets while preventing the premature and sweeping dismissal of entire cases. **The right to have one's day in court is fundamental to protecting basic civil liberties and**

> **it must not be sacrificed to overbroad claims of secrecy**."
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> Rep. Petri commented, "Imagine the government locks you up but says you can't see the evidence for reasons of national security. I'm sure there are cases where national security is truly at risk, and that information must be protected. But we shouldn't have to simply take the executive branch's word for it. Shouldn't an independent, responsible party apart from the executive branch review the material to determine when and how national security really necessitates restricting the use of sensitive material? The answer is, quite obviously, yes. We have a procedure for criminal cases, and we need one for civil cases as well."
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> "National security and the search for justice are not mutually exclusive," said Rep. Zoe Lofgren. "By allowing a neutral arbiter to evaluate assertions of the state secret privilege with appropriate safeguards to protect national security information, the State Secret Protection Act strikes the appropriate balance between protecting our national security and protecting the rights of citizens."
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> The state secrets privilege allows the government to withhold evidence in litigation if its disclosure would harm national security. The purpose of the privilege is to protect legitimate state secrets; **but if not properly policed, it can be abused to conceal embarrassing or unlawful conduct** whose disclosure poses no genuine threat to national security.
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> For example, in 1953, the widows of three civilian engineers filed a civil case against the government for negligence in a military airplane crash that killed their husbands. The

government, citing national security concerns, refused to provide an accident report of the crash. The Supreme Court, in U.S. v. Reynolds, upheld that refusal, without ever reviewing the documents. When the report was discovered through an internet search fifty years later, it did not reveal any secret military information but, instead, showed the government's negligence in the crash.

"Since the Reynolds decision, the courts have allowed the government to conceal or hide illegal activity by claiming a national security privilege with no oversight," said Rep. Delahunt. "This legislation ends the abuse of this privilege which was exemplified in this case, while protecting our national security."

And, in the past few years, the Bush administration's use of the privilege to dismiss cases challenging the most troubling aspects of its war on terror – including rendition, torture and warrantless wiretapping – have highlighted the need to ensure that judges do not simply accept a government's secrecy claim at face value. This past week, the Obama administration adopted the prior administration's argument, in Mohamed v. Jeppesen Dataplan, Inc., that a case challenging rendition to torture should be dismissed outright without even allowing the parties to conduct non-privileged discovery. This underlines the continued need for clear guidance on proper court handling of state secret claims.

The bipartisan State Secret Protection Act is modeled on existing protections and procedures for handling secret evidence. Specifically, the bill would

> **require a court to make an independent assessment of the privilege claim**, and would allow evidence to be withheld only if "public disclosure of the evidence that the government seeks to protect would be reasonably likely to cause significant harm to the national defense or diplomatic relations of the United States."
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> Under the bill, when this standard is met, a judge must protect the evidence from harmful disclosure, and shall consider whether a non-privileged substitute can be created that would prevent an unnecessary dismissal of the claims. The sponsors noted that through reasonable and uniform procedures and standards, their bill would strengthen national security and the rule of law, and would help restore checks and balances. [my emphasis]