

## **STATE SECRETS PRIVILEGE**

### **BACKGROUND**

The state secrets privilege is a common law privilege that allows the federal government to prevent sensitive national security information from being disclosed as evidence in litigation. If not carefully applied, the state secrets privilege can be used by the government to cover up information they seek to withhold even though it may not actually be sensitive or necessarily a threat to national security.

The government abused the state secrets privilege in the seminal Supreme Court case, *United States v. Reynolds*, 345 U.S. (1953), which serves as the basis for the privilege today. An accident report about a military plane crash in *Reynolds* was purposefully excluded as evidence from the court because the government claimed that if revealed, the accident report would disclose state secrets. The accident report, which was declassified in 2000, makes it clear that the report did not contain state secrets. It did, however, contain embarrassing information divulging government negligence.

The state secrets privilege has clearly been abused. OpenTheGovernment.org's [2009 Secrecy Report Card](#) states that since 2001, the privilege has been used a reported 48 times, which translates to an average of six times per year in eight years (through 2008). This number is more than double the average (2.46 times per year) during the previous twenty-four years.

As a presidential candidate, then-Senator Barack Obama expressed his support for legislation that would limit the use of the state secrets privilege. Unfortunately, the Obama Administration has disappointed openness advocates, including AALL, by already asserting the state secrets privilege in several cases that were originally brought against the Bush Administration, including *Jewel v. NSA* about warrantless wiretapping *Mohamed et al. v Jeppesen Dataplan, Inc* about "extraordinary rendition," and *Shubert, et al. v. Barack Obama, et al*, regarding surveillance of Americans' electronic communications.

On September 23, 2009, Attorney General Eric Holder released a [memorandum](#) outlining new Department of Justice policies and procedures pertaining to the state secrets privilege. The memorandum sets out clear procedural policies to ensure greater government accountability when the state secrets privilege is invoked in litigation to protect national security. The policy also notes the Department's commitment to provide periodic reports to the appropriate congressional oversight committees on all cases in which the privilege has been invoked.

The new policy has been met with mixed reviews by open government advocates. While the memorandum reflects many of the recommendations in the [Moving Toward a 21st Century Right-to-Know Agenda](#) Report, which AALL endorsed, we believe that the lack of judicial review and audits raises red flags for government accountability. In addition, the government has

since invoked the privilege, demonstrating that legislation on the state secrets privilege is clearly needed.

### **CURRENT STATUS IN THE 111<sup>th</sup> CONGRESS (AS OF NOVEMBER 2009)**

On February 11, 2009, Senate Judiciary Chairman Patrick Leahy (D-VT) introduced the *State Secrets Protection Act* ([S.417](#)). The Senate bill provides for procedures to be set in place for judges to review claims of executive privilege and full review of the classified evidence in question. It also would provide for an obligation on the part of government to release a non-classified summary of the privileged evidence when possible. AALL signed on to a [letter](#) on May 20, 2009, to Chairman Leahy and Ranking Member Jeff Sessions (R-AL) in support of the bill.

Also on February 11, Rep. Jerrold Nadler (D-NY-8) introduced the *State Secret Protection Act of 2009* ([H.R. 984](#)), which AALL supports, to reform the state secrets privilege. Like the Senate bill, this bill would require judges to review the government's claims of executive privilege and the classified evidence in question. H.R. 984 would apply to all future cases and would also have limited retroactive effect, whereas S. 417 would apply only to all pending and future cases. The House Judiciary Committee's Subcommittee on the Constitution, Civil Rights, and Civil Liberties held a hearing on the bill on June 4. On November 5, the full House Judiciary Committee reported the bill favorably by a vote of 18-12.

The Government Relations Office and Government Relations Committee will keep you updated on the state secrets privilege as new developments occur.

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AALL Government Relations Committee