



State Secrets Protection Act of 2008 (H.R. 5607)

What is the state secrets privilege?

The state secrets privilege is a common-law evidentiary rule that permits the government “to block discovery in a lawsuit of any information that, if disclosed, would adversely affect national security.” (Ellsberg v. Mitchell, 709 F.2d 51, 56 (D.C. Cir. 1983); See also, United States v. Reynolds, 345 U.S. 1, 10 (1953); Tenenbaum v. Simonini, 372 F.3d 776, 777 (6th Cir. 2004).

What is the problem with the states secrets privilege?

Since September 11, 2001, the state secrets privilege has mutated into an alternative form of immunity that is increasingly being used to shield the government and its agents from accountability for systemic violations of the Constitution. In cases challenging the Bush administration’s illegal policies of warrantless surveillance, extraordinary rendition, and torture, for example, the government has asserted the state secrets privilege – not merely to exclude evidence, but as the basis for negating suits in their entirety. The resulting untimely dismissal of important lawsuits has undermined our constitutional system of checks and balances and weakened our national interest in having a government that is accountable to the people. The misuse of the privilege by the executive branch, coupled with the failure of the courts to exercise independent scrutiny over privilege claims, has allowed serious, ongoing abuses of executive power to go unchecked.

Because there are currently no statutory standards for the state secrets privilege, there is substantial confusion in the lower courts regarding *when* the privilege may properly be invoked, and *what* precisely the privilege may be invoked to protect. While the privilege must be asserted on an item-by-item basis with respect to particular disputed evidence, some courts have permitted the government to invoke the privilege at the pleading stage, with respect to entire *categories* of information – or even the entire subject matter of the action – before evidentiary disputes arise. There is also wide divergence among the lower courts regarding how deeply a court must probe the government’s claim of privilege and what the court must examine in assessing a privilege claim and its consequences.

What would the State Secrets Protection Act do?

The State Secrets Protection Act (SSPA) is modeled after the Classified Information Procedures Act (CIPA), which sets standards for the handling of classified information in criminal cases. The State Secrets Protection Act would extend similar protections to civil cases. *Under the State Secrets Protection Act:*

- Judges would be required to review information that the government seeks to protect and any other evidence or argument relevant to the claim to determine whether the harm identified by the government is reasonably likely to occur if evidence is disclosed in court (Sec. 6).
- If the judge determines that harm is likely to occur with disclosure, the judge must protect the information and consider whether a non-classified substitute such as redacted

documents or summaries can be created that would allow the litigation to continue. If the government refuses to produce the substitute, the court can resolve the issue against the government, as happens in CIPA (Sec. 3; Sec. 7).

- If there is no possible substitute, the judge may issue appropriate orders in the interest of justice, including dismissing the claim or finding for or against a party on a factual or legal issue (Sec. 7).
- When information is disclosed, courts must take appropriate measures to protect sensitive information, such as requiring security clearances for lawyers, limiting access to documents, and conducting closed proceedings (Sec. 3).
- Courts may not prematurely dismiss claims before all issues of privilege are resolved and the parties have the opportunity to conduct non-privileged discovery (Sec. 4).

The SSPA would rebalance the interests of the government and individual plaintiffs by directing the courts to act as the neutral arbiters they were meant to be. By putting the burden on the government to demonstrate why information must be protected, courts will have a meaningful opportunity to determine whether secrecy is truly necessary to prevent harm and craft discovery and litigation options accordingly. Courts have been fulfilling this role in criminal cases for almost three decades – the SSPA would ensure that civil litigants have the same protection.