Association of the Bar of the City of New York
Committee on Civil Rights

Supplemental Statement on Pending Legislation Addressing the States Secrets Privilege

May 24, 2010

On June 3, 2009, the Association of the Bar of the City of New York ("the Association") released a statement expressing its support for two bills that would establish procedures and legal standards to govern application of the state secrets privilege. 1) S. 417, the "State Secrets Protection Act"; and 2) H.R. 984, "The State Secret Protection Act of 2009."

Both bills still remain pending. In addition, on September 23, 2009, the Office of Attorney General Eric Holder issued a memorandum (the "Attorney General Memorandum") outlining its own internal process for governing application of the state secrets privilege. [1]

The process mandates that a governmental department or agency seeking to invoke the State Secrets privilege to preclude the admission of evidence which "reasonably could be expected to cause significant harm to the national defense or foreign relations," must present a declaration, based on personal knowledge, which describes the basis for the assertion to an Assistant Attorney General. This declaration is required to specify: (i) the nature of the information that must be protected from unauthorized disclosure; (ii) the significant harm to national security that disclosure can reasonably be expected to cause; (iii) the reason why unauthorized disclosure is reasonably likely to cause such harm; and (iv) any other information relevant to the decision whether the privilege should be invoked in litigation.[2]

If the request is approved, it is then sent to a "State Secrets Review Committee" (the "Committee") which consists of an unspecified number of unnamed Department of Justice ("DOJ") officials appointed by the Attorney General. If the Committee, in consultation with the government department or agency seeking to invoke the privilege, deems the request appropriate, it formally recommends this action to the Attorney General, who in turn, makes the final determination.[3]

While this more stringent self-policing of Executive Branch secrecy claims represents a welcome, if largely symbolic, development, the Association's support of the pending legislation

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[1] Office of the Attorney General, *Memorandum for Heads of Executive Departments and Agencies, Memorandum for the Heads of Department Components*, September 23, 2009, ("AG Memorandum") available at http://www.justice.gov/opa/documents/state-secret-privileges.pdf, attached hereto as Appendix "A," at 2.
[2] *Id.*
[3] *Id.* at 2-3.

remains. [4] Without a permanent legislative mandate providing consistent standards and procedures for courts to independently review the administration's state secrecy claims, the privilege threatens drastic infringements upon the rights of current and potential plaintiffs, and represents the same disturbing lack of governmental transparency that the current Administration once roundly criticized.[5] Moreover, despite the fact that the Attorney General Memorandum went into effect as recently as October 1, 2009, there remains every reason to believe this trend will continue.[6]

The Attorney General Memorandum also posits the dismissal of a litigant's entire case to "protect against the risk of significant harm to national security."[7] The Association opposes such a drastic remedy without first providing litigants with a "full opportunity to complete discovery of non-privileged evidence and to litigate the issue or claim to which the privileged evidence is relevant without regard to that privileged information."[8] To that end, the Association continues to support both the House and Senate bills' propositions that the validity of governmental state secrets claims be subject to challenge through adversarial hearings.[9]

Furthermore, the Association fully endorses both the House and Senate bills' requirement that evidentiary alternatives be considered to permit the litigation to proceed, once the court concludes that the state secrets privilege is valid.[10] For example, the Senate Bill provides that the court must determine whether it is possible to craft a non-privileged substitute to provide the plaintiff with a "substantially equivalent opportunity to litigate the claim or defense," and thereupon, order that the governmental agency or department prepare a non-privileged substitute.[11]

Dismissal of a case on the pleadings alone, if ever justified, should only be permitted after all other options have been explored. The legitimacy of the privilege's invocation should never be presumed. For these reasons, and those set forth in the Association's initial statement (attached), the Association reasserts its support for both S. 417, the "State Secrets Protection Act," and H.R. 984, "The State Secret Protection Act of 2009."

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[4] Association of the Bar of the City of New York Committee on Civil Rights, *Statement on Pending Legislation Addressing the States Secrets Privilege*, June 3, 2009, *available at* http://www.nycbar.org/pdf/report/20071746_Statement_Pending_Legislation.pdf, attached hereto as Appendix "B."

[5] Los Angeles Times, *Obama White House breaks another promise to reject Bush secrecy*, available at http://latimesblogs.latimes.com/washington/2009/07/obama-bush-policies.html, attached hereto as Appendix "C."

[6] *See e.g.*, *Mohamed v. Jeppesen Dataplan, Inc.*, 539 F. Supp. 2d 1128 (N.D. Cal. 2008), *rev'd* 563 F.3d 992 (9th Cir. April 28, 2009), *amended by* 579 F.3d 943 (9th Cir. August 31, 2009), *rehearing granted* 586 F.3d 1108 (9th Cir. October 27, 2009)(Where, in a case that remains unresolved, the government moved to dismiss plaintiffs' case on state secrets grounds, amidst allegations Plaintiffs were "unlawfully apprehended, transported, imprisoned, interrogated and in some instances tortured, under the direction of the United States."); *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. December 9, 2009) (Where the government successfully moved to dismiss Plaintiff's case on state secrets grounds, amidst allegations that he was "mistreated for twelve days while in United States custody, and then removed to Syria via Jordan pursuant to an inter-governmental understanding that he would be detained and interrogated under torture by Syrian officials.")

[7] *Id.*

[8] H.R. 984, § 7.

[9] *See* H.R. 984, § 5(c); S. 417, § 4052(c); Association of the Bar of the City of New York Committee on Civil Rights, *supra* note 4, at 7.

[10] *See* H.R. § 984, § 7(c); S. 417, § 4053(b).

[11] S. 417 § 4053(b).