When the government cloaks itself in privilege, judges must rule.
SECRETLY FROM PAGE 68

The committee drew language and ideas from the Supreme Court decision that first recognized the state-secrets privilege, United States v. Reynolds (1953). The committee agreed that the privilege may be claimed only by the chief officer of the department administering the statute that the secret concerned. That officer is then required to make a showing to the judge, "in whole or in part in the form of sworn statement." The trial judge "may hear the matter in chambers, but all counsel are entitled to inspect the claim and showing and to be heard thereon." The judge "may take any protective measure which the interests of the government and the furtherance of justice may require."

If the judge denies a claim of privilege for a state secret involving the governor as a party, the court will have several options. If the claim deprives a private party of material evidence, the judge can make "any further order which the interests of justice require, including striking the testimony of a witness, declaring a mistrial, finding against the government upon an issue as to which the evidence is relevant, or dismissing the action." A note prepared by the advisory committee explained that the showing needed by the government to claim the privilege "represents a compromise between the complete abdication of the right to litigate, in which event the controversy would result from accepting as final the decision of a departmental officer and the infringement upon security which would attend a requirement of complete disclosure to the judge, even though it be in camera." Left unspecified was what happens if a judge rejects the judgment of a department official. Can the document be read in chambers? Shared with plaintiff’s lawyer? Would final judgment be left to the self-interest of the executive branch? Only a court could provide an effective, credible, and independent check, and to reach an informed conclusion, the judge would have to examine the document.

The Supreme Court sent the proposed rules of evidence to Congress on Feb. 5, 1973, to take effect July 1, 1973. New language in Rule 509 included a redrafted definition of secret state: "A secret of state is a governmental secret relating to the national defense or the international relations of the United States." Congress concluded that it lacked time to thoroughly review all the proposed rules of evidence within 90 days and vote to disapprove particular ones. It passed legislation to provide that the proposed rules "shall have no force or effect" unless expressly approved by Congress. Approval never came. Among the rejected rules was Rule 509.

PASSING RULE 501

Subsequently, Congress passed the rules of evidence in 1975, including Rule 501 on privileges. Rule 501 comes down squarely on the side of authorizing courts to decide the scope of a privilege. The rule covers all parties to a case, including the government. It does not recognize any authority on the part of the executive branch to dictate the reach of a privilege. There is no acknowledgment of state secrets.

Rule 501 expressly grants authority to the courts to decide privileges. The rule states: "Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules promulgated by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." (Emphasis added.)

The only exception in Rule 501 concerns civil actions at the state level where state law supplies the rule of decision, and this wouldn’t apply to the federal constitutional questions in which the Bush administration is asserting a state-secrets privilege.

The legislative history of Rule 501 explains how and why the provisions on state secrets were deleted. When the bill reached the House floor, it came with a closed rule, which prohibited amendments. The privileges covered by the rule (including those of government secret, husband and wife, physician and patient, and reporters) were considered "massive in nature" rather than rules of evidence. In 1974, Rep. David Dennis (R-Ind.) told his colleagues, "We were so divided on that subject ourselves, let alone what the House would be, that we would just let a bill if we got bogged down in that subject matter which really ought to be taken up separately in separate legislation." The Senate Judiciary Committee also reported on the massive nature of the rule on privileges, including disputes over state secrets. Under those pressures, Congress abandoned Rule 509.

Executive officials who now invoke the state-secrets privilege need to understand that the branch that decides questions of privilege and evidence is the judiciary, not the executive. They can learn much from their predecessors, including President George W. Bush’s first director of the CIA. On Feb. 10, 2000, then-CIA Director George Tenet signed a formal claim of state-secrets privilege, adding: "I recognize it is the Court’s decision rather than mine to determine whether requested material is relevant to matters being addressed in litigation." That language appears in Tenet’s declaration in Barton v. United States (2000) before the Court of Federal Claims.

It stands as a model of executive subordination to the rule of law and upholds the constitutional principle of judicial independence. The current executive branch and reviewing courts can find helpful guidance there.

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