Court Call

Bill would give judges more power to decide feds’ state secrets claims

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By Rhonda McMillion

The ABA is urging Congress to bolster the role of federal courts in deciding when the executive branch may invoke the state secrets privilege to keep sensitive national security information from being disclosed in lawsuits against the government.

The privilege is firmly rooted in common law going back to the early 19th century. In modern times, the federal courts have considered the government’s state secrets claims in accordance with the U.S. Supreme Court’s 1953 ruling in United States v. Reynolds.

In Reynolds, the court upheld a government claim that official reports on the 1948 crash of a B-29 bomber should be barred from a lawsuit filed against the government by the widows of three civilian crew members. The court reached its decision without reviewing the documents in question.

The Supreme Court has not, however, issued follow-up decisions that offer further guidance to the lower federal courts on how Reynolds should be interpreted and applied. As a result, the lower courts have adopted divergent approaches to dealing with privilege claims by the executive branch, which have been on the rise in recent years.

SEEKING BALANCE

In August, the ABA’s policy-making House of Delegates called for Congress to pass legislation that would balance the federal government’s responsibility for protecting the country’s national security and the interests of Americans seeking redress through lawsuits against the government.

“The ABA believes that Congress should establish confidential procedures offering ample opportunity for the government to assert the privilege, meaningful judicial access to the evidence at issue to evaluate whether the privilege should apply, and a chance for litigation to proceed with nonprivileged evidence,” said H. Thomas Wells Jr., the ABA president-elect, when he testified Jan. 29 before a panel of the House Judiciary Committee.

In his testimony, Wells voiced the ABA’s support for a bill recently introduced by Sens. Edward M. Kennedy, D-Mass., Arlen Specter, R-Pa., and Patrick Leahy, D-Vt., who chairs the Senate Judiciary Committee.

Wells of Birmingham, Ala., emphasized that ABA policy respects the roles of all three government branches and does not suggest that courts should substitute their judgments on national security matters for those of the executive branch. Privilege claims would be subject to judicial review under a deferential standard that takes into account the executive branch’s expertise in national security matters.
The bill (S. 2533) would require judges to conduct in camera review of the actual evidence that the government claims should be privileged. The bill would allow plaintiffs and the government to make their preliminary cases with nonsecret evidence, and courts would be allowed to develop ways for lawsuits to proceed by using unclassified substitutes for secret evidence. The bill also contains provisions allowing expedited appeals of state secrets decisions by lower courts.

“Such legislation would affirm the appropriate role of the courts in our system of government by assuring that they have a meaningful role in making decisions about the evidence that is subject to the privilege,” said Wells in his testimony. “More searching judicial review, informed by evidence, would ensure that government assertions of necessity are truly warranted and not simply a means to avoid embarrassment or accountability.”

Going forward, Wells said, “robust congressional oversight will strengthen the ability of our government as a whole to ensure that our justice system is properly equipped to balance national security interests with the protection of individual rights and liberties.”

This column is written by the ABA Governmental Affairs Office and discusses advocacy efforts by the ABA relating to issues being addressed by Congress and the executive branch of the federal government.

Rhonda McMillion is editor of Washington Letter, an ABA Governmental Affairs Office publication.

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