

Statement of
The Honorable Arlen Specter

United States Senator
Pennsylvania
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The State Secrets Protection Act Is Necessary and Proper

Currently there is nothing more than a common law state secrets privilege to protect classified information in civil cases before federal courts. In criminal cases on the other hand, the Classified Information Procedures Act (CIPA) prevails. The State Secrets Protection Act is a bipartisan, common-sense effort to fill the void by serving as the civil case CIPA.

In addition to enacting CIPA, Congress has asserted its coequal role in addressing the use of classified or sensitive national security evidence in both the FOIA and the FISA. However, as noted by the Judiciary Committee in its Report last year, "with only a single ambiguous Supreme Court decision from the 1950s to guide them, lower courts have been taking disparate approaches when faced with a claim of the state secrets privilege." This lack of uniformity, coupled with a Supreme Court disinterested in bridging the divide, leaves litigants to "flounder under the ad hoc procedures and varying standards employed by the courts today."

In recent years, the executive branch has asserted the privilege more frequently and broadly than before, typically to seek dismissal of lawsuits at the pleadings stage. Overuse of the privilege is not a partisan issue.

? "Although the privilege was asserted sparingly over the first few decades of its existence, it has been raised with increasing frequency over the past twenty years by both Democratic and Republican administrations. The privilege has been cited not only as grounds for withholding evidence, but also as a basis for the immediate dismissal, prior to discovery, of entire categories of cases challenging the legality of executive conduct."

? The state secrets privilege was recently asserted in *Mohamed v. Jeppesen Dataplan, Inc.*, a case brought challenging a private air carrier's assistance in the C.I.A.'s 'extraordinary rendition' program.

In 2007, the American Bar Association issued a report "urg[ing] Congress to enact legislation governing federal civil cases implicating the state secrets privilege."

Judge Patricia M. Wald, former Chief Judge of the D.C. Circuit agrees that a codified privilege would ease confusion and engender greater uniformity. Over a year ago, former Chief Judge Wald testified that "[t]here is a wide consensus in the legal community" that Congress should prescribe regulations on the privilege, and that "[t]he time is now ripe for such legislation."

Overuse of the privilege without any attendant checks or balances--as provided in the bill--has caused intelligence officials pause as well. As one former CIA officer stated recently: "There will

finally be an instance where you've cried 'state secrets' so many times that [no one will] believe it anymore, and potentially something that is a state secret will get out."