



Department of Justice

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Attorney General Establishes New State Secrets Policies and Procedures

Attorney General Eric Holder today issued a memorandum instituting new Department of Justice policies and procedures in order to ensure greater accountability in the government's assertion of the state secrets privilege in litigation.

"This policy is an important step toward rebuilding the public's trust in the government's use of this privilege while recognizing the imperative need to protect national security," Holder said. "It sets out clear procedures that will provide greater accountability and ensure the state secrets privilege is invoked only when necessary and in the narrowest way possible."

Earlier this year, Attorney General Holder ordered senior Justice officials to conduct a review of the Department's existing state secrets policies and procedures, including an internal evaluation of the pending cases in which the privilege had been invoked. The results of that internal review were shared with an interagency group comprised of officials from the Department and the intelligence community, which provided input into the formulation of the new policies and procedures. The new policy and procedures take effect October 1, 2009.

The Attorney General's memorandum outlines several aspects of the new administrative process that increases accountability and oversight, including:

Facilitation of Court Review – The policy ensures that before approving invocation of the state secrets privilege in court, the Department must be satisfied that there is strong evidentiary support for it. In order to facilitate meaningful judicial scrutiny of the privilege assertions, the Department will submit evidence to the court for review.

Significant Harm Standard – The policy adopts a more rigorous standard to govern when the Department will defend assertions of the state secrets privilege in new cases. Under the new policy, the Department will now defend the assertion of the privilege only to the extent necessary to protect against the risk of significant harm to national security.

Narrow Tailoring of Privilege Assertions – Under this policy, the Department will narrowly tailor the use of the state secrets privilege whenever possible to allow cases to move forward in the event that the sensitive information at issue is not critical to the case. As part of this policy, the Department also commits not to invoke the privilege for the purpose of concealing government wrongdoing or avoiding

embarrassment to government agencies or officials.

State Secrets Review Committee – A State Secrets Review Committee will be formed consisting of senior Department officials designated by the Attorney General who will evaluate any recommendation by the Assistant Attorney General of the relevant Division to invoke the privilege. The Committee would make its recommendation to the Associate Attorney General, who would review and refer to the Deputy Attorney General for a final recommendation to the Attorney General or his designee.

Approval by the Attorney General – The policy requires the approval of the Attorney General prior to the invocation of the state secret privilege, except when the Attorney General is recused or unavailable. Previously, the invocation of the state secrets privilege could be approved by the appropriate Assistant Attorney General

Referral to Inspectors General. The policy implements a referral process to relevant Offices of Inspector General whenever there are credible allegations of government wrongdoing in a case, but the assertion of state secrets privilege might preclude the case from moving forward.

Under the policy, the Department also commits to provide periodic reports on all cases in which the privilege is asserted to the appropriate oversight Committees in Congress.

[Policies and Procedures Governing Invocation of the State Secrets Privilege](#)

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