

Alabama Rules of Evidence

Article V. Privileges

Rule 508.

Secrets of state and other official information: Governmental privileges.

(a) *Claim of privilege under federal law.* If the United States creates a governmental privilege that the courts of this State must recognize under the Constitution of the United States, the privilege may be claimed as provided by the law of the United States.

(b) *Privileges recognized under state law.* No other governmental privilege is recognized except as created by the Constitution or statutes of this State or rules promulgated by the Supreme Court of Alabama.

(c) *Effect of sustaining claim.* If a claim of governmental privilege is sustained and it appears that a party is thereby deprived of material evidence, the court shall make any further orders the interests of justice require, such as striking the testimony of a witness, declaring a mistrial, making a finding upon an issue as to which the evidence is relevant, or dismissing the action.

Advisory Committee's Notes

This rule is based upon the language found in the corresponding Uniform Rule of Evidence. See Unif.R.Evid. 508. Rather than undertaking to create a governmental privilege, this rule merely embraces those privileges that, under the law of the United States or the law of Alabama, already exist or may be created in the future.

Section (a). Claim of privilege under federal law. This section provides that a governmental privilege arising from federal case law or statute, and which as a matter of federal constitutional law must be enforced by the courts of Alabama, may be claimed in the state courts in the manner provided by federal law.

A number of governmental privileges have evolved at common law, either by case law alone or in conjunction with statutes. Sometimes these privileges are said to possess constitutional underpinnings, particularly as they relate to the separation of powers. No effort is made here to list or exhaustively catalog these federal privileges. Chief among them, however, is that applied for the protection of military or diplomatic secrets of state. *United States v. Reynolds*, 345 U.S. 1 (1953). See 8 J. Wigmore, *Wigmore on Evidence* § 2370 (McNaughton rev. 1961). While this particular privilege is an absolute one, others are qualified and may give way upon a showing of need for the information. The most celebrated, albeit the least frequently arising, of the qualified privileges is that commonly referred to as the "presidential privilege," which establishes a cloak of protection for confidential communications between the

President of the United States and the President's immediate advisors. *United States v. Nixon*, 418 U.S. 683 (1974). See E. Cleary, McCormick on Evidence § 108 (3d ed. 1984). Additionally, an official information privilege has evolved to protect communications within and among governmental agencies. *Pacific Molasses Co. v. NLRB*, 577 F.2d 1172 (5th Cir.1978). See 5 U.S.C. § 552(b)(5) (1994) (section of Freedom of Information Act that exempts such communications from its coverage). Law enforcement investigation files likewise have been treated as carrying a qualified privilege. *Black v. Sheraton Corp. of Am.*, 564 F.2d 531 (D.C.Cir.1977). See 5 U.S.C. § 552(b)(7) (1994) (exempting such files from the Freedom of Information Act). Compare 18 U.S.C. § 3500 (1988) (Jencks Act provision insulating prior statements or reports of Government witness in criminal case against subpoena, discovery, or inspection until the witness has testified on direct examination at the trial, but then entitling the defense to their production).

Section (b). Privileges recognized under state law. The only available governmental privileges, other than those existing under federal law, arise under the Alabama constitution, Alabama statutes, or rules promulgated by the Supreme Court of Alabama. Compare Ala.R.Evid. 501. While the Alabama constitution contains no express provision granting an executive privilege, it would be within the power of the courts to imply such a privilege from the separation of powers principle. See *United States v. Nixon*, 418 U.S. 683 (1974); N.D.R.Evid. 508(b) explanatory note. Alabama statutes create privileges that may be categorized as governmental. These statutes are not affected by adoption of Rule 508. See, e.g., Ala. Code 1975, § 22-11A-15 (calling for the exclusion from evidence, because of confidentiality, of physician reports to the state board of health concerning persons with sexually transmitted diseases); Ala. Code 1975, § 32-10-11 (giving privilege status to reports required to be filed concerning automobile accidents); Ala. Code 1975, § 40-18-52 (income tax returns as privileged).

Section (c). Effect of sustaining claim. Whenever a claim of governmental privilege is sustained, so that a litigant is deprived of what would otherwise constitute admissible evidence, the court may order such relief for that litigant as is required by the interests of justice. Devices the court may use for this purpose include striking a witness's testimony, declaring a mistrial, making a determination, as a matter of law, as to the issue upon which the evidence is relevant, or dismissing the action altogether. This list of available devices is not exhaustive, but merely illustrative. These measures will most often be taken in those cases where a governmental entity that holds and asserts the privilege is a party to the litigation. As expressed in the following passage taken from the advisory committee's note to the rejected Federal Rule of Evidence 509, the particular order issued by the court depends upon the nature of the case and the prejudice to a party that may be caused by the exclusion of the evidence:

“Reference to other types of cases serves to illustrate the variety of situations which may arise and the impossibility of evolving a single formula to be applied automatically to all of them. The privileged materials may be the statement of [a] government witness, as under the Jencks statute, which provides that, if the government elects not to produce the statement, the judge is to strike the testimony of the witness, or that he may declare a mistrial if the interests of justice so require. 18 U.S.C. § 3500(d). Or the privileged materials may disclose a possible basis for applying pressure upon witnesses. *United States v. Beekman*, 155 F.2d 580 (2d Cir.1946). Or they may bear directly upon

a substantive element of a criminal case, requiring dismissal in the event of a successful claim of privilege. *United States v. Andolschek*, 142 F.2d 503 (2d Cir.1944); and see *United States v. Reynolds*, 345 U.S. 1, 73 S.Ct. 528, 97 L.Ed. 727 (1953). Or they may relate to an element of a plaintiff's claim against the government, with the decisions indicating unwillingness to allow the government's claim of privilege for secrets of state to be used as an offensive weapon against it. *United States v. Reynolds*, supra; *Republic of China v. National Union Fire Ins. Co.*, 142 F.Supp. 551 (D.Md.1956)."