

## **OMB Watch Lauds Obama Administration's Unprecedented Move on State Secrets Policy**

Posted on September 23, 2009

### **PRESS RELEASE**

*-For Immediate Release-*  
Sept. 23, 2009

Contact: Brian Gumm, Communications Director, (202) 683-4812, [bgumm@ombwatch.org](mailto:bgumm@ombwatch.org)

### **OMB Watch Lauds Obama Administration's Unprecedented Move on State Secrets Policy**

WASHINGTON, Sept. 23, 2009—OMB Watch strongly supports the Obama administration's unprecedented move to create a government-wide policy on use of the state secrets privilege. The policy, issued earlier in the day, is the latest in a series of decisions by the administration to make government more open and accountable.

Gary D. Bass, executive director of OMB Watch, noted that the new policy marks a significant change in the way the executive branch is approaching state secrets. "Unlike past administrations, where the state secrets privilege seemed to be invoked on an almost ad hoc basis, the Obama administration is signaling that it will only exercise the privilege in situations where significant harm to national security is likely and will be guided by a specific, step-by-step process to ensure there is not abuse of the privilege," Bass said.

Previous administrations have been heavily criticized for what some called an abuse of the court-created privilege. The state secrets privilege was established by the U.S. Supreme Court in *United States v. Reynolds*, an opinion from 1953, and was ostensibly designed to protect sensitive national security information from being revealed, including in court records and proceedings. However, past administrations have been accused of using the privilege to prevent political damage to the executive branch or to cover up embarrassing misconduct or corruption.

Bass said that the Obama administration's policy tracks closely with suggestions that government openness advocates made to Obama when he was president-elect in November 2008. "The spirit of this policy is consistent with open government recommendations endorsed by more than 350 organizations and individuals from across the political spectrum," Bass stated.

After a two-year process coordinated by OMB Watch to collaboratively develop recommendations for the incoming presidential administration, the right-to-know community delivered to the Obama transition team the report *Moving Toward a 21st Century Right to Know Agenda*. The report contained 70 detailed recommendations for improving government transparency, including several calling for reform of the state secrets privilege. Specifically, access advocates wanted a policy that restricted use of the privilege to agency heads and made it clear that it could not be used to hide illegal or unconstitutional activities. The recommendations also called for greater oversight with improved reporting to key congressional committees on the use of the privilege, allowing in camera review by judges, and the use of experts to evaluate claims. Another recommendation requested a review by the Attorney General of assertions in previous or ongoing cases to evaluate if the assertions should be withdrawn.

While the policy does not adhere to every detail of the open government recommendations, Bass said, "I not only commend the administration for the new policy but also for the commitment to government openness that this important change demonstrates."

It is unclear what, if any, concrete policies other administrations have had for the invocation and application of the state secrets privilege. The 1953 Supreme Court opinion only required that records receiving the claim meet the standard that the disclosure of information would be "harmful" to national security. That the Obama administration is openly sharing its state secrets policy with the press and the American people appears to be new, however, and the importance of this should not be underestimated. Bass said, "Though future administrations will have the authority to modify or even scrap this policy, it will be difficult for them – in the eyes of Congress, the public, and possibly even the courts – to bring the country back to the bad old days of abuse of the state secrets privilege."

Bass added that OMB Watch supports efforts in Congress to require more definite judicial review of the privilege, noting that the administration's policy creates some uncertainty over the role of the courts moving forward. Additionally, a key test of the policy will be how it is applied to existing cases.

The new state secrets policy joins other moves by the administration toward a more open and accountable government, including: the decision to release certain White House visitor logs; the use of new social media tools to gather input on a pending open government directive; the first-ever decision to ask the public to submit ideas on a new executive order on regulatory review; the launch of [Recovery.gov](http://Recovery.gov); and an expansive Justice Department memo on the application of the Freedom of Information Act (FOIA). While none of these policies alone can usher in the "most open and accountable administration ever" that America was promised on President Obama's first day in office, they are significant steps toward instilling a culture of transparency throughout the executive branch.

###

*OMB Watch is a nonprofit government watchdog organization dedicated to promoting government accountability, citizen participation in public policy decisions, and the use of fiscal and regulatory policy to serve the public interest.*