
Proposed Legislation Seeks to Restrict State Secrets Privilege

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Congress is contemplating a proposal seeking both to codify and modify the state secrets privilege. The government's assertion of the privilege in several cases related to the war on terrorism has focused legislative attention on the privilege. Senators Edward Kennedy (D-MA) and Arlen Specter (R-PA) have introduced the State Secrets Protection Act in an effort to limit the scope of the privilege.

The privilege allows the United States government to prevent the disclosure of classified information in a judicial proceeding if disclosure would pose a risk to national security. When a court upholds the government's assertion of the privilege, it will dismiss a case entirely if the claims or defenses cannot be fully litigated without the privileged evidence or if the very subject matter of the case is a state secret. Although only the government can assert the privilege, it can intervene in private civil litigation in order to do so; for example, the government might seek to prevent classified information from being revealed in a *qui tam* or other private lawsuit against a government contractor.

The pending bill seeks to alter how courts would address the government's claims of privilege:

A court would be required to review both the actual evidence for which the government claims the privilege as well as a supporting affidavit explaining the factual basis for the privilege claim. Currently, a court can rely on an affidavit alone--or even on an unexplained assertion of the privilege, if an explanation would itself create an unacceptable risk that sensitive information could be disclosed.

Where evidence is found to be privileged, a court could order the government to produce a non-privileged substitute, such as a summary, redacted version, or admission of certain facts. The court could not dismiss a claim due to the state secrets privilege unless it has found that such a substitute cannot be created. If the government refuses to produce such a substitute in a suit where it is the defendant, the court would resolve the disputed issue against the government.

A court could appoint a guardian ad litem with the necessary security clearance to represent a party in hearings.

A claim could only be dismissed due to the privilege if national security would not be harmed by dismissal and continuing with the litigation in the absence of the privileged material would

substantially impair a party's ability to pursue a "valid" defense.

While an analogous bill has not yet been introduced in the House of Representatives, this issue was the subject of a recent House subcommittee hearing at which a similar proposal by the American Bar Association received substantial support.

If such a bill were to pass both houses of Congress and withstand a possible Presidential veto, it would likely face challenges to its constitutionality on the basis that it would infringe upon the President's powers over military and foreign affairs.

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