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Constitution Project Applauds First Steps in New State Secrets Policy

WASHINGTON - September 23 - Attorney General Eric Holder announced today a new policy tightening the standards for when executive agencies may assert the state secrets privilege to prevent disclosure of national security secrets in litigation. The announcement marks a shift in policy away from the broad assertions of secrecy previously made by both the Bush and Obama administrations in such cases. The Constitution Project welcomes today's announcement by the Department of Justice as an important first step in the right direction, defining and limiting the ability of the executive branch to assert the privilege. However, the Constitution Project calls on the administration and Congress to support legislation to protect and clarify the role of the courts in determining whether the state secrets privilege properly applies in given cases.

In a memorandum to the heads of all executive branch departments and agencies, Attorney General Holder laid out the procedures for new assertions of the state secrets privilege, providing a much-needed higher standard for assertion of the privilege and for important multiple reviews and approvals before final sign off from the attorney general. To prevent the reoccurrence of past abuses, Holder specifically said the privilege would not be used to "conceal violations of the law, inefficiency or administrative error" or to prevent embarrassment of government officials. Recognizing the appropriate role of the legislative branch, the policy requires regular reports to Congress on the use of the assertion, and also provides that if the government asserts the privilege but the case raises credible allegations of government wrongdoing, the Justice Department will refer those cases to the relevant agency's Inspector General for investigation.

The following may be attributed to Sharon Bradford Franklin, Senior Counsel for the Constitution Project:

"The Obama administration has taken a significant and commendable first step in reining in the overbroad assertions of secrecy that have too often blocked litigation of cases involving national security policies. We welcome this new policy establishing tighter standards, a thorough review process, and increased oversight by Congress and Inspectors General. However, much work remains to safeguard the role of courts in evaluating the evidence to determine the validity of the government's claim for the need for secrecy. We call on Congress to promptly pass legislation to clarify that judges, and not the executive branch, have the final say about whether disputed evidence is subject to the privilege."

In February, just before oral arguments in Mohamed v. Jeppesen Dataplan, the Constitution Project called on Attorney General Holder to reverse the position taken by the Bush administration in this case, and to consent to having the trial judge review the evidence claimed to be secret and determine whether enough non-privileged evidence is available for the case to proceed. To see the letter sent to the attorney general, go to:

http://www.constitutionproject.org/pdf/Letter_to_Holder_Regarding_Mohamed_v_Jeppesen_Dataplan.pdf

In 2007, the Constitution Project released a report signed by a broad bipartisan coalition that endorsed reforming the state secrets privilege. The report is available at:

<http://www.constitutionproject.org/manage/file/52.pdf>

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The Constitution Project is a politically independent think tank established in 1997 to promote and defend constitutional safeguards. More information about the Constitution Project is available at <http://constitutionproject.org/>.